



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

ZAMA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Roland Adjovi

**Counsel for the Respondent:**

Federica Midiri, United Nations Population Fund (UNFPA)

## **Introduction**

1. The Applicant is a former staff member of the United Nations Population Fund (UNFPA). He joined UNFPA in December 1979, and served on a permanent appointment since 2004. As at his last posting, he served as Technical Advisor in the Population and Development Unit for UNFPA's sub-regional Office in Johannesburg, South Africa.

## **Procedural History**

2. On 13 March 2015, the Applicant filed the subject application of the present Judgment challenging the Respondent's decision to terminate his appointment with UNFPA.

3. The Respondent filed his Reply to the Application on 16 April 2015.

4. On 9 October 2015, the Applicant filed his response to the Respondent's Reply.

5. The Tribunal held a case management discussion with the parties on 13 October 2015.

6. On 21 October 2015, the Respondent made further submissions in response to the Applicant's response.

7. A hearing and oral arguments were held on 12 and 13 January 2016. The Applicant testified, as did one witness called by the Respondent.

## **Facts**

8. On 22 October 2009, the Applicant was assigned as UNFPA's Country Representative to Kenya. This posting was at the D-1 level, and he held the position in

Kenya until he was posted to South Africa on 5 April 2012 as the Technical Adviser on Population and Development.

9. In early March 2011, a shortage of condoms was raised as a public health concern in Marsabit County, Kenya. UNFPA, with its partner Kenya Red Cross, arranged to have condoms delivered to Isiolo to alleviate the concerns that were raised.

10. For his part, the Applicant wrote to UNFPA's Director of the Africa Regional Office, Mr. Makinwa, and informed him of the temporary measure that was adopted by UNFPA Kenya to address the concerns in Marsabit. The Applicant was commended for his role and thereafter Mr. Makinwa constituted and dispatched a fact-finding team to investigate the condom shortage issue. The fact-finding team never disclosed the report of its findings to the Applicant.

11. On 13 June 2011, Mr. Makinwa wrote to the Applicant and raised three matters to which he sought the latter's response. The Applicant was asked to address: (a) challenges with systemic arrangements among partners; (b) technical and programmatic weaknesses and challenges in logistics management; and (c) challenges with staffing and management.

12. On 6 January 2012, Mr. Makinwa wrote to the Applicant with concerns about his capacity and competence to manage the condom issue and to manage an important office like the country office, Kenya.

13. The Applicant responded on 13 January 2012, and among other issues raised the conduct and reporting methods of the fact-finding team. He complained that the

said fact-finding team did not give him a draft of their report for his comments neither was a copy of the final report shown to him.

14. On 16 January 2012, the Applicant provided Mr. Makinwa with a detailed response to his letter of 6 January.

15. In March 2012 when the 2011/2011 reporting year was ending, the Applicant was rated poorly in his performance appraisal by Mr. Makinwa, who also directed the Applicant to complete his own input by 16 March 2012.

16. On 29 March 2012, before his performance appraisal was finalised and while matters raised in the appraisal were still being disputed, the Applicant was contacted by UNFPA's Chief of Recruitment, Ms. Serina Choo. Ms. Choo informed the Applicant that senior management had decided to reassign him before the end of his four-year tenure as country representative. She told the Applicant that in the alternative, he could opt to take an early retirement package of USD150,000. The Applicant refused the early retirement package offer.

17. In April 2012, the Applicant received paperwork pertaining to his reassignment to Johannesburg. The post of country representative which the Applicant was encumbering at the time was then advertised the following month.

18. On 30 May 2012, the Applicant filed papers to rebut the unfavourable appraisal he was given for the 2011/12 reporting cycle.

19. The Applicant commenced his new posting in Johannesburg on 7 January 2013. The Technical Adviser position that he was assigned to was at the P-5 level but the Applicant was to be paid at his personal D-1 level.

20. On 24 October 2013, the UNFPA Representative for the East and South African Regional Office (ESARO) Dr. Onabanjo, informed all ESARO staff members of a

restructuring exercise that was about to commence at the two UNFPA Regional Offices in Africa. The email from Dr. Onabanjo contained information pertaining to the restructuring process which entailed a job-matching exercise and a job fair. Staff members were also apprised of separation packages that they could apply for. By mid-November, staff members were informed of the timelines for the job-matching exercise.

