Keywords: Oral hearings (discretion of the Tribunal); compensation for loss of an internal employment opportunity (job elimination/redundancy due to reorganization, duty to draw attention to internal vacancies, duty to provide training opportunities); claim for additional compensation to reflect the actual work scope (request to determine work percentage); claim for pension fund contributions on overtime; compensation for overtime work in excess of weekly working time (limitation period); award of legal costs (when prevailing in part)

Schlagworte: Mündliche Verhandlung (Ermessen des Gerichts); Entschädigung für den Verlust einer internen Anstellungsmöglichkeit (Stellenabbau/Entlassung aufgrund von Reorganisation, Pflicht auf interne freie Stellen hinzuweisen, Pflicht Weiterbildungsmöglichkeiten anzubieten); Anspruch auf zusätzliche Vergütung entsprechend dem tatsächlichen Arbeitsumfang (Antrag auf Feststellung des Teilzeitarbeitsumfangs); Anspruch auf Pensionskassenbeiträge für Überstunden; Vergütung für Überstunden, die über die wöchentliche Arbeitszeit hinausgehen (Verjährungsfrist); Zuspruch von Prozesskosten (bei teilweise Obsiegen)

Mots-clefs: Procédure orale (pouvoir d'appréciation du tribunal); indemnisation pour la perte d'une chance d'engagement interne (suppression de poste/ licenciement en raison d'une réorganisation, obligation d'attirer l'attention sur les postes vacants internes, obligation d'offrir des possibilités de formation); action en paiement de la rémunération supplémentaire pour refléter le volume de travail effectif (demande de détermination du pourcentage de travail); action en cotisations de pension pour les heures supplémentaires; rémunération des heures supplémentaires dépassant la durée hebdomadaire de travail (délai de prescription); octroi des frais de justice (en cas de gain partiel)

1/2021

Judgment of 30 September 2022

Administrative Tribunal of the Bank for International Settlements

Prof. Dr. Abbo Junker, Presiding Judge
Dame Elizabeth Slade, Reporting Judge
Prof. Dr. Dr. h.c. Jean-Marc Rapp, Member of the Panel
Prof. Dr. Ramon Mabillard, Registrar

X. _____,

represented by Z. _____,

Applicant

versus

the Bank for International Settlements, international organisation with registered office in Basel,

Respondent

re

Payment of One Month’s Salary, Allowances, Severance payment and Pension Fund Contributions (Request #1);
Compensation for Material and Moral Damages (Request #2);
Compensation and Declaratory Relief Based on Actual Work Scope (Request #3a), Alternatively Pension Contributions on Actual work scope (Request #3b);
Overtime Surcharge (Request #4);
Costs (Request #5)

As to the facts

Contractual Relationship

1 The Applicant commenced employment with the Respondent on 1 August 1999 as a […] in the [….] Service pursuant to the terms of a letter dated 25 June 1999 ("the contract of employment"; […]).

2 On 1 July 2003 the Applicant was promoted to […]. On 1 December 2009 the Applicant's job title changed to […]. This change was as a result of a general change in titles within the unit without a change in responsibilities or terms and conditions of employment.

3 The contractual terms material to this application are as follows:

4 The contract of employment (translated into English as submitted by the Applicant; […]):

"Working hours

Your employment contract is based on 50 % of the normal weekly working hours, ie, an average of 20 hours per week, to be performed in consultation with your line manager. Should you wish to change this percentage at a later date, there is no obligation on the part of the Bank to comply with your wish; any change must be formally agreed and constitutes a change in the terms of the contract.

Time compensation is granted for work performed on working days in excess of a weekly working time of 22 hours, whereby the overtime to be compensated is rounded up to a quarter of an hour. In exceptional cases and subject to the approval of your line manager, you may also be paid for overtime:

at [X] % for hours in excess of a weekly working time of 22 hours;

at [Y] % for hours in excess of a weekly working time of 44 hours or for hours performed on weekends and public holidays.

Remuneration

Salary Annual amount CHF […]

Insurance

Subject to future amendment, the following provisions currently apply to part-time employees at the Bank:

You will be covered under the Bank's health (hospital) and accident insurance. The Bank pays the costs up to an amount corresponding to the percentage of employment; the rest is deducted from your salary.

The special allowance under the health insurance scheme is paid on a pro rata basis.

Pension scheme and Swiss social insurances (AHV/IV/EO/ALV)

In accordance with Article 2 of the Regulations on (of) the Pension Scheme, your pensionable salary will be equal to [...], i.e., CHF […].

Other terms

The terms and conditions of employment are set out in the Staff Regulations and Service Note 911 […]. A notice period of one month applies during the provisional period and three months thereafter."

5 Staff Regulations ([…]):

"Article 14

Termination of appointments

Appointments may be terminated at any time upon three months' notice being given on either side.

Pursuant to paragraph 1 above, the appointment of a member of staff may be terminated by the Bank in accordance with the applicable special staff rules:

[…]

b. if, in connection with a reorganisation, the necessities of the service require abolition of the job and the Bank cannot find an alternative position whose requirements the member of staff meets or can be trained to meet.

Article 17

Working conditions of members of the staff, such as office hours, annual leave, special leave and overtime, are laid down in the relevant Special Staff Rule."

6 Special Staff Rule relating to Article 17 of the Staff Regulations 1.2.06 ([…]):

"Working conditions

III Unsocial working hours

Weekends, public holidays as defined in Annex 1 to this Special Staff Rule, and weekdays from 20.00 to 06.00 are considered to be unsocial working hours. When necessary for business reasons, members of staff may be required by their line manager to work during these hours. Compensation for such work during unsocial hours will be granted as follows:

(a) Staff members holding jobs in categories A to E will be compensated at the rate of 100 % in time, plus 25 % in money."

7 Service-based working time in D Services: basic internal rules 19 January 2007 ([…]):

"Special arrangements

E period

Extra hours worked by part-time staff in grades A-E during the week are paid at 100 %. Required extra hours on weekends and public holidays are usually compensated 100 % in time and paid at 25 % or in exceptional cases, to avoid undue accumulation of hours to be taken, paid at 125 %."

8 Service Note 1067 16 March 1999 Revised ([…]):

"Reorganisation and its consequences

First principles: alternative employment within the Bank

The Bank will make every effort to maintain employment for staff whose jobs are affected by a reorganisation. This will, in principle, be done in the following ways:

[…]

(b) if the job disappears, the Bank will try to find an alternative position whose requirements the staff member meets or can be trained to meet.

In situations where the reorganisation can be anticipated, the Bank will as early as possible bring potential alternative positions to the attention of staff who are likely to be affected, if necessary recruiting staff on fixed-term contracts to bridge the gap until the staff member can take up the position.

Given the small size of the Bank and the specialised nature of its work, the opportunities for finding alternative positions are, however, limited and efforts to provide alternative employment can only be successful if staff members are prepared to be flexible.

Severance payment

The staff member will receive a lump sum which will reflect the length of service and be calculated on the basis of one-twelfth of the total annual salary and family allowances per year of service capped at 24 or, if the staff member is over 63, at the number of months to age 65."

9 Staffing Guidelines Service Note 1163 ([…]):

"IV Appointment of external candidates

Provisional period

2. As a general rule, all BIS appointments are subject to a provisional period of 12 months … The aim of the provisional period is to assess if the staff member meets the Bank's expectations with regard to the position…

[…]

VII Standard recruitment process

3. Selection process for job categories A to G

HR, together with the hiring line manager (and wider team, as appropriate), reviews the applications for a vacancy and shortlists for interview those candidates whose background most closely match the requirements of the position.

[…]

6. Exceptions to the standard recruitment process

The following cases may deviate from the standard recruitment process.

a) Appointments that derive from an obligation by the Bank, for example…re-deployment of staff member as a consequence of job elimination (as per Service Note 1067) […]."

Employment Relationship

10 From the outset of [the Applicant's] employment with the Respondent the Applicant received excellent annual reports. [The Applicant] was a perfectionist, diligent and adaptable.

11 The Applicant worked additional hours at the time of preparation of the […] and […].

12 At many of [the Applicant's] annual reviews the Applicant raised the question of [the Applicant's] additional hours worked and asked for these to be recognised by increasing the percentage of [the Applicant's] full-time equivalent (FTE) work contract. This was always refused.

13 In an email of 13 October 2020 to Mr. H, head of […], the Applicant wrote:

"The last time I suggested an FTE ('full time equivalent') increase by 0.1 was in 2017 when I brought up my large SBWT (service based working time) balance ([…] hours at end-April 2017) was during the Performance Review discussion with my line manager. I subsequently made my FTE increase suggestion in a formal memorandum. When it was denied, I escalated the matter for the first time and approached [Ms.] J and you. In the end, with no additional FTEs available, I indeed agreed to […] overtime being paid out. In this context, it was the overtime payment vs the compensation in time (which would have increased by SBWT balance still further) that were discussed."

14 In 2014 the Board of Directors of the Respondent decided to reduce the staffing level for [the business unit where the Applicant worked] by one FTE position. Two 50 % FTE positions were reduced to one, which was retained by the Applicant.

15 In 2018 the Respondent decided to produce [certain of] its [products], including the […], in [a more limited way].

16 On 13 May 2019 the Respondent's Board of Directors decided to discontinue the [business unit where the Applicant worked] altogether. At a meeting on 20 May 2019 the Applicant was informed by HR of this decision. [The Applicant's] position would disappear and Service Note 1067 would be applied to [the Applicant].

17 At paragraph 18 of its Answer the Respondent stated that following the meeting with the Applicant on 20 May 2019 at which [the Applicant] was informed of the decision to discontinue [the business unit where the Applicant worked], it immediately started exploring suitable alternative positions for [the Applicant].

18 During a meeting on 13 June 2019 the Applicant indicated that [the Applicant] wanted to continue to work part-time and was not prepared to work more than a maximum of 70 % to 80 % FTE.

19 At a meeting with the Respondent's HR representatives on 4 July 2019 the Applicant was informed of two potentially suitable positions. One was in the Respondent's […] Department and the other in […] On 5 July 2019 the Applicant expressed […] potential interest in the vacant position in [one of the positions]. In the same communication [the Applicant] informed HR that [the Applicant] would rather not consider at that stage the [other] vacant position in the Respondent's […] Department.

20 Following a meeting between the Applicant and the [Head of the Department where the position for which the Applicant expressed an interest was located], the Applicant informed HR on 16 August 2019 that [the Applicant] would think about the offer and decide within one week whether to accept it. On 22 August 2019 the Applicant informed HR that for [Applicant] it was out of the question to consider the position because it was a full time five days a week post. However, [the Applicant] indicated that [the Applicant] could see […]self working in [in that same Department] albeit not in the role proposed to [the Applicant].

