



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/148

Judgment No.: UNDT/2022/069

Date: 25 July 2022

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

HOSSAIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Teresa Posse, UNDP

Background

1. The Applicant is challenging the decision not to renew his fixed-term appointment (“FTA”) due to abolition of his post for reasons of nationalization. The Respondent argues that the decision to abolish the Applicant’s post resulted from a legitimate organizational restructuring which led to a revision of the finance function in the Applicant’s unit. His services as an international staff member were no longer required. For reasons given below, the application is allowed and the Administration’s decision is rescinded.

Facts and Procedure

2. On 21 February 2016, the Applicant commenced his employment as Finance Specialist in the Programme Management Unit (“PMU”) of the Zimbabwe Resilience Building Fund (“ZRBF”) programme, at the P-3 level. The ZRBF is managed and supported by the UNDP Zimbabwe Country Office as secretariat (“UNDP Zimbabwe”) and co-funded by several donors including the Department for International Development (“DFID”), the European Union (“EU”), Sweden and UNDP.

3. Sometime in 2017, the Head of PMU, the Country Director and his deputy formulated a long-term vision Human Resources (“HR”) Strategy for the ZRBF PMU (“HR Strategy”) in which they came up with a forward-looking organogram for PMU as follows:¹

¹ Trial bundle, pages 902 – 911.

Figure 4: Organogram Zimbabwe Resilience Fund Management Unit – envisioned 1/1/2019

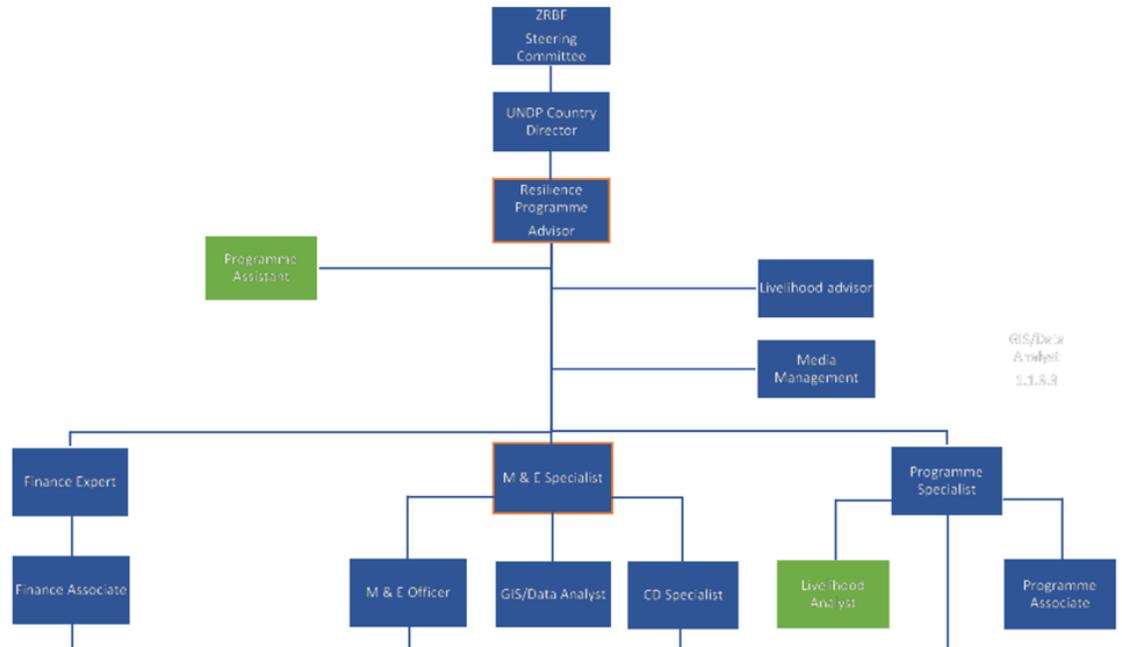


Figure 1: HR Strategy organogram, boxes marked with orange are international positions.

4. Based on this HR Strategy, on 26 February 2018, the Head of PMU invited the Applicant to a meeting to advise him that according to the long-term vision of ZRBF PMU, his position would no longer be required.

5. Around the same month, in February 2018, the donors approved the ZRBF budget which provided for the following approved organogram for the PMU:²

² Trial bundle, page 603.