21. On 18 November 2013, the Applicant spoke to the Director of the Division of Human Resources (DGR), Mr Michael Emery. The latter suggested that the Applicant consider a separation package as part of the restructuring exercise, which the Applicant again declined. The DHR then wrote to the Applicant and invited him to participate in

the job matching exercise. The Applicant was particularly asked to consider three positions, which had been previously discussed with him.

22. The job-matching exercise for professional staff closed on 25 November 2013. The Applicant did not participate in the said job-matching exercise.

23. The results of the job-matching exercise were communicated to the Executive Director of UNFPA on 4 December 2013 by memorandum. The said memorandum also stated that the Applicant refused to participate in the exercise.

24. Thereafter, the abolition of the Technical Adviser post which the Applicant had encumbered since his reassignment to the Regional office in Johannesburg was thus approved on 7 January 2014.

25. On 15 January 2014, the DHR informed the Applicant that his post had been abolished. He was invited to use the six-month lead time to apply and compete for suitable vacancies within UNFPA.

26. The Applicant's post was formally terminated by the Executive Director on 4 March 2014.

27. On 21 April 2014, the Applicant received a letter indicating that his permanent appointment was to be terminated as of 31 July 2014.

28. The Applicant sought management evaluation of the decision to terminate his permanent appointment on 18 June 2014.

29. Efforts to settle the dispute between the parties took place between July and November 2014. Throughout the mediation discussions, the Applicant was assisted by

the Office of Staff Legal Assistance (OSLA). The Ombudsman closed the matter on 19 November 2014 after settlement discussions failed.

### **Issues and Deliberations**

30. The parties agree that the crux of the dispute between them is whether the Applicant's termination and separation from service was wrongful.

31. The Applicant submitted that he was wrongfully terminated because the officer who issued the termination letter did not have the authority to do so. It was also his case that the Respondent breached his obligation to find the Applicant another position and that the decision to separate him from service was tainted by extraneous factors related to the condom crisis during his time as UNFPA Representative in Kenya.

32. The Respondent contends that the process of terminating the Applicant's appointment was carried out in accordance with the requirements of the Staff Rules and Regulations, and UNFPA's Separation from Service Policy. He submitted on his part that the restructuring of the two UNFPA Regional Offices in Africa could not have been carried out with a view to terminating the Applicant's appointment. He submitted that the Organization had acted in good faith to find the Applicant alternative positions.

33. The issues to be interrogated are formulated as follows: (1) Was the decision to reassign the Applicant from the post of country representative in Kenya to a lower post in South Africa in 2012 based on the Respondent's belief that the Applicant was responsible for the widely-reported condom crisis in Kenya in March 2011?; (2) Did the Respondent fail in his obligation to retain the Applicant following a major restructuring that affected two of UNFPA's regional offices in Africa?; and (3) Was the Applicant's termination and consequent separation from service wrongful?

***Was the decision to reassign the Applicant from the post of country representative in Kenya to a lower-level post in South Africa in 2012 based on the Respondent's belief***

***that the Applicant was responsible for the widely-reported condom crisis in Kenya in March 2011?***

34. The Respondent submitted that the Applicant challenges among other issues in his application, his reassignment from the D-1 post of country representative in Kenya to a lower-level post at the sub-regional office in South Africa.

35. The Respondent additionally argued that the said reassignment is an administrative decision requiring a management evaluation under the provisions of staff rule 11.2(a) and article 8 of the UNDT Statute. The Respondent argued that since the Applicant had never addressed a management evaluation of that decision to UNFPA and the statutory period that was allowed him to do so had elapsed, any application challenging the reassignment is time-barred and cannot be entertained by the Tribunal.

36. The Applicant on his part argued that he is neither challenging his reassignment to South Africa nor the poor performance appraisal given him for the 2011/2012 reporting cycle in this application. It was submitted on his behalf that these incidents were but facts leading to his wrongful termination which termination is properly the subject matter of this application.

37. The Tribunal agrees that the subject matter of this application is the lawfulness of the termination of the Applicant's contract by UNFPA in 2014. Even though the Tribunal's jurisdiction here does not include a determination as to whether UNFPA management was justified or not justified in reassigning the Applicant to Johannesburg before his tenure was up or to grant reliefs to the Applicant on account of any wrongs resulting in that reassignment in 2012; the facts surrounding that reassignment form



part of the *res gestae* and are critical to the proper understanding and adjudication of the present application.