21 By letter of 26 August 2019 ([…]) the Respondent confirmed to the Applicant that [their] position as […] would be abolished with effect from 31 October 2019 and that as of 1 November 2019 [the Applicant] would be temporarily assigned to a transitory role which would take into account [the Applicant's] skills and capabilities. [The Applicant's] employment conditions would be unchanged. The letter provided:

> *"If after a maximum of one year's time from the date of effective discontinuation of the [business unit where the Applicant worked] (31 October 2019), and in spite of all efforts made, no suitable option is identified, the BIS will terminate your employment in application of Service Note 1067, providing due notice period, paying you in particular the corresponding severance lump-sum and providing you with outplacement services."*

22 On 6 September 2019 the Respondent informed the Applicant that [the Applicant] would be assigned to a transitory role in […] from 1 October 2019 to 31 October 2020 at the latest. By email of 7 September 2019 the Applicant accepted this transitory role.

23 At a meeting on 21 November 2019 with HR, the Applicant was informed that continuation of the [transitory] assignment beyond 31 October 2020 could not be guaranteed and that currently there was no vacant position in [in the Department where the transitory role was located]. For this reason the Applicant was again encouraged to apply for suitable vacancies.

24 The Applicant was provided with the services of an external career coach, Ms. T.

25 On 30 March 2020 the Applicant applied for the position of […]. This was a position which allowed for 80 % FTE working. At paragraph 30 of its Answer the Respondent states:

> *"However, it was not a position which was identified as suitable for the Applicant by the Respondent, given the requirements for specific qualifications (namely a Batchelor's degree in […]) […] skills (in […]), and experience in […], which the Applicant did not have and which were not of a nature which could be acquired within reasonable time and with reasonable training. The Applicant applied at [the Applicant's own initiative, indicating in the application form that [the Applicant did not have key skills listed as essential requirements for the position."*

26 The Respondent states that notwithstanding [the Applicant's] lack of key skills for the post, given [the Applicant's] risk of redundancy, the Applicant was invited to the initial stages of the recruitment process with a view to giving [the Applicant] an opportunity to demonstrate [the Applicant's] suitability for the role. The Applicant was not selected for the subsequent stages of the recruitment process.

27 On 9 June 2020 the Applicant was informed by HR that [the Applicant's] application for the position of […] had been rejected. [The Applicant] was told that "[…] final candidates are being considered, all from outside the BIS and with relevant education/work experience, who do not need to be trained first" (translated into English as submitted by the Applicant; […]).

28 On 9 June 2020, at the suggestion of [the Applicant's] line manager, Mr. V, the Applicant applied for the Career Management Assignment (CMA) position of […] in the […] department.

29 On 10 June 2020 Mr. LL, the hiring manager […], informed the Applicant that in [hiring manager's] opinion [the Applicant's] profile on [the Applicant's] CV did not correspond with the profile of the job.

30 At paragraph 31 of its Answer the Respondent states of the [CMA position] […]:

> *"This role required specific […] qualifications (BA/BSc in […]), […] skills (inter alia […]) and experience ([…]). The Applicant did not possess the qualifications and skills required, and they were such as could not have reasonably be acquired during the short term duration of the CMA through additional reasonable training in order for an incumbent to be able to benefit in terms of career development from such short-term assignment."*

31 On 2 July 2020, the Applicant received an email from HR that [the Applicant's] application for the [CMA] position in the […] department would not be considered stating "[…] unfortunately we will not be progressing matters with your candidature. We have selected a pool of candidates whose skill and experience are more aligned with our current requirements".

32 At a meeting on 6 August 2020 with HR, the Applicant's coach mentioned the transferrable skills the Applicant had demonstrated in [the Applicant's] transitory assignment in […] department. These were skills such as organisation, planning, discipline and efficiency. During the meeting the Applicant indicated that [the Applicant] was prepared to follow more targeted training but without specifying what particular profile or career path [the Applicant] wished to follow.

33 After the meeting of 6 August 2020 the HR representative met with the HR recruitment team to enquire whether there were any new openings which had not yet been advertised and which could be suitable for the Applicant. The only one which was identified as potentially suitable was a […] role in the […] BIS […] unit.

34 On 2 September 2020 the Applicant was informed that [the Applicant's] application for the position of […] in the […] department was not successful as a more suitable candidate had been identified.

35 At a meeting on 3 September 2020 the Applicant was informed by HR of a vacancy for the position of […] in the […department]. However, the Applicant did not express an interest in this position and did not apply for it.

36 By email of 25 September 2020 from HR ([…]) the Applicant was told that [the Applicant's] employment would terminate on 31 October 2020 since no suitable alternative position to which [the Applicant] could be transferred had been identified within the Respondent. In reply ([…]) the Applicant expressed surprise that [the Applicant's] employment was to terminate on 31 October 2020 as [the Applicant] had been told [that the Applicant] would be given a period of notice ([…]).

37 The Applicant was offered a choice and accepted the sum of CHF […] in lieu of outplacement services. The Applicant was also paid the sum of CHF […] by way of severance payment under Service Note 1067 ([…]).

Procedural History

Grievance Procedure

38 On 30 October 2020 the Applicant initiated a Grievance under the Respondent's Grievance Procedure concerning the matters which are the subject of this application before the Tribunal ([…]).

39 As a result of the Level 1 Review the Applicant's Line Manager informed the Applicant on 13 November 2020 that [the Applicant] would be reinstated retroactively as of 1 November 2020 for a period of an additional three months ending 31 January 2021. The Applicant was informed that such three months would constitute notice of termination ([…]). The date of termination

of [the Applicant's] contract was confirmed by letter from the Respondent to the Applicant dated 16 November 2020 ([…]).

40 On 26 November 2020 the Applicant initiated a Level 2 review repeating [the Applicant's] original requests ([…]). The Level 2 Grievance Panel made recommendations which included payment of compensation equivalent to six months' salary, benefits and pension contributions and payment of the legal fees incurred by the Applicant in dealing with the Grievance Request […].

41 By her decision of 6 April 2021 ([…]) the Secretary General of the Respondent did not accept the recommendations of the Grievance Panel. The Secretary General decided to reject all actions requested as formulated by the Applicant in [the Applicant's] Level 2 Grievance Request dated 26 November 2020 ([…]). In recognition of the fact that the notice of termination of employment given by the Respondent was 16 days short of the required three months and the delay and inconvenience over the matter of the notice period, the Secretary General decided to grant the Applicant financial compensation of CHF […] corresponding to one month's net salary (at 50 % working time) including allowances.

42 By letter of 6 May 2021 ([…]) the Applicant notified the Respondent of [the Applicant's] intention to file an application to the ATBIS as provided by Article VI (2) (d) and Article VII (2) of the Statute.

Administrative Tribunal Procedure

43 By [the Applicant's] Application dated 2 July 2021 received on 6 July 2021, pursuant to Article X (1) of the Statute, the Applicant requests the Tribunal to quash the decision of the Secretary General of 6 April 2021 and:

1) *To order the Respondent to pay to the Applicant [their] full monthly salary and allowances for February 2021 and severance pay according to Service Note 1067 for February 2021 with interest of 5 % from 1 March 2021*

2) *To grant to the Applicant compensation for material and moral damages for breach of contract in an amount not less than two years' gross salary of CHF […] together with allowances and interest of 5 % from 1 March 2021*

3) *(a) To determine that the Applicant's actual FTE percentage from 1 January 2000 to 31 December 2018 was on average 57.75 % of full-time employment and to order the Respondent to make payment or pay compensation for loss of salary and benefits due on that basis and to order the Respondent:*

   i. *To pay to the Applicant the amount of CHF […] or an amount to be disclosed by the Respondent on that basis together with associated increased contractual benefits and compensation and interest of 5 % from 1 March 2021.*

   ii. *To contribute into their Pension Plan for the benefit of the Applicant the amount of CHF […] or the amount to be disclosed*

by the Respondent with interest of 5 % since 1 March 2021 and to allow the Applicant to pay [their] contributions of CHF […] into the pension plan.

iii. To make contributions to the health insurance plan based on working 57.75 % FTE.

3) (b) If Request #3a is not granted, to order the Respondent to pay pension fund employer contributions in the sum of CHF […] or an amount to be disclosed by the Respondent in respect of compensation for overtime worked by the Applicant from 1 January 2000 to 31 December 2018 and to allow the Applicant to make employee contributions into the pension fund on such overtime compensation in the sum of CHF […].

4) Pursuant to the Applicant's employment contract to order the Respondent to pay the Applicant the amount of CHF […] plus interest of 5 % since March 2021, equivalent to the surcharge of 25 % on overtime hours worked from 1 May 2000 to 29 June 2018 in excess of 44 hours per week.

5) To award the Applicant reasonable legal costs for the Grievance Procedure together with [the Applicant's] costs of the proceedings before the Tribunal

44 Procedural Order No. 1 received on 9 July 2021 notified the parties that the President of the ATBIS had appointed the following members of the panel which would deal with the Application: Prof Dr Abbo Junker (as Presiding Judge), Dame Elizabeth Slade (as Reporting Judge) and Prof Dr Jan-Marc Rapp (as Judge).

45 On 15 October 2021 the Respondent filed its Answer after receiving an extension of time by Procedural Order No. 3. The Answer requests the Tribunal to dismiss the Application in its entirety and, accordingly, not to award the Applicant compensation for legal costs incurred by [the Applicant] in connection with [the Applicant's] application before the Tribunal.

46 On 14 January 2022 the Applicant filed [the Applicant's] Reply after receiving an extension of time by Procedural Order No. 6. By [the Applicant's] Reply the Applicant maintained that the Respondent had failed to rebut [the Applicant's] claims. The Applicant repeated [the Applicant's] original request for an oral hearing. Further, [the Applicant] amended [the Applicant's] Request #1 and asked the Tribunal to order the Respondent to pay [the Applicant] the amount of CHF […] (corresponding to [the Applicant's] full monthly salary and allowances for February 2021 and the appropriate amount of related severance pay according to Service Note 1067 for February 2021, less employee contribution to the pension plan (CHF […]) and less CHF […] paid by the Respondent on 10 September 2021 together with interest of 5% on CHF […], or the precise amount to be disclosed by the Respondent, plus interest of 5 % since 1 March 2021. Additionally, the Applicant asked the Tribunal to order the Respondent to pay into the pension fund on behalf of the Applicant the total of both employer and employee contributions of CHF […], or the precise amount to be disclosed by the Respondent.

47 On 18 March 2022 the Respondent filed its Rejoinder to the Reply after receiving an extension of time by Procedural Order No. 7. The Respondent repeated its objection to an oral hearing. Further, the Respondent challenged the amendment of the Applicant's Request #1 as to the payment by the Respondent into the BIS Pension Fund on behalf of the Applicant of a contribution in the amount of CHF […] and an amount of additional severance payment (CHF […]), plus interest as well as questioning the amount claimed in the Applicant's Request #4. The Respondent stated that its observations on the merits and the additional clarifications provided in the Rejoinder are without prejudice to its position on the merits of the Applicant's claims which it continued to consider are entirely unfounded.

48 The Respondent requested the Tribunal to exclude the Applicant's exhibit 71 on grounds of legal privilege. It also requested the Tribunal to disregard the Applicant's exhibit 83 which was [the Applicant's] notes of a meeting of 4 July 2019.