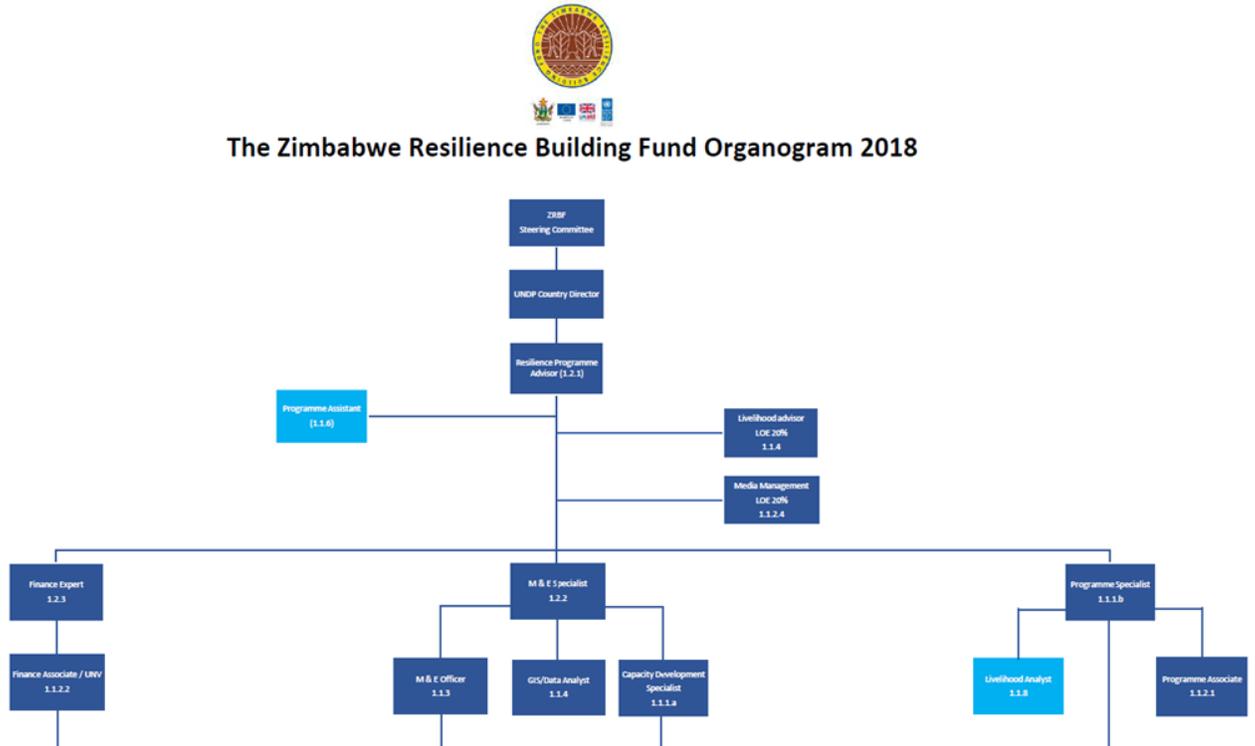


Figure 2: ZRBF approved organogram, boxes marked 1.2.3, 1.2.2 and 1.1.1(b) are international positions.

6. On 8 March 2018, Mr. Georges van Montfort, the Resident Representative (“RR”), Country Director, UNDP Zimbabwe, notified the Applicant in writing that the Finance Specialist position he encumbered would be abolished and that a national position would be created as part of the long-term vision and strategy of the ZRBF to build the capacity of national staff. He was advised in that notice to provide support and training to national staff. He was further informed that his FTA would be extended until 31 December 2018, at which time his assignment with the UNDP Zimbabwe Country Office would reach completion.³

7. On 5 October 2018, the Applicant filed a request for management evaluation

³ Reply, annex 2.

contesting the decision to abolish the position of Finance Specialist.⁴

8. On 31 October 2018, DFID completed its Annual Review of the ZRBF, which covered the period from 1 July 2017 until 30 June 2018, and one of its recommendations was an assessment of the UNDP PMU to determine whether, “*the team had the right allocation of roles and responsibilities and help get the most out of the team’s talent towards the effective management of ZRBF*”.⁵ The ZRBF annual review did not make any change to the ZRBF PMU organogram, reproduced in Figure 2 above.

9. By letter dated 19 November 2018, Mr. van Montfort, informed the Applicant that based on DFID’s recommendation, UNDP would request for an independent assessment of the capacity of the PMU. Considering this, it had been decided to set aside the decision on the abolition of his post and that his FTA would be extended until 31 March 2019 pending the completion of the independent assessment.⁶

10. To carry out the capacity assessment, a three-member Capacity Assessment team (the Team) consisting of Mr. Alfredo Teixeira, (UNDP Deputy Resident Representative for Mali who participated as Team Leader) and two other colleagues was created. In a series of emails in early January 2019, Mr. van Montfort transmitted the terms of reference for the capacity assessment exercise to the Team. The scope of the capacity assessment is reproduced below.⁷

Scope: UNDP senior management’s expectations for the exercise are that, beyond the capacity assessment of the current state (looking at roles, responsibilities, workflow, levels of delegation, team structure), an independent team **would help to review and finalize a long-term HR strategy for the PMU.** (Emphasis supplied)

This HR strategy should recognize that the project-driven capacity requirements of the PMU will evolve with the project and that hence forward planning would be helpful. Furthermore, such a strategy will

⁴ Application, annex 9.