38. In *Zachariah* 2017-UNAT-764, the United Nations Appeals Tribunal (UNAT) held that this Tribunal has the discretion to interpret an application broadly in the light of numerous factors. It added that this Tribunal must adequately interpret and comprehend the application whatever the name attached to it since the judgment must necessarily refer to the scope of the contentions by the parties. UNAT held further that the Dispute Tribunal has inherent power to define and individualize the administrative decision challenged by a party and to identify the subjects of judicial review.

39. It is not disputed that following a widely-publicized incident of condom shortage in parts of Eastern Kenya, the Applicant's supervisor, Mr. Makinwa, set up a fact-finding mission on the issue. It is not disputed also that neither the draft of that fact-finding mission's report nor its final report was shown to the Applicant for his comments even though he was singled out for blame by UNFPA in the report for a condom shortage which appeared to involve many stake-holders and players.

40. It is a matter of undisputed fact that during the next performance evaluation cycle of 2011/2012, the Applicant's supervisor gave him extremely poor ratings which he rebutted. It is also a matter of fact that the rebuttal proceedings took UNFPA one year to complete and that the decision to reassign the Applicant to the sub-regional office in South Africa was made and implemented while the rebuttal process was yet to be completed. It is in evidence also that the rebuttal panel relied on the fact-finding report to make certain deductions in favour of upholding the appraisal which the Applicant complained of.

41. It is not disputed that on 30 March 2012, one Ms. Serina Choo who was Chief of Recruitment in UNFPA DHR informed the Applicant on behalf of UNFPA management that a decision had been made to reassign him before the expiry of his four-year tenure as country representative in Kenya based on his 2011/2012

performance ratings and that he was being offered an early retirement package of USD150,000. At the time of that decision, the Applicant's performance ratings had not even been finalized.

42. It is the evidence also that the post to which the Applicant was reassigned at the sub-regional office was a relatively junior position at the P-5 level although he retained his D-1 level for purposes of emoluments and entitlements. It is not disputed too that the Applicant did not challenge the outcome of the rebuttal process and that his request for management evaluation of his reassignment was wrongfully sent to the United Nations Secretariat instead of to UNFPA and was therefore never attended to.

43. In the light of the fore-going facts, the Tribunal finds, as is obvious, that the reassignment of the Applicant from the Nairobi country office to a lower-level position in the sub-regional office in Johannesburg was based on the UNFPA management's concern and belief that UNFPA's image was dented because of the widely-reported condom crisis in Kenya. There is no doubt that the blame for that situation was placed at the door step of the Applicant who was at the relevant time the UNFPA country representative in Kenya. In the absence of further explanations on the part of the Respondent, the Applicant's reassignment was based on the said condom crisis.

44. In this application, the Applicant has strenuously sought to show that there is a nexus between UNFPA management blaming him for the condom crisis, his hasty reassignment to South Africa which followed together with the offer of an unsolicited early retirement package and the eventual termination of his appointment two years later. The Tribunal in subsequent paragraphs will carefully examine the evidence to determine whether the condom crisis and its aftermath are directly or indirectly linked to the Applicant's impugned termination by UNFPA.

***Did the Respondent fail in his obligation to retain the Applicant following major restructuring that affected two of UNFPA's regional offices in Africa? Did UNFPA***

***breach its obligations of good faith when it terminated the Applicant's permanent appointment?***

45. It was argued on behalf of the Applicant that the Staff Regulations and Rules place an obligation on UNFPA to protect staff members such as the Applicant who have permanent contracts in cases of abolition of post or reduction of staff. Whereas both the Applicant and UNFPA were obliged to act in good faith towards each other, UNFPA breached its obligations of good faith towards the Applicant by not making any efforts at finding a suitable position for him in the Organization.

46. It was also the Applicant's submission that the new organizational structure for UNFPA was already under discussion in January 2013 and its implementation at the time of his reassignment was imminent. UNFPA management knew that his new post was due to be abolished and the fact that the said management went forward to place him on that post amounted to constructive dismissal.