49 By Procedural Order No. 8 it was ordered that the Panel would decide on the current submissions of the parties whether an oral hearing would take place. If the Panel found that an oral hearing was necessary, this decision would be delivered to the parties at an appropriate time. The Respondent's request for exclusion of Application Exhibit 71 ([…]) from the evidence in these proceedings was refused. The Respondent's request to disregard Application Exhibit 83 ([…]) would be taken into consideration by the Panel when it decided on the weight to be attached to the evidence.

50 On 11 April 2022 the Applicant submitted a Rebuttal to the Rejoinder. The Applicant requested the Tribunal to dismiss the Respondent's observations on the amount claimed by Request #4.

51 The Panel did not consider an oral hearing to be necessary. Whilst it is understandable that the Applicant wished to give oral evidence and to challenge the witnesses relied upon by the Respondent the Tribunal concluded that an oral hearing would not assist it on the material facts and issues relevant to it[…]. The written submissions and witness statements before the Tribunal are in accordance with the formal requirements set out in the Rules of Procedure. Witness statements are provided by parties as part of the evidence put forward by them. The Applicant comments in paragraph 10 of [the Applicant's] Reply that because three witness statements were made "on behalf of' the Respondent" they may not be compliant with the Rules and the deponents should be subject to questions in an oral hearing. The witnesses have provided, under oath, their narrative of relevant facts, as recollected by them notwithstanding the time elapsed since the occurrence of some of the events or as in the case of Ms. NN, the fact they have already left the service of the Respondent. There is no basis for concluding that in material respects the witness statements provided by the parties are not to be relied upon. [The external career coach] declined to give a statement. Neither the parties nor the Tribunal can compel individuals to provide a witness statement. In paragraph 9 of [the Applicant's] Reply the Applicant refers to three paragraphs of the Application which refer to [the external career coach]. There is no material in those paragraphs or generally which

indicates that [the external career coach] could add any relevant material to that which is before the Tribunal. The Tribunal, as requested by [the Applicant], has considered the additional Documents […] and […] submitted by the Applicant. Parties in proceedings before the Tribunal have the opportunity to express their views on the witness statement provided by the opposite party. The Applicant could have but did not put forward any additional questions [the Applicant] wished to submit to the Respondent's witnesses. It follows that this Judgment is based upon the written submissions and written evidence of the parties according to Article VIII (3) of the Statute and Article 18 (1) of the Rules of Procedure.

52 By Procedural Order No. 10, having regard to Article XIV (2) of the Statute regarding the discretion to order the Respondent to indemnify the Applicant for all or part of expenses incurred by [the Applicant] if it rules in [the Applicant's] favour or in exceptional circumstances even if it does not rule in [the Applicant's] favour, the Applicant was invited to submit [the Applicant's] representative's fee note by 15 August 2022.

53 By Procedural Order No. 11 the Applicant's representative's fee note was to be forwarded to the Respondent.

54 The Applicant submitted [the Applicant's] representative's fee note by letter of 12 August 2022 received on 15 August 2022.

As to the Law

55 Article X (1) of the Statute provides that if the Tribunal finds that the Application is well-founded it may quash the decision contested and, if necessary, grant an appropriate remedy.

Admissibility

56 The Application is compliant with Article VI and Article VII of the Statute and is admissible.

57 Preliminary points will be dealt with in considering the claim to which they relate.

The Claims

Request #1: Claim for Compensation for one Month's Salary, Allowances, Severance Pay and Pension Fund Contributions

58 The Applicant contends that the Respondent was in breach of contract by failing to give [the Applicant] notice of termination of [the Applicant's] employment. [The Applicant] contends that such notice would have expired at the end of February 2021. The Applicant requests the Tribunal to order the Respondent to pay compensation to the Applicant for [the Applicant's] full monthly salary and allowances for February 2021 and related severance pay

according to Service Note 1067 with interest of 5 %. [The Applicant] also asks for an order that the Respondent make contributions into the Pension Fund in respect of employment in February 2021.

59 In [the Applicant's] Reply the Applicant amended the amount claimed in Request #1. The original Application was lodged on 2 July 2021. In it [the Applicant] claimed salary and allowances for the month of February 2021 together with related severance pay in accordance with Service Note 1067 and employee contribution to the Pension Fund plus interest. After lodging the Application, on 10 September 2021, following the decision of the Secretary General on [the Applicant's] Grievance, the Respondent paid [the Applicant] the sum of CHF […]. By [the Applicant's] amendment set out in paragraph 23 of the Reply the Applicant takes into account the payment by the Respondent on 10 September 2021 and also deducts the amount of employee contributions to the Pension Fund. [The Applicant] amends the claim for interest to 5 % on CHF […] between 1 March and 10 September 2021 when the payment of CHF […] was made and on CHF […] from 10 September 2021. In addition, by [the Applicant's] amendment in paragraph 24 of the Reply the Applicant seeks an order that the Respondent pay into the Pension Fund the sum of employer contributions of CHF […] and employee contributions of CHF […] for February 2021.

60 In its Rejoinder the Respondent contends that these changes amount to a new claim. It refers to Article 12(2)(b) of the Rules of Procedure requires that the application instituting the proceedings contains the claims being made. Accordingly, the Respondent asks the Tribunal to dismiss the amended claim.

61 The amendment set out in paragraphs 23 and 24 of the Reply does not contain a new claim. The Applicant claimed and continues to claim damages for breach of contract for failing to give [the Applicant] the contractual notice to which [the Applicant] was contractually entitled. The amendment does not seek to change this cause of action. What is amended is the amount of damages claimed as a result of the breach of contract. The first part of the amendment in paragraph 23 rightly adjusts the amount claimed by deducting the sum paid by the Respondent to the Applicant. As this sum was paid after the lodging of the Application it was not originally taken into account. The first amendment also rightly deducts the employee contribution into the Pension Fund which had been originally claimed. The second part of the amendment in paragraph 24 seeks payment into the pension fund of contributions which should have been made by the Respondent if it had complied with its obligation to give contractual notice. Like the first, this is an amendment to the amount of damages claimed, not to the cause of action.

62 The amendment to Request #1 is allowed subject to deduction of the employee contribution to the Pension Fund of CHF 670.56 which the Applicant would have been obliged to make had [the Applicant's] employment continued for the contractual notice period.

63 In her decision of 6 April 2021, the Secretary General held that as the Level 1 Grievance Decision of 13 November 2020 in which it was said that notice of termination was given on 1 November 2020 to expire on 31 January 2021 did not reach the Applicant until 16 November 2020, [the Applicant] was

notified of the termination of [the Applicant's] employment 16 days short of [the Applicant's] contractual entitlement of three months' notice. In recognition of that delay and any inconvenience which may have been caused, the Applicant was awarded financial compensation corresponding to one month's salary and allowances.

64 The Applicant originally contended in [the Applicant's] Grievance Requests Level 1 and 2 that [the Applicant's] employment with the Respondent had not been terminated and that [the Applicant] continued to be entitled to [the Applicant's] salary and benefits.

65 In paragraph 67 of [the Applicant's] Application to the Tribunal, the Applicant acknowledges that, "[…] arguably the letter of 16 November 2020 could be understood as a notice of termination […]". However, [the Applicant] contends that the notice period of three months ended on 28 February 2021 and not on 31 January 2021 "[…] because customarily, the notice period of three months ends at the end of a calendar month, which the Grievance Decision of 6 April 2021 acknowledges in section 2."

66 In resisting the Applicant's Grievance Request, the Respondent originally contended that the Applicant's employment had terminated on 31 October 2020 by reason of its letter of 26 August 2019. However, by the Level 1 Grievance Decision of 13 November 2020, without admitting liability, the Respondent stated that it "[…] reinstates [the Applicant's] employment as of 1 November 2020, as of which date [the Applicant is] also given three months of notice of termination of employment with the Respondent. [The Applicant's] employment with the Respondent will end on 31 January 2021."

67 In paragraph 140 of its Answer the Respondent contends that it complied with its contractual obligation by giving three months' notice to the Applicant of the termination of [the Applicant's] employment ending on 31 January 2021. Alternatively, it contends that if such notice ended on 13 February 2021, in the context of the Level 2 Grievance Decision it has provided compensation for any missing 13 additional days' notice from 31 January to 13 February 2021 by paying the Applicant an additional month's salary and allowances.

68 The parties agree that pursuant to [the Applicant's] contract of 25 June 1999 the employment of the Applicant could be terminated on three months' notice. The contract of employment included under the heading "Other terms" those set out in the Staff Regulations. Article 14 of the Staff Regulations ([…]) provides:

> *"1. Appointments may be terminated at any time upon three months' notice being given on either side."*

69 The Applicant has not advanced any evidence to support [the Applicant's] contention in paragraph 68 of [the Applicant's] Application that by custom and practice the notice period ends at the end of a calendar month.

70 The final Grievance Decision of 6 April 2021 does not acknowledge that the notice period ends at the end of a calendar month. Paragraph 2 upon which the Applicant relies, on the basis that it was received on 1 November 2020,

states that the Applicant was given notice of the termination of [the Applicant's] employment 16 days short of the required period of three months. The notice period of three months ran from 16 not 1 November 2020. The Applicant asserts that [the Applicant] did not receive the documents until 18 November 2020. Even if this assertion were correct and the notice of termination to expire on 31 January 2021 was 18 rather than 16 days short it does not make a material difference to the outcome save as explained below. The Respondent has compensated the Applicant for any shortfall in the notice given by paying additional compensation of one month's salary and allowances in accordance with the decision of the Secretary General of 6 April 2021 ([…]). However, an additional sum would be due in respect of employer's pension contributions until 18 February 2021 (rather than 16 February if notice was not received until that date) if such were not made or were not included in the payment of 10 September 2021.

71 The Tribunal wishes to observe that the earlier letters of 26 August 2019 and the email of 6 September 2019 were not notices of termination. A notice of termination must notify an employee of a certain date when their employment will come to an end. The communications earlier relied upon did not do this. The letter of 26 August 2019 stated that if suitable alternative employment were not found within a year of 31 October 2020 the Respondent would terminate the Applicant's employment in application of Service Note 1067, "providing due notice period". By its own terms the letter did not purport to terminate the Applicant's employment on 31 October 2020 or any other date certain. Further a notice period runs from the date on which it is received by the employee not from when it is sent.

72 Therefore, the Applicant's claim for payment of one month salary, allowances and severance payment and pension contributions as set out in Request #1 as amended is dismissed save for a payment in respect of employer's pension contributions in respect of the Applicant up to 18 February 2021 if not already made. Interest of 5% from 19 February 2021, the day after contractual notice if correctly given would have expired, is payable on any sum found to be due.

Request #2: Compensation for Material and Moral Damages

The Applicant's submissions

73 The Applicant requests the Tribunal to grant [the Applicant] compensation for material and moral damages for breach of contract in an amount not less than two years' gross salary of CHF […] together with allowances and interest of 5 % from 1 March 2021.