⁵ Application, annex 6.

⁶ Reply, annex 4.

⁷ Trial bundle, pages 596-599.

provide clarity to personnel in the PMU with regards to expectations for the duration of contracts etc.

The PMU structure, as agreed with the partners of the ZRBF for the current phase, consists of 20 positions all funded through the management pillar of the ZRBF (i.e. donor funding). The capacity is augmented by two Country Office staff who provide part-time (up to 20%) support with ZRBF funding these positions on the basis of actual time spent. Out of the 20 full-time positions, 3 are international (1 P5, 1 P4 and 1 P3) and 17 are national (all on Service Contracts). At the moment, 3 positions (all national Service Contracts) are vacant and a decision was made by UNDP management that, in light of the capacity assessment, recruitment for these positions is put on hold.

In terms of financial implications, it is important to highlight that the entire PMU is project funded and that any decision to deviate from the agreed project management budget will have to be approved by the partners and will be considered in light of the overall strategic direction of the project. Furthermore, as the budget signed with the donors is itemized, based on the EU format, there is a clear distinction between programme funds and ‘management’ funds related to financing of the PMU and the ratio between these two is an important metric. It is, therefore, expected that recommendations from the Capacity Assessment will have to be made within a similar funding envelope than previously agreed.

Modality: In a discussion with the donors, it was agreed that UNDP would seek to leverage its internal resources. In consultation with UNDP HQ, two colleagues have been identified: 1) Substantive resilience expertise and knowledge of Zimbabwe: Mr. [OS] 2) Change Management and Country Office expertise: Mr. Alfredo Teixeira, Resident Representative a.i. UNDP Burundi and certified Advisor of the Management Consulting Team.

In addition to remote preparation and follow-up, the two Advisors will facilitate meetings with the various stakeholders during a one-week mission in Zimbabwe scheduled for 21 – 25 January 2019. During this one week, the Advisors will meet with ZRBF donors (EU, DfID, Sweden, UNDP), Government partners (most notably Ministry of Lands, Agriculture, Water, Climate and Rural Resettlement), a selection of NGO consortia partners (2-3 of the 7 consortia partners of the ZRBF). Importantly, the team will also facilitate several interactive team-work sessions with the ZRBF PMU to review business processes, workflow, levels of delegation etc. A detailed agenda for the one week mission will be developed in consultation with the two Advisors.

The scope of this assignment is to assess the capacity of the PMU to deliver on its expectations, the intent is not to conduct individual staff capacity assessments.

At the end of the week, the Advisors will present preliminary findings to UNDP and the ZRBF donors for consideration before finalizing the report. After receipt of the final report, the regular project management mechanism will be followed for implementation of the agreed recommendations.

11. In an email dated 14 January 2019, Mr. van Montfort shared with the Capacity Assessment Team the proposed ZRBF PMUHR strategy;⁸ “*As discussed, this is the HR strategy we developed and which we would like to adjust based on the findings of the assessment*”.

12. A capacity assessment of the ZRBF PMU was conducted through a review of the background literature and interactive meetings with donors, partners, stakeholders, PMU Head of Programme, UNDP senior management and PMU staff members. A report of its findings including recommendations was issued in January 2019.⁹ The report made several findings, pertinent to this case, the report found:

- a. that the PMU structure should be reviewed and revised in order to reflect the size and the scope of the ZRBF as well as the environment within which it operated;
- b. that various PMU stakeholders recognized the Finance function as the weakest link, these functions needed to be reviewed and revised to ensure that the right capacities were in place to effectively and efficiently support the rest of the team to deliver;
- c. overall, partners expressed their relative satisfaction with PMU’s capacity and its performance though areas for improvement were noted, in particular, partners perceived the financial management function and the resilience advisory functions as the weakest links within the PMU;

⁸ Trial bundle, pages 902 – 911.

⁹ Application, annex 7; reply, annex 7.

d. there was a clear disconnect between the Finance Unit and the rest of the PMU units, while there should have been a close working relationship notably on risk assessments and lessons learnt, particularly at the current evolving economic context; and

e. Consortia members noted that the quality of service provided by the Finance Unit were sub-standard with some of the Consortia complaining that they received confusing instructions that impeded their work instead of being informed and guided.