47. The Respondent contended that the decision to terminate the post encumbered by the Applicant in the sub-regional office in Johannesburg was solely related to the restructuring within the UNFPA East and Southern Africa Regional Office (ESARO) and the West and Central Africa Regional Office (WECARO) and not the Applicant's performance. That restructuring required the abolition of all the existing posts and the creation of new ones for optimal performance.

48. Regarding the Applicant's rights as a staff member with a permanent contract to be retained following the abolishment of his post, the Respondent argued that the principle of protecting the career and rights of staff members holding permanent appointments does not mean that the Organization has a legal obligation to place such staff members on alternative posts.

49. Additionally, the Respondent submitted that the process of finding an alternative post for a staff member holding a permanent appointment should involve

not only the good faith effort of the Organization but also the participation of the staff member concerned. He submitted further that a staff member subject to termination of appointment due to abolition of post should take an active part in the search for alternative positions in the light of the obligation that both parties should maintain good faith towards each other.

50. It was his case that although the Respondent invited the Applicant, when it was apparent that his post was slated with many others for abolition in the restructuring exercise, to apply to available new positions that matched his competencies, the Applicant refused to do so and refused to participate in a job-matching exercise and by this posture did not exhibit the required good faith which he was obliged to show in the circumstances.

51. Part of the Applicant's case is that UNFPA's decision to reassign him from Nairobi to the sub-regional office in South Africa on 5 April 2012 was made in bad faith and that it was the first step taken in a bid to terminate his appointment. The subsequent termination in 2014, he argued, was the culmination of the same process of indirectly punishing him by sending him out of the Organization which process started with the incident of condom shortage in Kenya in March 2011 when he was the country representative there.

52. The Tribunal will examine all the facts and law relevant to this issue to arrive at a determination of the questions raised. Both parties in their submissions cited the governing legislation and some decided cases regarding the Respondent's obligation to find the Applicant an alternative position following the abolition of his post. Staff rule 9.6 provides for termination. Its sub-paragraph (a) defines termination as a separation from service initiated by the Secretary-General. Under sub-paragraph (b),

separations as a result of resignation, abandonment of post, expiration of appointment, retirement or death do not constitute termination.

53. Staff rule 9.6(e) provides for termination for abolition of posts and reduction of staff. This provision and staff rule 13.1(d) both provide in particular that where the necessities of service require that the services of staff members be terminated as the result of the abolition of a post or reduction of the staff and, subject to the availability of suitable posts in which their services can be effectively utilized when they possess relative competence, integrity and length of service, staff members holding continuing or permanent appointments shall be retained over others.

54. In addition, UNFPA Personnel Policies and Procedures Manual (PPPM) of 1 January 2014 at its paragraph 7.2.6 restates the protection of staff in cases of abolition of post or reduction of staff as provided for under the Staff Rules already mentioned above.

55. About affording staff rule 9.6(e) and 13.1(d) protection to staff members whose posts are abolished or who lose their jobs because of reduction of staff, the provisions of paragraph 7.2.11 of the PPPM further require the affected staff members to apply to available UNFPA posts for which they believe they have the required competencies. The language of the said paragraph 7.2.11 is mandatory.

56. Although the following paragraph 7.2.12 of the PPPM provide that the DHR or relevant managers in the field may draw the attention of affected staff members to specific posts and solicit applications from them; or at their own initiative, add the names of affected staff members to a list of applicants even though they did not apply, these actions and steps are not mandatory.

57. During the on-going restructuring in the UNFPA Africa Regional offices, on 24 October 2013 UNFPA Regional Director for ESARO, Dr. Onabanjo, published guidelines for implementation of the new restructuring to staff members, most of who

were to be affected by the said restructuring. The guidelines gave detailed explanation of the process which included: (1) an Agreed Separation Program (ASP); (2) a Job-Matching Exercise (JME); and (3) a Job Fair (JF).

58. The guidelines stipulated that all jobs in ESARO except for those of the Regional Director, the Deputy Regional Director and the Resource Mobilization and Partnership Advisor would be up for recruitment as from 4 November 2013. For all the three methods of the implementation specified, an affected staff member was to apply. Those wishing to take the ASP were required to submit a request for the approval of the Executive Director. For the JME which was to run for two weeks, serving staff members were to be invited to apply for posts at their own level that matched their experience, competencies and interest. The JF was to last four weeks and both staff and external candidates could apply.