74 The Applicant contends that the Respondent has failed in its contractual obligation to comply with Article 14 of the Staff Regulations and Service Note 1067 as well as the general principles of law of the international civil service. The staffing guidelines of the Respondent, Service Note 1163 ([…]), at paragraph 6 provide an exception to the standard recruitment process in making appointments "[…] that derive from an obligation by the Respondent,

for example […] re-deployment of staff member as a consequence of job elimination (as per Service Note 1067) […]".

75 The Applicant contends that the Respondent failed to comply with its obligations under Service Note 1067 and Article 14 of the Staff Regulations in two respects. It is said that the Respondent failed to make sufficient efforts to bring suitable internal vacancies to [the Applicant's] attention and did not start its efforts to find [the Applicant's] alternative employment in a timely manner when the reorganisation of [the business unit where the Applicant worked] was anticipated. Further, it is contended that the decision makers who rejected [the Applicant's] applications for the two positions for which [the Applicant] applied failed to apply Service Note 1067. In particular, if they thought [the Applicant] lacked the necessary skills or experience for the position, they failed to establish that they considered, as they were obliged to do, whether [the Applicant] could be trained to meet its requirements.

76 The proposal to discontinue [the business unit where the Applicant worked] was put to the Board of the Respondent in November 2018. The Respondent did not bring potential alternative positions to the Applicant's attention until July 2019. The Applicant does not know whether any suitable vacancies arose during that period, but [the Applicant] states that this cannot be excluded. The Applicant further contends that the obligation to seek alternative employment for [the Applicant] may have arisen even earlier, in March 2018 when the Respondent decided to produce [certain of its product on which the Applicant was involved in a more limited way. Despite anticipating since March 2018 that the [business unit where the Applicant worked] would no longer be needed and that [the Applicant's] job would go, in breach of its obligation the Respondent did not start looking for possible alternative positions for [the Applicant] until over a year later.

77 The Applicant contends that even after July 2019 the Respondent failed to adequately bring suitable vacancies to [the Applicant's] attention. [The Applicant] had to apply through official job advertisements and to compete with internal and external candidates. It is said that the HR Department did not provide the Applicant with information on vacant positions, nor did it alert [the Applicant] to upcoming vacancies before they were publicly advertised other than on 4 July 2019 when two were brought to [the Applicant's] attention and one in September 2020. The Applicant states that the positions brought to [the Applicant's] attention in 2019 were unsuitable and below [the Applicant's] level of education and expertise. They were full time at a significantly lower salary (level C instead of level E) which would have meant double the contractual workload for a lower salary and related benefits. Further the […] position was for a fixed term only with no guarantee that it would be extended. The Applicant gave the Respondent [the Applicant's] reasons for rejecting these vacancies. At this early stage the Applicant did not want to commit […]self to such unsuitable positions although [the Applicant] met with the head of […] department and obtained a transitory part-time position in that department.

78 The Respondent did not bring any other job opportunities to the attention of the Applicant until eleven months later, in September 2020 when they also

informed [the Applicant] that they would cease any further efforts to find [the Applicant] alternative employment in the Respondent.

79 The Applicant states that from [the Applicant's] first meeting with the HR Department [the Applicant] made it clear that [the Applicant] was willing to be as flexible as possible in terms of work percentage, function and job category. [The Applicant] took advantage of the suggestions of the job coach, Ms. T, to demonstrate [the Applicant's] adaptability and willingness to take on new tasks and to work in different environments. [The Applicant] had shown these qualities in [the Applicant's] temporary assignment in the […] department. This was recognised by [the Applicant's] line manager in the SZ, Mr. V. The Applicant also referred to the excellent reports on [the Applicant's] performance [the Applicant] received throughout [the Applicant's] long career at the Respondent.

80 In [the Applicant's] Reply at paragraph 38 the Applicant points out that the Respondent informed [the Applicant] of only three vacancies in the period from May 2019 until September 2020. For eight months, between November 2019 and August 2020, the Respondent did not meet the Applicant or inform [the Applicant] of any developments or new job vacancies, nor did [the Applicant] receive any training. Between November 2019 and September 2020 HR held only three meetings with the Applicant about finding [the Applicant] an alternative position, all at [the Applicant's] request. All the Applicant could do was participate in competitive application processes as any internal and external candidate.

81 The Applicant further contends that the evidence shows no or inadequate consideration by the Respondent of whether, if [the Applicant] lacked skills required for a vacancy, training within a reasonable time would rectify any material deficiency. Training opportunities were neither offered nor discussed. It is said that this conduct shows that the Respondent did not make every effort to maintain [the Applicant] in employment by trying to find [the Applicant] an alternative position whose requirements [the Applicant] could be trained to meet. It is said that this conduct shows that the Respondent failed in its duties under Service Note 1067.

82 Without any support from HR the Applicant applied for two vacancies but was unsuccessful.

83 In March 2020 the Applicant applied for the position of […] 80 % - 100 %. After completing two rounds of the selection process HR informed [the Applicant] on 9 June 2020 that [the Applicant] had not been considered for the shortlist. The Respondent asserts that the Applicant did not have the training, skills or experience required for this vacancy and these gaps could not be filled within a reasonable period of time. The shortlist consisted of four external candidates with relevant training and professional experience and who did not need to be inducted. The Applicant's note of a Webex Meeting on 15 June 2020 with the hiring manager, Mr. KK, records that he observed that one could see that [the Applicant] somewhat lacked the background for the position.

84 The Applicant contends at paragraph 44 of [the Applicant's] Reply that these reasons display a disregard of the Respondent's obligations under Service Note 1067. [the Applicant] states:

> *"[…] the Respondent's HR organisation took no steps whatsoever to review or even discuss with the Applicant or the hiring manager what, if any, skill gaps there were and what level and extent of training would be required to allow the Applicant to fill this position."*

85 Further at paragraph 45 of [the Applicant's] Reply, the Applicant points out that [the Applicant] possessed at least seven of the nine skills required for the position of […]. [The Applicant] performed below average only in numeric reasoning which was not a requisite skill according to the job description.

86 At paragraph 46 of the Reply the Applicant states:

> *"[…] both other longstanding members of the Respondent's […] team, who share the tasks with the successful candidate of this job posting, previously worked as [position] for the Respondent. It is hard to see why the Respondent was able to train GG but claims that it was unable to train the holder of an M.A. in [the Applicant's academic field] for this position. This is even less comprehensible considering that Service Note 1067 specifically allows for substantial training and would even have allowed to fill the position temporarily with a fixed-term employee to allow the Applicant to undergo the appropriate training […] Incidentally, it was one of the team members of FF who encouraged the Applicant to apply, telling [the Applicant] that [the Applicant] would be up to the task within two weeks."*

87 On 9 June 2020 when [the Applicant] was informed that [the Applicant] was not shortlisted for the position of […], at the suggestion of [the Applicant's] line manager, Mr. V, the Applicant applied for the [CMA] position of […] in the […] Department. This position was advertised as a Career Management Assignment (CMA). The purpose of a CMA is to enable staff to broaden and deepen their skills and competencies. The responsible line manager offering the CMA, Mr. LL head of HH, confirmed that permanent FTE posts were available in Y and that the CMA could be converted into a permanent position. However, on 2 July 2020 HR informed the Applicant that they would not be progressing [the Applicant's] application for a CMA as they had "[…] selected a pool of candidates whose skills and experience are more aligned with our current requirements" ([…]).

88 As with the rejection of [the Applicant's] application for the position of […], the Applicant was not told which important skills [the Applicant] lacked and why this lack could not be remedied by training.

89 The Applicant contends that the evidence shows that the Respondent failed to comply with its obligation under Service Note 1067 to consider whether [the Applicant] could be trained to meet the requirements of the positions for which [the Applicant] applied.

90 Further, the Applicant contends that [the Applicant] was placed at a disadvantage in [the Applicant's] job applications because [the Applicant's]

previous heavy workload prevented [the Applicant] from engaging in training which would have equipped [the Applicant] for a wider range of posts. The Respondent repeatedly used the Applicant's high overtime balance to explain not giving [the Applicant] opportunities for training which were routinely given to other members of staff. The Respondent insisted that [the Applicant] be compensated for Service Based Working Time (SBWT) overtime by time off in lieu (TOIL). The Applicant's recurring requests to increase [the Applicant's] contractual working scope and time which would have allowed [the Applicant] more flexibility for training were refused.

91 The Applicant summarises the effect of the denial of opportunities for training and development of [the Applicant's] skills in other areas in paragraph 45 of [the Applicant's] Application. [The Applicant] states that this lack of support and limited opportunities to attend training and education left [the Applicant] unable to improve [the Applicant's] prospects of finding an alternative position in the Respondent's organisation. This is significant because the Respondent rejected both [the Applicant's] applications of March and June 2020 because [the Applicant] would have required training for these positions.

The Respondent's submission

92 The Respondent contends that it made every effort to find an alternative position for the Applicant. It was not obliged to inform [the Applicant] of every such action. It is submitted that it is sufficient for the organisation to show that it made reasonable and genuine efforts to find an alternative position and that the Respondent met this requirement.

93 The Respondent has referred to a number of decisions of other Administrative Tribunals (see, *e.g.*, ILOAT Judgment 2933 [2010], *sub* 23). At paragraph 85 of its Answer the Respondent states:

> *"[…] as Administrative Tribunals have held, it is not necessary for the organisation to inform the staff member at risk of redundancy of every step taken as part of the efforts to find a suitable alternative position […]. It is sufficient for the organisation to show that it made reasonable and genuine efforts to find an alternative position and the Respondent has met this requirement."*

94 The Respondent contends that the evidence shows that it took required steps to find the Applicant an alternative position. It brought three suitable posts to [the Applicant's] attention. The Applicant refused two in 2019 and did not pursue one in 2020. In the discussion with the Applicant following [the Applicant's] rejection of the […] position HR reminded the Applicant that for efforts to find alternative employment to be successful, staff members are required to be flexible and that if [the Applicant] was not prepared to consider full-time positions this could significantly limit the options for identifying suitable alternative positions.

95 At paragraphs 60 and 61 of its Answer the Respondent relies on decisions of other Administrative Tribunals in which it was held that the obligation on the organisation is to try genuinely to find staff members alternative positions for

which they are qualified or for which those staff have the experience and qualifications (see, *e.g.*, WBAT Judgments 161 [1997] Arellano *v*. IBRD (No. 2), *sub* 42; 347 [2006] F (No. 2) *v*. IBRD, *sub* 55; ILOAT Judgments 3908 [2018], *sub* 16; 1602 [1997], *sub* 4; 133 [1969], *sub* 4; UNAT Judgment 2018-UNAT-847, *sub* 38). The Respondent relies on UNAT Judgment 2018-UNAT-847, *sub* 38 in which it is said: "If the redundant staff member is not fully competent to perform the core functions and responsibilities of a position, the administration has no duty to consider him or [the Applicant] for this position".