13. In their report, the Capacity Assessment Team proposed the following functional structure for ZRBF PMU.¹⁰

Figure 1: Proposed Functional Structure

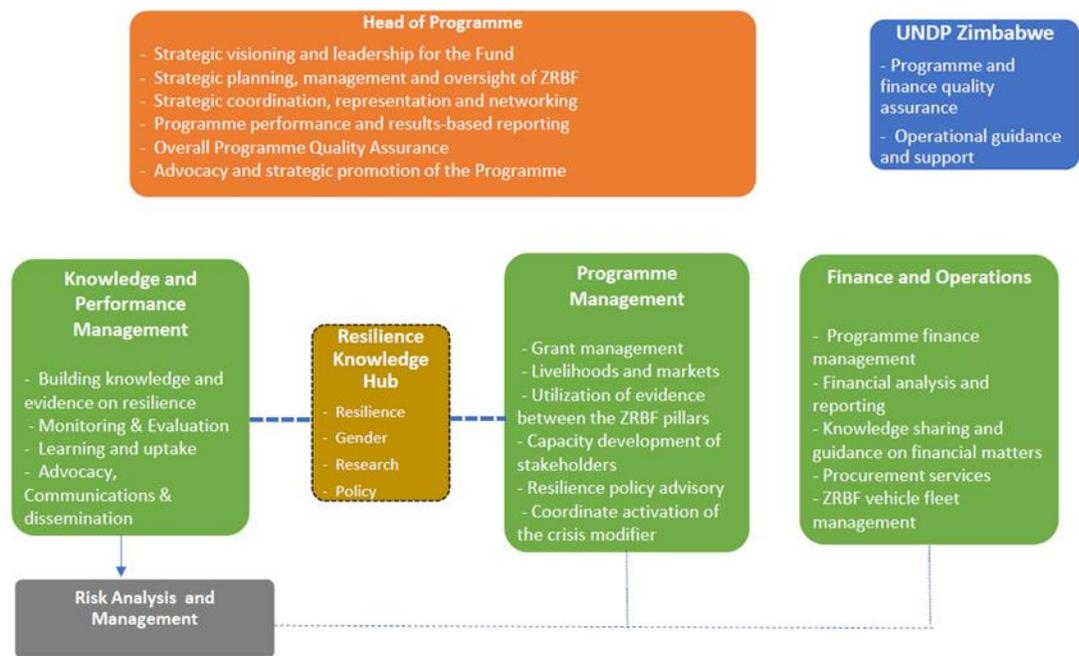


Figure 3: Capacity Assessment Team Functional Structure proposal

¹⁰ Trial bundle, page 200.

14. On 3 May 2019, a donor meeting was held, where the outcome of the ZRBF PMU capacity assessment was discussed.¹¹ The meeting noted a ‘no objection from all members present to the new proposed ZRBF PMU structure following discussions on the changes’.

15. On 16 May 2019, the ZRBF Steering Committee (“SC”) held a meeting, in which the results and the recommendations from the capacity assessment were presented.¹² The meeting noted a ‘no objection from all members present to the new proposed ZRBF PMU structure following discussions on the changes’.

16. On 18 May 2019, the Country Director, Mr van Montfort, wrote to the Bureau for Management Services (“BMS”) seeking their support and input on a classification which he had done. In this email he attached a matrix of the positions for classification and the justifications:¹³

I am writing you to request your support with the implementation of a recent capacity assessment of the Project Management Unit (PMU) of the Zimbabwe Resilience Building Fund.

In line with the recommendation of the capacity assessment (report & HR impact presentation to staff herewith attached), the CO is finalizing the JDs of the posts affected. The Steering Committee of the project sat on Thursday (16/5/2019) and approved the recommendations of the capacity assessment in relation to the PMU changes.

...

*We are aware that the CO [Country Office] is responsible for the classification of SC [Service Contracts] posts however as **we are anticipating contestation**, we will be most grateful if you could review the attached and provide your input before we finalize the process. The reasons for classification are as follows: (Emphasis supplied)*

¹¹ Reply, annex 8.

¹² Reply, annex 9.

¹³ Trial bundle, page 232.

Current		Proposed		Remarks
Post	Level	Post	Level	
Finance Specialist	P3	Finance and Operations Analyst	SB4 equiv. to NOB	Given the evolution of needs for the project, the functions required are more of an Analyst. The post has been nationalized and the current incumbent (International Professional) may require an explanation. The position will be opened for competition.