59. The Respondent's lone witness was Mr. Paolo Bernasconi who at the times relevant to this case was a HR Specialist at UNFPA HQ. He told the Tribunal that under the new restructuring of the two Africa Regional offices; nearly all job positions were abolished and redrafted. He stated that all staff members sitting on the abolished posts were required to apply and participate in the JME and JF and that apart from the emails sent to staff by the Regional Director, the restructuring project was presented at three all-staff meetings.

60. The witness said that he met with the Applicant during the restructuring and explained to him the options which were open to him. He said that in another meeting with the Applicant which lasted two hours before the JME took place, he tried to dispel the Applicant's belief that there was an intention to terminate his appointment. He then invited the Applicant to apply to three P-5 positions in ESARO that matched his profile.

He said also that he asked him to apply to suitable positions in the job fair but that the Applicant did not apply to any post.

61. When cross-examined, the witness said the restructuring process started in December 2012 after a working group in the Africa region presented a document on restructuring in September 2012. In response to a question, he stated that there were no D-1 posts available for the JME and JF. Still in response to another question, the witness said he told the Applicant that if he was matched to a P-5 post, he had full authority to assure him that he would retain his personal grade of D-1 but still the Applicant did not apply.

62. Also in evidence is an email to the Applicant dated 19 November 2013 from the UNFPA Director of Human Resources, Michael Emery. In that email, Mr. Emery referred to a conversation the previous day in which the Applicant refused to take an ASP. He also asked the Applicant to participate in the ESARO JME and to apply for the three posts suggested to him by Mr. Bernasconi.

63. In his pleadings, the Applicant stated that while he was a D-1 officer, the only options UNFPA offered him were an early retirement package of USD150,000 which he refused and then he was asked to apply for only P-5 level posts. He continued that applying for P-5 level posts would have affected his financial basis, benefits and pension contributions. He added that UNFPA did not tell him whether he would continue to be paid at his personal D-1 level even if he were to be placed on a P-5 level post during the JME.

64. In the Applicant's witness statement of 27 November 2015, he stated that the P-5 post he was encumbering in the sub-regional office in Johannesburg was the only professional post that was abolished in the ESARO restructuring exercise. In his sworn testimony, the Applicant told the Tribunal that following the restructuring, there were

no available D-1 posts for him to apply to. He said that no-one approached him to consider the available P5 posts.

65. Under cross-examination, the Applicant admitted that he had discussions with Mr. Bernasconi but said that Mr. Bernasconi did not invite him to apply to any positions. In answer to a question, the Applicant also admitted that the restructuring affected all posts in ESARO. He said that he was never told by Mr. Bernasconi that he would retain his D-1 personal grade if he was selected for a P-5 post. The Applicant while still being cross-examined said he did not apply to any position because his profile did not match any. He said that he told Mr. Emery that he was interested in a managerial position or something similar.

66. In response to a question from the Tribunal, the Applicant said that in the culture of UNFPA, it was easier to move from a technical position to a managerial one and not the other way around.

67. In reviewing the entirety of evidence before the Tribunal, it cannot be denied that the Applicant factually contradicted himself sometimes during the proceedings. For instance, in his witness statement of 27 November 2015, he stated that the post he encumbered was the only professional post abolished during the restructuring in ESARO. When cross-examined, he admitted that the restructuring affected all posts in ESARO.

68. Again, although he denied both in his witness statement and in his sworn testimony that he was invited by UNFPA HR personnel (Bernasconi and Emery) to apply for any posts following the restructuring; the Applicant stated at paragraph 48(c) of his pleadings that all the positions he was being encouraged to apply for were at the P-5 level. The question arises as to whether the Respondent could only be adjudged to



have made good faith efforts in securing the Applicant, who was a D-1 officer, another post only if he invited him to consider and apply for D-1 posts.

69. In the light of the prevailing circumstances, such a position would be grossly untenable. This is because the restructuring exercise in issue appeared to have produced only P-5 posts that matched the Applicant's profile at the time of the JME and JF. While the Tribunal's jurisdiction in this application does not include making a finding on the lawfulness of the Applicant's reassignment to a P-5 level position in 2012, the fact remains that until the restructuring in ESARO, he successfully encumbered that post and was paid at his personal D-1 level. In view of that reality, it is unreasonable to posit that no good faith efforts were made by the Respondent towards securing a suitable and available post for the Applicant.