96 As for the criticism made by the Applicant that the Respondent failed in its obligations under Service Note 1067 because it denied [the Applicant] or failed to provide [the Applicant] with training for an alternative post, the Respondent contends at paragraph 90 of its Answer that the training referred to in Service Note 1067 is reasonable training which a staff member at risk of redundancy may receive in order to perform the duties of a suitable alternative position identified for them as part of the job search efforts. The Respondent maintains that: "Such reasonable training is usually regarded as an update of existing skills, or acquisition of new skills that can be acquired through courses or on-the-job training within a reasonable period of time".

97 The Respondent states that the positions for which the Applicant applied required a professional degree and requalification and relevant experience was an important requirement for the roles. It is said that this goes beyond training considered reasonable in such circumstances. As for the criticism that the Applicant was not given the opportunity of training or education during [the Applicant's] time [in the Applicant's role], the Respondent refers to a list of training which [the Applicant] undertook.

Reply of the Applicant

98 The Applicant submits in paragraph 32 of the Reply that decisions of other Administrative Tribunals relied upon by the Respondent in paragraphs 60 to 63 of its Answer do not support the assertion in paragraph 64 that:

> *"The question is, therefore, (i) on the one hand whether the Bank fulfilled its obligation to actively and in good faith pursue the task of identifying a suitable alternative position to which the Applicant could be reassigned and to support the Applicant in [the Applicant's] applications; and (ii) on the other hand, whether the Applicant made the efforts and applied the flexibility required under [Service Note] 1067 for securing such a position."*

99 These decisions are based on the specific rules and regulations in force in the relevant organisations. The Applicant contends that the Respondent fails to establish the relevance of these decisions and does not consider the particular rules applied in those cases and whether they lay down the same test as that in Service Note 1067. What is relevant in this case are the Staff Rules and Service Notes 1067 and 1163. The Applicant points out in paragraph 31 of the Reply that Service Note 1067 imposes on the Respondent a significantly higher level of active effort to maintain employment of staff members affected

by a reorganisation than that advanced by the Respondent in paragraph 64 of its Answer.

100 The Applicant refers to the obligation placed on the Respondent by Service Note 1067 to try to find the employee whose job disappears an alternative position whose requirements the staff member can be trained to meet. At paragraph 49 of the Reply the Applicant states:

> *"The Respondent simply did not consider any alternative position that would have required any training. Both applications which the Applicant submitted on [the Applicant's] own initiative, were rejected specifically because other candidates better met the requirements and 'there was no need to train them first' (see para 40 of the Application)."*

101 The Applicant points out that [the Applicant's] two applications were rejected specifically because other candidates better met the requirements and "[…] there was no need to train them first". Paragraph 61 of the Answer is also referred to in which the Respondent states that it was not obliged to assign a position to the Applicant if [the Applicant] was not fully and completely qualified for it from the outset. It is said that this approach is in breach of Service Note 1067.

102 As for the Respondent's criticism that the Applicant failed to display the flexibility which may be needed in the search for an alternative position, the Applicant refers to the evidence of [the Applicant's] willingness to work more than 50 % FTE. The Applicant informed the Respondent that [the Applicant] would be prepared to work up to 80 % and throughout [the Applicant's] time with the Respondent worked more than 50 % as [the Applicant] accumulated SBWT figures showed. Further [the Applicant] had worked for a year in a different area from the […] service. Mr. V who worked with the Applicant in […] department confirmed that [the Applicant] was very flexible to accommodate work requirements.

Rejoinder of the Respondent

103 At paragraph 31 of the Rejoinder the Respondent asserts that its obligation to commence a job search for alternative positions only arose once the decision to discontinue [the business unit where the Applicant worked] was taken by the Board of the Respondent in May 2019.

104 The Respondent submits that it cannot be suggested that the job search period was too short as it spanned 18 months. Two positions were brought to the Applicant's attention in July 2019 and a further one in 2020.

105 The Respondent answers the Applicant's contention that it failed to consider training [the Applicant] for the posts for which [the Applicant] unsuccessfully applied by saying at paragraph 34 that:

> *"[…] a decision whether or not an applicant is suitable for a position for which they are applying, wish to be promoted to or wish to be assigned to (as in the case of the Applicant) is a discretionary one. As such, an administrative tribunal cannot substitute its judgement in*

such discretionary decisions for that of the hiring managers, as to their discretionary assessments of the qualifications and suitability of an applicant for a position."

106 It is submitted that an Administrative Tribunal can only interfere with such a discretionary decision if it:

"[…] was taken without authority or in breach of a rule, or of form, or of procedure; or if was based on a mistake of fact or of law; or if some material fact was overlooked; or if there was an abuse of authority; or if a clearly wrong conclusion was drawn from the evidence […]. The burden of proof that any of these breaches have tainted the decision lies on the Applicant contesting the decision."

107 Further at paragraph 34 of its Rejoinder the Respondent contends that:

"The Applicant in this case has not provided any proof and as shown by the evidence provided by the [Respondent], none of these breaches have occurred."

Compensation for Material and Moral Damages

108 The burden of proof is on the Applicant to establish on a balance of probabilities that the Respondent was in breach of its contractual obligations to [the Applicant] in failing to make every effort to maintain [the Applicant's] employment by trying to find [the Applicant] an alternative position whose requirements [the Applicant] meets or can be trained to meet.

109 The Respondent relies on decisions of other Administrative Tribunals in other cases to argue that the decision whether to offer the Applicant an alternative position was a discretionary one which can only be interfered with in limited circumstances. However, the ambit of the employer's discretion depends on the particular agreement between the parties which sets the parameters within which it is to be exercised. The relevant provisions in this case are Article 14 of the Staff Regulations, Service Notes 1067 and 1163.

110 Article 14 (2) (b) of the Staff Regulations enables termination of employment in a redundancy situation if "[…] the Respondent cannot find an alternative position whose requirements the member of staff meets or can be trained to meet". As recognised by the Respondent in its letter of 26 August 2019 "in line with Service Note 1067" the Respondent were to make every effort to maintain the Applicant's employment and try to identify a suitable role for [the Applicant] in the Respondent. The language of Service Note 1163 Staffing Guidelines paragraph VII 6 a) indicates that Service Note 1067 imposed obligations on the Respondent in dealing with potentially redundant members of staff. It was permissible to deviate from standard recruitment processes in order to meet such obligations.

111 At the time when it decided to discontinue [the business unit in which the Applicant worked] and therefore that the Applicant's job would disappear, Service Note 1067 set out the content of the Respondent's obligations. Different and lesser obligations were placed on the Respondent by the Special

Staff Rule relating to Article 14 2(b) of the Staff Regulations Version 2.0 but that did not come into effect until 1 August 2020.

112 Service Note 1067 required the Respondent to make every effort to maintain employment for staff whose jobs are affected by a reorganisation. The Service Note specifies the way, in principle, in which this is to be done. Where the job of a member of staff disappeared as in the case of the Applicant, the Respondent was obliged to try to find an alternative position "[…] whose requirements the staff member meets or can be trained to meet". It is a necessarily implied term of that obligation that the Respondent is required to use reasonable efforts to try to find such a position for the affected member of staff.

113 Whilst the obligation placed on the Respondent by Service Note 1067 to consider for appointment an applicant within scope who would be suitable with some training does not specify the degree or length of training which should be regarded as reasonable in accordance with a necessarily implied term, it has enforceable content. Where a potentially redundant candidate applies for a different position, the selector should apply Service Note 1067 and come to a reasonable decision. If such an applicant would be suitable but for lack of certain skills or experience, there is an obligation to consider whether any lack of necessary skill or experience can be remedied by reasonable training within a reasonable period of time.

114 By reason of Service Note 1067 the candidate whose original job has disappeared in a reorganisation is in a different position from the generality of applicants. This is also recognised by Service Note 1163 Staffing Guidelines. Section 6: Exceptions to the standard recruitment process, provides that cases may deviate from the standard process for re-deployment of staff in the case of appointments which derive from an obligation such as under Service Note 1067.

115 Service Note 1067 provided that where reorganisation could be anticipated the Respondent would bring potential alternative positions to the attention of staff who were likely to be affected.

116 The Respondent became obliged to bring potential alternative roles to the attention of the Applicant when a reorganisation could be anticipated which would result in the disappearance of [the Applicant's] job. This was at the latest on 13 May 2019 when the Board decided to cease [the business units where the Applicant worked].

117 At a meeting on 20 May 2019 the Applicant was informed by HR that the Board of the Respondent had decided to cease [the business unit where the Applicant worked] and therefore [the Applicant's] position was redundant. The Respondent started to look for an alternative position in the Respondent for the Applicant.

118 At a meeting on 13 June 2019 the Applicant stated that because of [the Applicant's] personal circumstances [the Applicant] wished to continue working part time with a maximum of 70 %-80 % FTE.

119 At a meeting on 4 July 2019 with HR, the Applicant was informed of two potentially suitable positions: one in the Respondent's RR and one in SZ.

120 In [the Applicant's] Reply the Applicant refers to [the Applicant's] note of the meeting of 4 July 2019 which is exhibited at […]. The Respondent asked for this document to be disregarded. The Tribunal has considered it but does not consider it to be material to its decision.

121 Following the formal notification by letter dated 26 August 2019 that the position of Senior C/A would cease to exist on 31 October 2019 the Applicant was told that [the Applicant] would be assigned to a transitory role in SZ on a 50 % FTE basis.

122 Whilst there were some meetings between the Applicant and HR between November 2019 and October 2020 it is apparent there were not many. The only other post which HR brought to the attention of the Applicant in that period was that of […] Project Manager in the BIS […][unit]. The Applicant was informed of this vacancy at a meeting on 3 September 2020. [The Applicant] did not express an interest in this position and did not apply for it.

123 It is noteworthy that the Respondent brought no potential posts to the attention of the Applicant in more than one year between 4 July 2019 to 2 September 2020. Exhibit ([…]), Taleo requisition data, lists the 75 vacancies which arose in that period. The Applicant applied for numbers 1 and 2 but without success. Numbers 3, 4, and 5 were brought to [the Applicant's] attention by HR in meetings. Save for vacancy number 1, for which the Applicant applied, and 23, 28, 43, 45, and 46, all required full time working. These vacancies were posted on the Respondent's system and were accessible to the Applicant.

124 The Applicant made it clear at the meeting on 13 June 2019 that [the Applicant] wished to continue working part time and that the maximum [the Applicant] would contemplate was 70 %-80 % FTE. The decision that [the Applicant] would not contemplate full time working was not transitory. The Applicant refused a job in SZ on 22 August 2019 because full time working was required.

125 It is not suggested that the Applicant changed [their] mind about not working full time or that [the Applicant] ever communicated such change of mind to the Respondent in the period after 22 August 2019.

126 Part-time working in responsible posts may well have become more usual in recent years. However, it has not been suggested on behalf of the Applicant that there were any vacancies for which [the Applicant] may have been suited which could have been modified so that full time working would no longer be required.

127 The Applicant has not alleged or established that there were other vacancies which were not advertised and which should have been brought to [the Applicant's] attention. Nor does [the Applicant] adduce any evidence that any of the vacancies could reasonably have been performed part-time.