Figure 4: Country Office Classification chart

17. On 22 May 2019, the BMS responded to the 18 May 2019 request as follows¹⁴,

Subject: Classification Review of Resilience Building Fund PMU positions

File: UNDP Zimbabwe

We refer to the classification request of 18 May 2019 on the above post.

We are pleased to advise that we have finalized the review and classification as follows:

Post	Title	Level	Contract Type
N/A	Finance and Operations Analyst	ICS-09 equivalent	SC
N/A	Grant Management Analyst	ICS-09 equivalent	SC
N/A	Programme Specialist	ICS-10 equivalent	SC
N/A	Grant Management Associate	ICS-07 equivalent	SC

The effective date of classification is 22 May 2019.

18. On 30 May 2019, the Applicant was informed that based on the capacity assessment exercise, the position of Finance Specialist he encumbered would be abolished, and that his FTA would not be renewed beyond its expiry date on 30 June 2019.¹⁵

¹⁴ Trial bundle, page 235.

¹⁵ Application, annex 5.

19. On 11 June 2019, the Applicant requested management evaluation of the decision. He received a response on 25 July 2019.

20. On 23 October 2019, the Applicant filed this application challenging the impugned decision.

21. The Respondent filed his reply on 2 December 2019.

22. The file was assigned to the current judge on 26 August 2020 for the January-March 2021 deployment.

23. The Tribunal heard the case on 24 September 2021, 27 and 28 January 2022, 23-30 March 2022 and from 12-13 April 2021. During the oral hearings, the Tribunal received testimonies from:

- a. the Applicant;
- b. Mr. Tendai Kausiyo, former Finance Assistant;
- c. Mr. Alfredo Teixeira, Team Leader, Capacity Assessment Team and
- d. Mr. Georges van Montfort.

24. The Respondent and Applicant filed their closing submissions on 27 April and 19 May 2022 respectively.

Submissions

The Applicant

25. The relevant part of the Applicant's case is summarized below.

- a. The Applicant submits that it has been proven beyond any doubt that all the actions, starting from his contract extension of six months in February 2016 to the abolition of the Finance Specialist position in March 2018 and June 2019 were based on prejudice, bias, discrimination and abuse of

authority.

- i. The Capacity Assessment was conducted with predetermined results as evidenced by the diversion from DFID recommendation.
 - ii. The re-classification and nationalization of his post were done in violation of UNDP policy.
- b. The DFID recommendation did not indicate anything about the long-term HR strategy, rather it stated, “help get the most out of the team’s talent”. The DFID recommendation was to find out talent within the team but this recommendation was tainted with improper motivation and diverted to achieve the goal set by the management.
- c. The Capacity Assessment Team was not able to maintain independence throughout the process.
- i. The Applicant’s responses in relation to his feedback to the Capacity Assessment report were only shared with him during the trial in this case indicating intentional suppression of facts.
 - ii. The Capacity Assessment Team only conducted a functional analysis instead of looking at the issues holistically and, in this way, the DFID recommendation was diverted to fulfil UNDP Zimbabwe’s management’s agenda of abolition of the Finance Specialist position.
 - iii. The Capacity Assessment Team had not discussed the HR strategy during their meeting with PMU staff while references have been made from the ZRBF HR strategy in the report [capacity assessment]. The HR strategy was only shared during the oral hearing, which further indicated suppression of facts.
 - iv. The issues of “delinking”, “weakest link”, and “non-cooperation” were highlighted negatively in the Capacity Assessment

report which created serious negative impressions about the Finance Unit among the donors. The Finance Unit was presented to the donors negatively without it being indicated that the information was for improper motivation, discrimination, humiliation, and lack of integrity on the part of the Capacity Assessment Team.

d. The Respondent acknowledged that the PMU staff was “competent and qualified to deliver the core functions of the PMU. The Applicant argues that if no individual staff capacity assessment was conducted then the Capacity Assessment Team would not be able to confirm that the PMU staff were competent and qualified. The Capacity Assessment Team failed to take note of the second part of the DFID recommendation which was to “help get the most out of the team’s talent towards the effective management of ZRBF”. This is evidence that the Capacity Assessment Team was improperly motivated and biased.

e. The donors as well as the SC meeting minutes do not mention blanket approval of the ZRBF structure, rather, the approval was specific. It was highlighted how three to four positions were undergoing major change and needed to be put up under competitive processes with one new position being introduced. The Respondent’s argument of approval of the ZRBF PMU structure was not substantiated with evidence.

f. The Applicant argues that the re-classification of the Finance Specialist post was done in violation of UNDP’s HR policy, as a result, his contract was for all intents terminated and he therefore requests termination indemnity as per staff rule 9.3(c).