70. The Tribunal finds that three available P-5 positions appeared to match the Applicant's experiences and competencies for the purposes of the JME that was conducted for the newly created ESARO in the month of November 2013. The evidence also shows that the Applicant did not apply to any posts and therefore did not participate in the JME or in the JF that followed. Clearly the applicable UNFPA guidelines required him in mandatory terms to show interest by applying to available posts even though he had a permanent appointment.

71. The Applicant admitted in his testimony that he did not apply because there were no available D-1 posts. He also stated that he preferred a managerial position to a technical one. Mr. Bernasconi testified on behalf of the Respondent that when the Applicant indicated to him that he wanted the position of UNFPA Resident Representative in South Africa, he then told him that it was also a P-5 level position and was already at an advanced stage of recruitment.

72. Even if the Tribunal were to accept the Applicant's version that Mr. Bernasconi never told him that if he was placed on a P-5 post, UNFPA would pay him at his personal D-1 level as was done when he was reassigned to Johannesburg; it is both

strange and incredible that the Applicant who had served for about 30 years in UNFPA did not raise the issue of his personal D-1 grade with HR officers when invited to apply for P-5 posts.

73. It was also submitted on behalf of the Applicant that the obligation to make good faith efforts to retain the Applicant upon the abolition of his post was an obligation for both the Respondent and the Applicant himself. It was further submitted that even though the Applicant had the duty to look for and apply for available positions, this duty did not extinguish UNFPA's obligation to look for suitable positions on which to place the Applicant.

74. The Tribunal agrees totally that the obligation of good faith in finding a suitable position for the Applicant upon the abolition of his post was an obligation for both the Respondent and the Applicant. It was up to both parties to work together in cooperation to fulfil that obligation. The facts as already stated above show that UNFPA HR personnel (Bernasconi and Emery) reached out to the Applicant and invited and encouraged him to apply for three P-5 posts in order to make him participate in the JME and JF and to find him a possible placement. The evidence also is that the Applicant did not apply to any posts.

75. In *Zachariah*<sup>1</sup>, UNAT held that "any permanent staff member facing termination due to abolition of post must show an interest in a new position by timely and completely applying for the position; otherwise, the Administration would be engaged in a fruitless exercise, attempting to pair a permanent staff member with a position that would not be accepted." UNAT upheld the UNDT judgment in favour of the applicant Mr. Zachariah who had a permanent appointment and had applied for a post in the new structure. While the Respondent did not claim that Mr. Zechariah was not qualified for the post he applied for, the Respondent could not show that priority

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<sup>1</sup> 2017-UNAT-764.

consideration was given to the said applicant when another candidate was selected for the post.

76. In *Tolstopiatov*<sup>2</sup>, while it was reiterated that the obligation of good faith efforts is implicitly part of staff rule 9.6(e), the Tribunal held also that the burden of proving that the Organization made a diligent search rests with the Organization. In the instant case, the Respondent could show that three available P-5 posts were identified as suitable to the Applicant's qualifications and experience and that he was invited to apply for them for consideration. If the Applicant had put a foot in the door by applying to any of them, then the next stage would be for the Tribunal to examine whether UNFPA selected a non-permanent staff member above the qualified Applicant thus denying the Applicant of the protections afforded him by staff rules 9.6(e) and 13(d).

77. With regard to the issue of the Applicant's priority status in cases of abolition of posts or staff reduction as provided for in staff rules 13.1 and 9.6(e), the Tribunal finds that the Respondent had shown sufficient good faith in taking the initiative to identify and invite the Applicant to apply for available posts. Unfortunately, the Applicant did not cooperate in those efforts to start the process of placing him on an available post by applying for any of the posts identified to him or indeed for any posts that he preferred. In *Shashaa*<sup>3</sup>, it was held that the employer can expect reasonable cooperation from the affected staff member. Beyond the extant provisions of law, Equity aids the vigilant and not the indolent. The vigilant Applicant must fulfil his own obligations.

78. The Tribunal finds and holds that the Applicant refused or neglected to apply to any posts in ESARO to participate in the JME and JF. In choosing not to apply for any available posts, he failed to live up to his own good faith obligations to cooperate with UNFPA in seeking new placement for himself. On the part of the Respondent, invitations to the Applicant to apply to the available P-5 level posts meant that he had

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<sup>2</sup> UNDT/2010/147.