128 In the Tribunal's judgment on the evidence the Applicant has not established that the Respondent failed to seek or bring to [the Applicant's] attention alternative job opportunities.

129 The Applicant contends that the Respondent failed to meet its obligation under Service Note 1067 by not considering whether any deficiencies in [the Applicant's] skill or experience required for the posts for which [the Applicant] was rejected could be remedied by training within a reasonable period of time.

130 The Applicant has pointed out that [the Applicant] was denied the opportunity for the training to broaden [the Applicant's] skills and experience which was made available to other members of staff. [The Applicant] states that this lack of training placed [the Applicant] at a disadvantage when see[k]ing alternative internal positions. The list provided by the Respondent of courses attended by the Applicant do not show that [the Applicant] was trained in new skills. None lasted more than one day, and most were less than eight hours in duration. Three were in 2006, one in 2007, two in 2009, one in each of 2012, 2015 and 2019. The few which were subject based such as credit derivatives and writing for the internet were not long enough to give a meaningful grounding in these topics. Other courses were on such matters as speed reading, fire safety and basic life support. There is no evidence that the Respondent gave the Applicant any training during [the Applicant's] time as a A which broadened [the Applicant's] skills to equip [the Applicant] to perform tasks outside [the Applicant's] particular role.

131 The Applicant applied for the post of U in the […] of the […] which was advertised on 2 March 2020. The qualifications, skills, or experience required included good skills in use of […], […], and […]. In answer to prescreening questions the Applicant replied no to questions of whether [the Applicant] had experience working with […] and […] ([…]). However, in paragraph 45 of [the Applicant's] Reply the Applicant stated that [the Applicant] possessed at least seven of the nine skills required for the position in particular all those related to the principal accountabilities for […] (40 % of the job).

132 The Applicant did not progress to the final interview stage for the post and on 9 June 2020 was informed by HR that [the Applicant] was not to be appointed.

133 The Applicant made a note of a Webex Meeting on 15 June 2020 [the Applicant] had with Mr. KK, the hiring manager (translated into English as submitted by the Applicant; Doc A 42). [The Applicant] noted that he said of the second round of interviews from which the Applicant did not progress to the final selection:

> *"[…] one could see that I somewhat lacked the background; I could perhaps have made some better use of the time available, and where I was not able to draw on work experience in the relevant field, I could have done some self-advertising in a related field, could have emphasised my relevant strengths, could have marketed myself better."*

134 The Applicant commented (see […] and […]) that:

> *"During the recruitment process, [the Applicant] performed above average in one part of the tests (verbal reasoning), average in another part (inductive reasoning), and below average only in numeric reasoning, which was not a requisite skill according to the job description."*

135 By email of 9 June 2020 the Applicant informed [the external career coach] of the reason [the Applicant] had been given for [the Applicant's] rejection (translated into English as submitted by the Applicant; […]). This was:

> *"[…] 4 final candidates are being considered, all from outside the BIS and with relevant education/work experience, who do not need to be trained first."*

136 At paragraph 30 of the Respondent's Answer, it is stated: "The tests and recorded interview confirmed indeed that the Applicant lacked the key experience and skills in this specific field and the gap was such as would not be able to be filled with reasonable training".

137 Mr. KK, the manager who made the decision to reject the application of the Applicant for the position of U, has not given a statement in these proceedings.

138 More than a year after the rejection of the application for the position of U, on 15 October 2021 Ms. J of HR made a statement in support of the Respondent ([…]). In paragraph 24 she stated of the Applicant:

> *"[The Applicant] was also considered for the U position and invited to the interview rounds taking into account that [the Applicant] was at risk of redundancy and notwithstanding [the Applicant's] lack of specialised background. Moreover, [the Applicant] was supported throughout this period by the external coach retained by HR. As an […], I could not intervene in the competitive selection process more actively."*

139 Ms. J wrote at paragraph 22:

> *"As confirmed to me by the hiring manager, Mr. KK, Head of […], the two initial stages of the recruitment process in which [the Applicant] participated for this position confirmed that [the Applicant] lacked the skillset that was required for the role ([…]) and moreover [the Applicant] did not display a keen interest in […]. It appeared that the gap in skills was such that it could not be bridged in a reasonable timeframe, even with additional reasonable training."*

140 Ms. J does not state that she made the hiring manager, Mr. KK, aware of the Respondent's obligation under Service Note 1067 to make every effort to maintain employment for staff whose jobs are affected by reorganisation including trying to find an alternative position whose requirements the staff member can be trained to meet. There is no statement from Mr. KK. It is not known whether he was aware of the Respondent's obligation under Service Note 1067. Although Ms. J states in paragraph 22 of her statement that Mr. KK confirmed to her that the gap in the Applicant's skills "[…] could not be

bridged in a reasonable timeframe, even with additional reasonable training […]", no direct evidence has been advanced in support of that assertion. There is no evidence from the Respondent what training would have been needed, how long that would have taken and why this could not have been completed within a reasonable time. It is therefore not known whether the Applicant's lack of background in […] could have been made good by training and if so, what such training would have involved and how long it would have taken.

141 The wording which Ms. J uses to explain the reason for Mr. KK's rejection of the application of the Applicant for the position of U is almost the same as that used in the statement of Mr. LL, the hiring manager in the other post for which the Applicant applied and was rejected. Ms. J does not state when Mr. KK is said to have made these observations or in what context.

142 On 9 June 2020, the day of [the Applicant's] rejection by Mr. KK, at the suggestion of [the Applicant's] line manager, Mr. V, the Applicant applied for a Career Management Assignment (CMA) in the […] Unit of the […] [department] of the Respondent. The line manager and decision maker was Mr. LL.

143 On 2 July the Applicant received an email from the HR department informing [the Applicant] that [the Applicant's] application would not be progressed stating:

> *"We have selected a pool of candidates whose skills and experience are more aligned with our current requirements."*

144 The hiring manager, Mr. LL made a statement on 4 October 2021 in support of the Respondent ([…]). He stated at paragraph 8 of his statement:

> *"I was aware that [the Applicant] was looking for an alternative position in view of the elimination of [the Applicant's] position.*
>
> *[The Applicant] was not included in the first round of interviews because, in my opinion, [the Applicant] lacked the relevant skills and experience in […] and/or […]. I believed this gap was such that it could not have [been] bridged in a reasonable timeframe, even with training."*

145 As in the case of the application for the position of U, no particulars were given of which skills and experience needed for the post were lacking. Nor is there any evidence of whether and if so what training over what time period could have remedied this lack of needed skill and experience. However, unlike Mr. KK, Mr. LL has made a statement for these proceedings in which he attests to the accuracy of its contents. He states:

> *"I have carefully reviewed the statement and confirm that it correctly reflects my recollection of the facts described and my opinions."*

146 The Applicant challenges as being in breach of their obligations under Service Note 1067 the decision makers who rejected the two applications made by [the Applicant] for the posts of […] and [the Career Management Assignment position].

147 It is of concern that the Respondent in its Answer at paragraphs 60 and 61 relies upon decisions of other Administrative Tribunals which have applied a test of identifying alternative positions for potentially redundant staff for which they have the experience and qualifications (see, *e.g.*, WBAT Judgments 161 [1997] Arellano *v*. IBRD (No. 2), *sub* 42; 347 [2006] F (No. 2) *v*. IBRD, *sub* 55; ILOAT Judgments 3908 [2018], *sub* 16; 1602 [1997], *sub* 4; 133 [1969], *sub* 4; UNAT Judgment 2018-UNAT-847, *sub* 38). The decisions relied upon do not refer to the obligation to try to find alternative positions for which the Applicant could be trained within a reasonable time which is the test for satisfying the obligation of the Respondent under Service Note 1067. The first part of the test proposed by the Respondent in paragraph 64 of its Answer does not accurately reflect its obligations under the Service Note.

148 The contemporaneous evidence of the reason Mr. KK rejected the application of the Applicant for the post of […] is that [the Applicant] lacked the background for the position. In Paragraph 70 of its Answer the Respondent states that the Applicant did not meet the basic requirements of the post and the gaps were such as could not be filled with reasonable training and within a reasonable period of time. Support for this elaboration which is also contained in the statement made by Ms. J is not to be seen in any original contemporaneous evidence of the reasoning of Mr. KK at the time he took his decision. There is no direct evidence from Mr. KK of his reason for rejecting the application of the Applicant and whether he had regard to the obligation to consider whether [the Applicant] could be trained for the vacant alternative post within a reasonable period of time. Nor is it apparent that he had in mind the provision in the Staffing Guidance Service Note 1163 which permits an exception in the case of appointments which derive from an obligation of the Respondent, such as by reason of Service Note 1067, to the standard recruitment process in which candidates "[…] whose background most closely match the requirements of the position".

149 The Applicant has established on the evidence before the Tribunal that the Respondent was in breach of Service Note 1067 by failing to consider whether any lack of experience or qualification for the post of U could be rectified by reasonable training within a reasonable period of time.

150 Although the observations about the Respondent's reliance on decisions of other Administrative Tribunals which were applying different rules from that relevant in this application are as relevant to the justification of the decision of Mr. LL as well as that of Mr. KK, there is a material difference in the evidence relating to the decisions taken by each. Unlike the decision taken by Mr. KK Mr. LL has given a statement including his reasons for rejecting the application of the Applicant for the [Career Management Assignment] position in the […] department. His statement that the gap of the Applicant in relevant skills and experience in […] and/or […] "[…] could not have been bridged in a reasonable timeframe, even with training" is attested to by him. The statement shows that at the time the decision to reject the Applicant's application was taken, Mr. LL did have in mind the obligation to consider whether any gap in skill or experience could be overcome by training within a reasonable period of time. The Applicant has not discharged the burden of

proof which is on [the Applicant] to show that Mr. LL failed to apply Service Note 1067 in rejecting [the Applicant's] application for the Career Management Assignment post in the […] department.

151 Provided that the obligations under Service Note 1067 are adhered to where applicable, the Tribunal would not seek to interfere with a hiring decision reached within reasonable parameters. However, in this case the Applicant has established on a balance of probabilities that the obligations under Service Note 1067 were not held in mind or applied by the decision maker, Mr. KK, who rejected [the Applicant's] application for the post of U.

152 In accordance with Article X (2) of the Statute it is not for this Tribunal to substitute its decision for that of an employer on a discretionary matter such as the appointment of a candidate to a post. Provided that the decision maker acts within their powers and obligations whether imposed under statute or contract, the Tribunal will only interfere if the decision is one which no reasonable employer in the circumstances would have reached or is one made failing to take into account a relevant fact or legal principle or taking into account irrelevant ones. This Tribunal has regarded to paragraphs 146-147 of ATBIS Judgment 1/2018 which it adopts.

153 This Tribunal expresses no view on the discretionary decision on the appointments made by the Respondent.

154 The consequence of the conclusion that the Respondent was in breach of Service Note 1067 in its consideration of the Applicant's application for the position of U, the Applicant is to be awarded compensation for loss of the chance of appointment to that position.