g. The Tribunal’s decision not to allow him to cross examine his former supervisor has limited his opportunity to discuss vital issues which are relevant to this case as she was the one who was behind all decisions related to the abolition of his post.

h. As per world-wide standard practices, the Plan/Strategy is prepared before implementation, however, in this case, Mr. van Montfort and his team had implemented the wish list of the abolition of the Finance Specialist position before development of the Plan and strategy. This was inconsistent with standard practices, and an example of discrimination and abuse of authority.

i. The Applicant submits that the Capacity Assessment report was flawed.

i. The ZRBF PMU was managing its programme without any problems, and its delivery was as per plan hence the change of Finance function was biased and made with improper motivation.

ii. No qualified finance expert was included in the Capacity Assessment Team, as such, they failed to identify the correct problems, consequently, they made confusing, biased, and incorrect recommendations about the Finance Unit.

iii. The Capacity Assessment Team's recommendation to provide day-day support to the Grantees is not consistent with the signed Grants Agreement between UNDP and the Grantees.

26. The Applicant requests the Tribunal to grant him the following reliefs:

a. compensation in the amount of two years' net base salary as per art. 10(5)(b) of the UNDT Statute;

b. retroactive reinstatement to the United Nations Joint Staff Pension Fund;

c. compensation in the amount of three months' net base salary for emotional injury and distress; and

- d. an order directing the Respondent to reinstate him to his position or to direct the competent authority to deploy him in any other suitable position.

The Respondent

27. The relevant part of the Respondent's case is summarized below.
28. The Respondent contends that the decision to abolish the position of Finance Specialist was a proper exercise of administrative discretion.

- a. The scope of the capacity assessment was consistent with DFID's recommendation.

- i. Contrary to the Applicant's claim that the objective of the capacity assessment was not consistent with the recommendation made by DFID in its 2018 annual review report, Mr. Teixeira clarified that the Capacity Assessment Team's role was based on their Terms of Reference, which quoted the recommendation made by DFID, and defined the scope and expectations of their mission.

- ii. Building on DFID's recommendation to determine whether the PMU team had the right allocation of roles and responsibilities to effectively manage the ZRBF, the capacity assessment was expected to review the current state as well as propose a long-term HR strategy for the PMU. The scope of the capacity assessment was consistent with DFID's recommendation.

- b. The Capacity Assessment Team conducted an independent review of the PMU.

- i. The Applicant has provided no evidence to support his claim that the Capacity Assessment Team was influenced by his supervisor - Ms. Andersen, Mr. van Montfort and Ms. Debab Asrat Ynessu, Deputy Resident Representative, UNDP Zimbabwe in order to abolish

the Finance Specialist post.

ii. Mr. Teixeira provided credible testimony that the Capacity Assessment Team conducted their role with full independence. The Capacity Assessment Team received extensive background documentation in preparation for their mission to Zimbabwe and met with the Country Office's management, which as clarified by Mr. Teixeira, was not present during the consultations with the different stakeholders.

iii. The Applicant speculates that the Country Office's draft HR Strategy document influenced the capacity assessment Report. However, multiple differences were pointed out by Mr. van Montfort regarding the proposed functional structures envisioned in the two documents, including the recommendation of the Capacity Assessment Team to create a new Resilience Advisor position, the transfer of the financial oversight and control role to the Country Office, the move of two positions under the Programme Specialist post, the change of the Communications Assistant post under different funding and the elimination of a P-4 position. In addition, the record clearly shows that the HR Strategy had foreseen a different structure, workflow and roles for the PMU than that proposed by the Capacity Assessment Team, which further confirms that the capacity assessment conducted an independent review.

iv. Mr. Teixeira stated that the Capacity Assessment Team had meetings with all the stakeholders – the Government of Zimbabwe, all ZRBF donors, two Consortia partners and the ZRBF PMU team members –, listened to them and considered their views. Mr. Teixeira described that the Capacity Assessment Team had several meetings with the PMU team - more than with any other stakeholder - and that the discussions were very interactive. He recalled that the Applicant

participated in all the meetings that the Capacity Assessment Team had with the PMU team - one of which did not include the Head of the PMU - and that he was a very active participant at these meetings, where he presented his views. Mr. Teixeira explained that having considered the various views of the stakeholders, the Capacity Assessment Team conducted their own analysis and independently reached their conclusions, which were then incorporated into a draft report that was shared with all the stakeholders.

v. In addition to considering the oral feedback provided by the stakeholders during the meetings with the Capacity Assessment Team, Mr. Teixeira provided proof that the Team also reviewed and took into consideration the comments of the stakeholders who provided written comments on the draft report. This included several comments provided by the Applicant and Mr. Kausiyo, as well as other members of the PMU, the donors and the Government. After consideration of all the comments - to which the Team provided written responses - the Team revised its report.