<sup>3</sup> UNDT/2009/034.

taken the necessary first steps towards discharging the obligation on his part. In the absence of any show of interest by the Applicant, the Respondent did not have a duty to do anything more to consider him for placement on another post.

79. In the light of UNAT's decision in *Zachariah*, the Applicant's argument that his duty to look for and apply for available positions did not extinguish UNFPA's obligation to place him on a suitable position is untenable. Good faith efforts on both sides mean that both parties cooperate to identify suitable positions for which the Applicant would apply and then work toward the common purpose of enabling the said Applicant to enjoy the priority consideration and protection due to him under staff rules 9.6(e) and 13(d). The Applicant cannot expect to enjoy the preferential treatment due to him following the restructuring and attendant abolition of his post if he is unwilling to apply for available posts.

***Did Mr. Arturo Pagan terminate the Applicant's appointment? Did he have the authority to sign the termination letter? Was the Applicant's termination and consequent separation from service wrongful?***

80. It was part of the Applicant's case that the decision to terminate him was made by the Officer-in-Charge of UNFPA's Human Resources division, Mr. Arturo Pagan, who gave him notice of the decision to terminate him on 21 April 2014. It was argued for the Applicant that it is only the Executive Director of UNFPA who has authority to terminate his contract. He continued that the role of the Director, DHR is to recommend terminations to the Executive Director and therefore his termination is flawed and ought to be rescinded.

81. The Respondent countered that the decision to terminate the Applicant's appointment was taken by the UNFPA Executive Director in an internal memorandum. He argued that UNFPA's consistent practice has been that letters informing staff members of a decision to terminate their appointments are signed by the Director, DHR or the Officer-in-Charge in the absence of the Director. When, in other words, a

decision to abolish a post is made by UNFPA Executive Director, the said decision is communicated to the affected staff member by the Director DHR. This is the procedure that was followed in this case when the notice of termination sent to the Applicant was signed by Mr. Pagan in the absence of the Director, DHR.

82. The Respondent submitted that the administrative decision to abolish the post encumbered by the Applicant and the decision to terminate his appointment were both duly authorized by the UNFPA Executive Director and that the Applicant's separation from service was therefore lawful.

83. The Tribunal is persuaded by the Respondent's argument on this score. A mere communication by the Officer-in-Charge of Human Resources regarding the termination of the Applicant's appointment following the abolition of his post cannot be proof that the said termination decision was made by the DHR or any of its officers. The Respondent's Annexes VI and VII clearly show that the recommendation for termination of the Applicant's post was made by the Director DHR while in Annex VII the termination was approved by the then Executive Director, Dr. Osotimehin.

84. The Applicant's termination was therefore not unlawful merely because notice of the said termination was sent to him by personnel of the UNFPA Human Resources.

### ***Conclusion***

85. The Tribunal finds that the Applicant's reassignment from his post of country representative in Kenya to the sub-regional office in Johannesburg was done even before a contentious performance appraisal which blamed him for UNFPA's embarrassment in a widely-publicized condom shortage in parts of Eastern Kenya in 2011 was finalized. Evidence before the Tribunal however did not establish a nexus

between that questionable reassignment and the abolition of the Applicant's post or the termination that followed.

86. In the absence of any show of interest by the Applicant to find a new and suitable position for himself upon the abolition of his former post, the Respondent had no obligation to unilaterally proceed to place him on a new post even though he was a permanent staff member. Equity aids the vigilant.

87. The Applicant's termination following the abolition of his former post was duly authorized by the UNFPA Executive Director.

88. He sought that he be granted the remedy of rescission of the impugned decision to terminate him or in the alternative that be awarded compensation of two years' salary. He additionally asked for compensation for loss of earnings and loss of pension contributions and benefits for the period 1 September 2014 until 30 November 2016 when he would have been due for retirement. He asked also to be given education grant for his four school-going children, full indemnity under the Rules and legal costs in the sum of 30,000

89. The Applicant is not entitled to any of the remedies he seeks.

90. His application is accordingly refused.



Judge Nkemdilim Izuako

Dated this 31<sup>st</sup> day of October 2017

Entered in the Register on this 31<sup>st</sup> day of October 2017



Abena Kwakye-Berko, Registrar, Nairobi