155 In assessing the value of loss of this chance the Tribunal takes into account the chance that the Applicant may have been appointed if the correct approach to the question of whether reasonable training within a reasonable period of time would have been likely to equip [the Applicant] for the position of U. The Tribunal also takes into account the prospects of [the Applicant] being able to mitigate [the Applicant's] loss by obtaining other employment outside the Respondent. The Applicant is now […] years old. [The Applicant] has worked for the Respondent since 1999 principally in the role of A. Without other training the possibilities of obtaining employment outside [the Applicant's] specialist field are likely to be limited.

156 Taking all these factors into account, the Tribunal adopts the approach of Service Note 1163 IV paragraph 2 in respect of new appointment to the BIS and grants the Applicant's Request #2 in part ordering the Respondent to pay the Applicant a sum representing pay and allowances for the period of 12 (twelve) months together with any increase in severance payment and interest at 5 % payable from 19 February 2021 the day after notice to terminate the employment of the Applicant should have expired.

Request #3 (a): Compensation Based on Actual Work Scope

Request #3 (b): Pension Contributions on Overtime Pay

The Applicant's Submission

157 The Applicant asks the Tribunal:

> *3. a) To determine that the Applicant's actual scope of work during [the Applicant's] employment with the Respondent from 1 January 2000 to 31 December 2018 was on average 57.75% of a full-time equivalent, and to order the Respondent:*
>
> *i. to pay to the Applicant the amount of CHF […], or in the precise amount to be disclosed by the Respondent, plus interest of 5% since 1 March 2021, in compensation of the contractual allowances due on the actual work scope of the Applicant in 2000 to 2018 (including the Respondent's contribution to the health and accident insurance costs., vacation entitlement and Savings Fund discontinuation allowance).*
>
> *ii. to order the Respondent to contribute into the Respondent's Pension Plan for the benefit of the Applicant the amount of CHF […], or the precise amount to be disclosed by the Respondent, plus interest of 5% since 1 March 2021, for outstanding pension plan contributions according to [the Applicant's] actual work scope, and to allow the Applicant to pay [the Applicant's] respective contributions into the pension plan in the amount of CHF […], and*
>
> *iii. to provide to the Applicant any future health insurance contributions according to [the Applicant's] actual work scope of 57.75%*
>
> *b) In the alternative, if Request #3 a) is denied, to order the Respondent to pay into the Respondent's Pension System in favour of the balance of the Applicant's pension funds, the amount of CHF […], or the precise amount to be disclosed by the Respondent, plus interest of 5% since 1 March 2021, for pension plan on all overtime compensation, which was paid by the Respondent to the Applicant from 1 January 2000 to 31 December 2018, and to allow the Applicant to pay [the Applicant's] equivalent share of the pension plan contributions in the amount of CHF […].*

158 The Applicant points out that [the Applicant] regularly worked overtime in excess of 50 % FTE. [The Applicant] requests this as a declaratory judgment, recognising in paragraph 84 of [the Applicant's] Application:

> *"[…] a request for a declaratory judgment is admissible only if the Applicant has a legal interest in obtaining such a type of decision. […] Such an interest is assumed, amongst other reasons, if only part of the performance demanded by the Applicant is due at the time of filing the Application. In the present case, the Applicant is requesting not only due allowances and pension plan contributions for overtime*

compensation paid from 2000 to 2018, but also that future allowances will be calculated as if [the Applicant] had been employed at a work scope of 57.75 % of a full-time equivalent. Without the declaratory judgment, this would remain a preliminary question in the present proceedings, and not participate in the substantive legal force of the judgment. The Applicant would be excluded from requesting any future claims or rights in the present proceedings."

159 In paragraph 85 of [the Applicant's] Application the Applicant recognized that:

"[…] the Applicant's overtime pay was not considered part of [the Applicant's] salary, and therefore, the Respondent did not grant [the Applicant] any allowances, nor social security contributions, on this pay. This means that for nineteen years, the Applicant was denied allowances, including contributions into the pension plan, in an amount equivalent to an average of 7.75 % of a full time equivalent per annum."

160 The Applicant refers to Special Staff Rule relating to Article 17 of the Staff Regulations – Working conditions ([…]) which provides at II (e) that if the number of hours worked exceeds 40 consistently the line manager should examine whether the staffing level and/or service level should be reviewed.

The Respondent's Submission

161 The Respondent asks the Tribunal to dismiss this claim on the grounds that it was submitted with excessive delay without reason. Further, the Applicant had accepted and acted upon the decision of the Respondent in 2017 to reject [the Applicant's] request for an increase in [the Applicant's] contractual working time.

162 The Respondent contends that pensionable pay was determined by the contract of employment and that overtime was compensated by TOIL or overtime payments. It observes at paragraph 103 of its Answer that it understands that the claim that contractual working hours should be 57.75 % relates to overtime worked during the period of the K which was paid off rather than compensated by TOIL.

163 Further, the Respondent refers at paragraphs 114 to 118 of its Answer to the limitations on obtaining a declaratory judgment. It alleges that this case does not fall within the category of exceptional cases in which declaratory relief may be obtained, which is in principle only in the case of impossibility of obtaining a decision on specific performance.

Reply of the Applicant

164 In [the Applicant's] Reply the Applicant states that the Respondent was well aware that [the Applicant] routinely worked considerable amounts of overtime and that by refusing to increase the percentage of [the Applicant's] FTE it was depriving [the Applicant] of increased benefits. Further [the Applicant] contends that [the Applicant] had no choice in 2017 but to accept

the rejection of [the Applicant's] request to increase the percentage of [the Applicant's] FTE working time and that [the Applicant] had "[…] no recourse to the [Respondent's] decision." [The Applicant] states that:

> *"[The Applicant] did not expect an escalation of the matter to lead to a different outcome, especially given [the Applicant's] line managers' cautionary comments."*

Decision on Request #3a:

165 The entitlement of the Applicant to pension contributions and other benefits depends on [the Applicant's] contract. The contract is set out in the Respondent's letter of 25 June 1999 and incorporated documents.

166 The contract (translated into English as submitted by the Applicant; […]) provides:

> *"Working hours*
>
> *[The Applicant's] employment contract is based on 50 % of the normal weekly working hours, i.e., an average to change this percentage at a later date, there is no obligation on the part of the [Respondent] to comply with [the Applicant's] wish; any change must be formally agreed and constitutes a change in the terms of [the Applicant's] contract.*
>
> *Insurance*
>
> *Subject to future amendment, the following provisions currently apply to part-time employees at the Bank:*
>
> *[The Applicant] will be covered under the Bank's health (hospital) and accident insurance. The Bank pays the costs up to an amount corresponding to the percentage of employment; the rest is deducted from [the Applicant's] salary.*
>
> *Pension scheme and Swiss social insurances (AHV/IV/EO/ALV)*
>
> *In accordance with Article 2 of the Regulations on the Pension System, [the Applicant's] pensionable salary will be equal to [the Applicant's] annual salary plus 25 %"*

167 The Regulations on the Pension System of the Respondent ([…]) govern pension contributions and payments. Article 2 of the Regulations on the Pension System provides:

> *"1. The contributions payable under the Pension System will be calculated on the basis of the pensionable remuneration.*
>
> *2. The pensionable remuneration will be equal to 125 % of the total annual salary, excluding all family and expatriation allowances, tax reimbursements, special bonuses and other special payments."*

168 The Applicant has failed to establish that [the Applicant] has a contractual entitlement to pension contributions based on an additional 7.75 % working time above [the Applicant's] agreed 50 % normal working hours. [The

Applicant] rightly recognises in paragraph 85 of [the Applicant's] Application that health insurance benefit is based on [the Applicant's] remuneration for contractually agreed normal weekly working hours. Pension contributions are based on "pensionable remuneration" which is defined as 125 % of annual salary excluding special payments. [The Applicant's] contractual annual salary was 50 % of FTE. Any change in that percentage would have to be agreed by the Respondent. Despite the Applicant's requests, the Respondent did not agree an increase in the percentage FTE of [the Applicant's] contractual normal weekly working hours. Accordingly annual or weekly salary working time related benefits are based on the percentage FTE agreed between the parties, in this case 50 % FTE.

169 Whether the request by the Applicant for a declaration that [the Applicant's] working hours were 57.75% FTE is to be regarded as asserting a cause of action or a remedy for breach of contract such an order would be contrary to the clear terms of the contract between the Respondent and the Applicant. Further, Article 11 (e) of the Special Staff Rule relating to Article 17 of the Staff Regulations relied upon by the Applicant in paragraph 86 of [the Applicant's] Application does not give a member of staff a contractual right to an increase in FTE percentage. It states that if agreed working hours are consistently exceeded, the line manager should examine whether staffing levels should be increased. The natural meaning of 'Staffing levels' is a reference to the number of staff. Further there is no obligation on the manager to increase the level of staff whether that means numbers or percentage FTE worked by an existing member of staff. There is no basis for disregarding the applicable contractual terms regarding the Applicant's percentage FTE of 50% set out in [the Applicant's] contract. A declaration could not be granted which would be contrary to those applicable terms.

170 As the answer to Request #3a is determined by reference to the terms of the Applicant's contract with the Respondent there is no need to consider arguments on delay or waiver. The terms of the agreement between the parties provide that pension contributions and other benefits are based on the contractually agreed percentage of working hours. This percentage can only be varied by agreement. It remained at 50 % FTE throughout the Applicant's employment.

171 Therefore, the Applicant's claim for compensation based on the actual work scope, Request #3a, is dismissed.

Request #3b

The Applicant's Submission

172 If the Tribunal does not order that the Applicant's working time be amended retrospectively to 57.75 %, [the Applicant] seeks an order that the Respondent make pension plan contributions retroactively on all overtime paid throughout [the Applicant's] employment.

173 The principal basis of this claim is that Article 2 (2) of the Regulations on the Pension System which provides that pensionable remuneration is 125 % of total annual salary excluding various payments including "other special

payments" does not exclude overtime payments. The Applicant contends that these were not special payments because "[…] overtime pay was provided regularly and had been foreseeable to the Parties from the beginning of the employment relationship".

174 In support of [the Applicant's] argument that overtime payments are pensionable pay, the Applicant also relies on a Memorandum of Legal Services of 2007 ([…]). [The Applicant] contends that the observation that "[…] by agreeing to overtime arrangements with related additional costs (higher salaries, higher social security costs, higher salary rates for overtime) […]" indicates that pension contributions would be payable on overtime payments.

The Respondent's Submissions

175 The Respondent contends that overtime payments are "special payments" because they are payment for time worked that deviates from the contractually agreed normal working time and related agreed salary. It also refers to the provision in the Applicant's contract which states that monetary compensation for overtime is awarded only exceptionally with the approval of the line manager. According to the Respondent payment for overtime is therefore an exceptional or special payment and is excluded from pensionable salary under the Pension Regulations.

176 In addition to objecting to reliance by the Applicant on legal advice given, the Respondent points out that the advice related to freelancers not to permanent employees such as the Applicant.