c. The capacity assessment report properly reflected the information gathered.

i. As explained by Mr. Teixeira, the capacity assessment report was not tasked to assess individual performance and did not place blame on any person or team, but its role was to conduct a review of the functions within the PMU, which included the finance function. Mr. Teixeira stated that Consortia partners, and in particular CARE International, had indicated that the financial support provided did not meet their expectations and that they required more guidance in areas such as budgeting and reporting. Thus, the recommendation made by the Capacity Assessment Team that the Finance Unit should concentrate on hands-on financial services provided to the Consortia

members to facilitate budgeting, delivery and reporting resulted from the information received during their consultations with the Consortia and was in line with UNDP's role as a capacity development organization.

ii. Mr. Teixeira explained the rationale that supported the Capacity Assessment Team's recommendations concerning the finance function, particularly regarding its suggestion that the Finance Unit focus on providing hands-on financial services to Consortia and perform the role of a typical programme finance function, while the Country Office carries out the finance control and oversight role. Mr. Teixeira also pointed out that during the discussions with the Capacity Assessment Team, the Applicant himself had identified areas that required improvement within the finance function, which included the need to clarify the reporting lines with the Finance Assistant. In fact, the Applicant's input contributed to the Capacity Assessment Team's recommendation to remove the finance role from the Grants Management Unit.

d. There was no ill motive that tainted the findings of the Capacity Assessment Team.

i. The Applicant suggests that the capacity assessment report, which identified the finance function as the PMU's "weakest link", targeted him personally with the intention to "oust him from his job". However, as indicated by Mr. Teixeira, the capacity assessment's intention was not to conduct individual staff assessments and assign any individual responsibility, but to focus on the review of the PMU functions. Moreover, the capacity assessment report explicitly acknowledged that the PMU staff was "competent and qualified" to deliver the core functions of the PMU.

ii. The Applicant's claim that he was personally targeted also fails since the evidence shows that the comments regarding finance concerned the various finance functions performed within the PMU, including by the Grants Management Unit. In addition, the documentary evidence proves that the recommendations made by the Capacity Assessment Team not only impacted the finance function but impacted the overall PMU structure and multiple positions within the PMU. The Applicant's contention that it was an individualized and targeted action against him is not supported by the evidence.

iii. The Applicant has not discharged his burden of proof that the Capacity Assessment Team was guided by any improper motives. On the contrary, the Respondent has shown that the capacity assessment was a fair and transparent process, without bias, prejudice or other improper motive.

e. There were substantial changes reflected in the job description of the new finance function.

i. The Applicant alleges that there were no substantial changes that justified the "re-classification of the Finance Specialist position". However, as proven by the Respondent during the cross-examination of the Applicant, there were substantial changes in the job description of the newly created position of Finance and Operations, which had a different level (SB-4 or P-2 equivalent) and a different contractual modality as a national position (Service Contract).

ii. To justify his position that there was no need to "re-classify" the position, the Applicant refers to paragraph 7(h) of UNDP's Job Evaluation policy. However, the Respondent submits that this policy is not applicable in this case since the position in question is not a staff position, but a Service Contract. The policies regulating Service

Contracts are UNDP's "Service Contract User Guide" and UNDP's "Handbook on Setting Remuneration for Service Contract Personnel", which include provisions concerning the classification of the terms of reference of Service Contracts to determine the appropriate level of pay.

iii. Even if the "Job Evaluation" policy were applicable, pursuant to paragraph 7(h), "re-classification" in the scenario presented by the Applicant would still be required since the grade level of the position changed and there were significant changes in the job description. Moreover, a change in contractual category (from international to national) would also necessarily trigger a "classification" of the position.

iv. The additional measures taken, as explained by Mr. van Montfort, ensured the transparency of the classification of all positions, including the finance position.

f. The nationalization of the finance position was justified.

i. The record shows that, during the start-up phase of the ZRBF, the funding donors expressed concern about the need to have international positions in the PMU. However, at the time, it was decided to recruit the Finance Specialist internationally since specific expertise was required to "develop and manage financial arrangements with partners" in a complex multi-donor set up. Mr. van Montfort indicated that the issue of nationalization of the position of Finance Specialist was raised on several occasions by the donors, including in a joint donor meeting in the first quarter of 2018 "given the change in requirements from the position and the cost-savings it would result in".