Decision on Request #3b

177 Any entitlement to pension contributions by the Respondent is determined by the contract of employment and the Regulations on the Pension System of the Respondent. The contract (translated into English as submitted by the Applicant; […]) provides that:

> *"In accordance with Article 2 of the Regulations on the Pension System, [the Applicant's] pensionable salary will be equal to [the Applicant's] annual salary plus 25 %.*
>
> *Overtime is generally compensated by TOIL and only in exceptional cases and subject to the approval of [the Applicant's] line manager, you may also be paid for overtime."*

178 Article 2 (2) of the Regulations on the Pensions System provides:

> *"The pensionable remuneration will be equal to 125 % of the total annual salary, excluding all family and expatriation allowances, tax reimbursements, special bonuses and other special payments."*

179 Pursuant to the contract of employment, payment for overtime is exceptional, however frequently or regularly it occurs. Payments to the Applicant for overtime whether regular or not were "special payments" within the meaning of the Pension Regulations and were not to be included in pensionable pay.

180 The reference to legal advice on the position of freelancers does not assist the Applicant. It does not consider or support a contention that overtime pay is pensionable. It refers to higher salary rates and social security costs related to overtime payments.

181 Therefore, the Applicant's claim for pension contributions on overtime pay, Request #3b, is dismissed.

Request #4: Overtime Surcharge

The Applicant's Submission

182 The Applicant claims overtime payment at the rate of 125 % in respect of overtime hours worked in a week in which [the Applicant] worked more than 44 hours. [The Applicant's] contract of employment of 25 June 1999 (translated into English as submitted by the Applicant; […]) provides:

> *"In exceptional cases and subject to the approval of [the Applicant's] line manager, [the Applicant] may also be paid for overtime:*
>
> *[…]*
>
> *at 125 % for hours in excess of a weekly working time of 44 hours or for hours performed on weekends and public holidays."*

183 The Applicant states that in accordance with [the Applicant's] contract the 125 % overtime payment rate included all additional hours worked on [certain BIS products]. Instead, the Respondent paid this overtime at a rate of 100 % based on the Special Arrangements in the document of 19 January 2007 for Service-based working time arrangements in [the area where the Applicant worked at the time].

184 The Applicant explains that [the Applicant] made several attempts to discuss with [the Applicant's] managers that the rate of [the Applicant's] overtime payments was being calculated incorrectly. The Applicant maintains that [the Applicant] was warned against escalating this request. In an email of 12 October 2020 Mr. H referred to a meeting that morning between the Applicant and Mr. MM, senior […] officer, in which [the Applicant] made a request for an increase in overtime payments related to [a certain BIS product] retroactively for a period of more than 20 years. Mr. H referred to a discussion with the Applicant in 2017/18 in which [the Applicant] raised a number of matters, but these did not include the rate of overtime payments. The email points out that on the Respondent's system the Applicant had populated overtime payment claims at 100 % and 25 % but did not raise any issue over the rate of payment.

185 The Applicant contends that the Respondent's system, PeopleSoft HR does not allow for the possibility of insertion of an overtime claim of 125 %. The basis of [the Applicant's] claim is that [the Applicant's] contract provides that overtime for hours worked in excess of 44 in a week are to be paid at 125 %. [The Applicant] could not record payment at 125 % on the Respondent's system but has not waived [the Applicant's] right to make a claim for the

shortfall in payments now. The Applicant has a record of hours of overtime which attracted a payment of 125 %.

The Respondent's Submissions

186 The Respondent contends that the claim made by the Applicant in Request #4 should not be entertained as [the Applicant] delayed far too long before raising the issue. The Applicant first brought it to the attention of the Respondent in the meeting on 12 October 2020 with Mr. MM.

187 The Respondent agrees that the PeopleSoft System does not have a special category for insertion of a claim in respect of overtime payments for "work in excess of 44 hours a week" to be paid at 125 %. This is because the arrangements for the Applicant were exceptional and contractually agreed only with [the Applicant]. The Respondent suggests that solutions for this omission could have been devised including a manual special arrangement.

188 The Respondent states that because the Applicant never brought [the Applicant's] claim to their attention it is not possible for the Respondent to establish how many hours of overtime fell within this category.

Payment of Overtime Surcharge

189 The rate of payment for work in excess of 44 hours a week is determined by the contract of employment. The Applicant was contractually entitled to overtime payment for these hours at the rate of 125 %. It is agreed between the parties that the Respondent's time recording system PeopleSoft HR enables overtime claims at the rate of 25 % and 100 % to be made but it does not enable claims for 125 %. Accordingly, the Applicant could only input claims for payment at the rate of 100 % for overtime hours for which [the Applicant] was entitled to payment at 125 %.

190 The Respondent contends that the Applicant is barred by extreme delay from bringing claims now for overtime payments of 125 % dating back many years. It is said that PeopleSoft would not give sufficient information to verify the claims made, that the Applicant should have checked the payments made to [the Applicant] and raised any issues at the time. [The Applicant] only raised the shortfall in overtime payments as late as October 2020.

191 The Respondent does not challenge the Applicant's contractual entitlement to the additional overtime pay. It asserts that it has no means of ascertaining whether any, and if so, how much is due in respect of the claimed additional 25 % payment for overtime.

192 Neither the Statute nor the Rules lay down a limitation period for bringing such claims. Whether a claim is to be barred by delay from being pursued will be considered having regard to the relevant facts of each case including the length, reason for and effect of the delay, its context, all relevant circumstances and legal principles. A decision whether a claim is to be ordered not to proceed because of delay will be taken in the interests of justice.

193 The Applicant's claim for a payment of additional 25 % in respect of certain overtime would be struck out if the Respondent were prejudiced in its ability to challenge the amount of the claim by reason of delay in pursuing it or if there were other compelling reasons to do so such as alteration of its position in reliance on the inaction. However, the Applicant has made a record which [the Applicant] asserts is accurate of the hours in respect of which [the Applicant] claims the additional payment of 25 %. It is not suggested by the Respondent that the record is unreliable. Although the Respondent may not be able to access its records, it is able to consider the basis of the claims and has put forward no reason to challenge the amounts claimed. Nor has the Respondent asserted that it has altered its position or otherwise acted in reliance on the delay of the Applicant in making a claim. Request #4 is not barred by delay in pursuing the claim.

194 Therefore, the Tribunal grants the Applicant's Request #4 and orders the Respondent to pay the Applicant the sum of CHF 12'919.72. The Applicant has asked for interest to run from the day after [the Applicant] maintains that notice of termination of [the Applicant's] employment should have come to an end. The Tribunal has found that date to be 19 February 2021, not 1 March 2021 as maintained by [the Applicant]. As the Applicant has not contended for an earlier date, the date or dates on which the sums claimed could be said to be due, the Tribunal orders that interest of 5 % is payable from 19 February 2021.

Request #5: Award of Legal Costs

The Applicant's Submission

195 The Applicant asks that the Respondent indemnify [the Applicant's] costs incurred for legal representation in pursuing the Grievance Procedure and [the Applicant's] Application before the Tribunal. [The Applicant] states that [the Applicant's] complaints involved legal issues in which [the Applicant] was not expert, and that the Respondent conducted its case on an adversarial basis.

The Respondent's Submission

196 The Respondent refers to the Special Staff Rule setting out the Grievance Procedure ([…]). Paragraph 1. General Principles provides:

> *"The objective of the Grievance Procedure is to find an amicable solution to work-related issues. The Grievance Procedure does not serve as a channel for resolving questions that are of a strictly legal nature […]"*

No Legal Costs for Grievance Procedure

197 Whether to have legal representation for the Grievance Procedure was a matter of choice for the Applicant. The issue of whether the Applicant should

be awarded such costs has already been determined by decision of the Secretary General of 6 April 2021. Ms. _____ decided ([…]):

> *"4. With regard to the payment of [the Applicant's] legal fees, these should not be reimbursed by the Respondent. The grievance procedure does not constitute a compulsory and adversarial dispute resolution mechanism requiring the assistance of a legal counsel. The purpose of the grievance process is to find an amicable solution to work related issues on a without prejudice basis."*

198 The Applicant has advanced no sustainable reason to interfere with the decision of the Secretary General to dismiss that request of the Applicant. No award of costs will be made in favour of the Applicant in respect of the costs of the Grievance Procedure.

Legal Costs for Application before the Tribunal

199 Pursuant to Article XIV of the Statute, the Applicant applies for [the Applicant's] costs of the proceedings before this Tribunal. Article XIV (2) of the Statute provides:

> *"The panel may, if it rules in the Applicant's favour, award costs to be borne by the Respondent as indemnity for all or part of the expenses incurred by the Applicant. Under exceptional circumstances, the panel may award costs even though it did not rule in the Applicant's favour."*

200 The Applicant has succeeded in establishing [the Applicant's] application with regard to Requests #2, #4 and [#] 1 […] in part subject to clarification by the parties. In recognition of the partial success of the Applicant, an award of costs is made.

201 Pursuant to Procedural Order No. 10 the Applicant has submitted [the Applicant's] representative's fee note up to 15 August 2022. The fee note dated 12 August 2022 shows that the Applicant incurred costs of CHF […] for representation in pursuing [the Applicant's] application before the Tribunal.

202 In deciding the proportion of the legal expenses incurred by the Applicant which should be indemnified by the Respondent, the Tribunal takes into account the relative importance, complexity and amount of material which the successful Requests bore to the totality of those before the Tribunal. The Tribunal then considers the overall fairness of the conclusion reached when making its final determination.

203 The Applicant has succeeded in two of [the Applicant's] four substantive Requests (#2 and #4), and partially in Request #1 in respect of pension contributions subject to clarification by the parties. Request #2 was the most important and complex of the four Requests before the Tribunal. Applying the approach set out above the Tribunal orders the Respondent to indemnify the Applicant approximately 3/5 of the fees incurred by [the Applicant] in pursuing [the Applicant's] Application before the Tribunal.

204 Accordingly, the Tribunal grants the Applicant's Request #5 in part and orders the Respondent to pay the Applicant the sum of CHF […].

Conclusions

205 In view of the foregoing, the Tribunal finds:

1. The Applicant's Amended Request #1 is dismissed save for an order for payment of a sum in respect of employer's pension contributions up to 18 February 2021 if, following clarification by the parties, such a sum is due.
2. The Applicant's Request #2 is granted, and the Respondent is ordered to pay the Applicant a sum representing pay and allowances for the period of twelve months together with an increase in severance payment and interest at 5 % payable from 19 February 2021.
3. The Applicant's Requests #3a and #3b are dismissed.
4. The Applicant's Request #4 is granted and the Respondent is ordered to pay the Applicant the sum of CHF […] together with interest at 5 % payable from 19 February 2021.
5. The Applicant's Request #5 is granted in part and the Respondent is ordered to pay the Applicant the sum of CHF […].

Basel, 30 September 2022

The President: The Registrar:

Prof. Dr. Abbo Junker Prof. Dr. Ramon Mabillard