ii. Mr. van Montfort explained that DFID had particularly

advocated to have a national of Zimbabwe lead the finance function in the PMU since “they understood that at the start of the ZRBF, an international finance specialist was warranted to help design the systems, processes, reporting, etc. but that, now that the ZRBF was up and running, these needs no longer existed”. Mr. van Montfort noted that DFID had mentioned that Zimbabwe had adequate national capacity in the finance area since the person heading their finance function in the country was a Zimbabwean national.

iii. Mr. Teixeira stated that the recommended revisions of the finance function justified the nationalization of the finance position, including the shifting of the finance control and oversight role to the Country Office. Mr. Teixeira also explained that, in his professional experience, when programmes are initially set up, international expertise may be required, “but once the institutional set up of the programme is established and running, as you move forward, you phase out international posts to build national capacity”.

iv. Mr. Teixeira also expressed the view that in Zimbabwe there was national capacity, which was confirmed by Mr. van Montfort who indicated that Zimbabwe has high-quality education, and that the Organization largely relies on national staff. In fact, the record shows that the majority of the positions in UNDP Zimbabwe and in the PMU of the ZRBF were encumbered by nationals of Zimbabwe. In this context, Mr. van Montfort also noted that critical needs may change in the lifetime of a project that require contracts to be adjusted, and that even in instances where there may be no shortage of funds, donors wanted the majority of the funds to be spent on the beneficiaries and to limit the cost of managing the programme, e.g. expenditure on salaries, office costs, etc. Thus, donors were urging the Organization to have national positions. As a result, the new position of Resilience

Advisor in the PMU - which was created in 2019 following the recommendation of the capacity assessment - was also a national position. Mr. van Montfort further confirmed that the position of M&E Specialist in the PMU also subsequently became a national position.

- v. Regarding the nationalization of the position, Mr. van Montfort further noted that all the finance positions in the UNDP Country Office were held by nationals of Zimbabwe, including the person in charge of the finance team.

- g. The decision to abolish the Finance Specialist post was properly motivated.
 - i. Mr. van Montfort took the decision to abolish the post of Finance Specialist in his capacity as Resident Representative. The decision was taken following the capacity assessment of the PMU, which recommended the revision of the finance function and subsequent to the approval of the Capacity Assessment Team's recommendations by the SC, and to the formulation and classification of the new Terms of Reference of the finance position. On this basis and given that the P-3 post of Finance Specialist was no longer contemplated in the new PMU structure, it was decided to abolish the post.
 - ii. Mr. van Montfort indicated that the Applicant's supervisor did not influence the decision to abolish the position. In this regard, Mr. van Montfort explained that all HR matters had been taken away from the programme management. The Applicant has failed to adduce any evidence to connect the decision to abolish the Finance Specialist post to his supervisor or to establish that the supervisor had any ill will.
 - iii. Contrary to the Applicant's claims, Mr. van Montfort confirmed that the abolition of the position in 2019 did not result from

the Applicant's 2016 performance evaluation, which was rated as "partially satisfactory" by his supervisor, nor did it result from "merg[ing] some of [his] major tasks with the Grants Management Unit" in 2017. The decision was driven by the changing needs of the ZRBF programme, as reflected in the new PMU structure, and was properly motivated.

iv. The record shows that the Applicant encumbered the post of Finance Specialist until its expiry on 30 June 2019. As clarified by Mr. van Montfort, the position was abolished after the Applicant's separation once the post was vacated.

h. The Applicant is not entitled to a termination indemnity.

i. The Applicant argues that his contract was "terminated" and that he is entitled to receive a termination indemnity.

ii. The Applicant did not present this claim in his request for management evaluation and should accordingly be precluded from raising it at this stage. The claims not first raised by the Applicant in a request for management evaluation are not receivable *ratione materiae*.

29. In conclusion, the Respondent submits that the Administration has demonstrated that it undertook a legitimate organizational restructuring of the PMU, which led to the abolition of the Finance Specialist position. While the Applicant claims improper motives, he has failed to present any evidence to support his allegations. The Respondent submits that the contested decision was properly motivated and was the result of a lawful exercise of discretion. For the foregoing reasons, the Respondent requests that the application be dismissed.

Considerations

The Issue

30. Substantial time was taken up during the hearing on whether this dispute concerns the Applicant's performance review of 2016-2017, whether this dispute relates to re-classification of the Applicant's position, whether the Applicant's services were terminated due to abolition of post, or his fixed term contract was not renewed and whether the Applicant is entitled to a termination indemnity.

31. In determining the issue, the Tribunal has been guided by the Applicant's request for management evaluation. The Applicant received his first notice of non-renewal of contract in March 2018. It was put on hold to allow for a capacity assessment exercise. A fresh notice was issued on 30 May 2019 that the position of Finance Specialist he encumbered would be abolished, and that his FTA would not be renewed beyond its expiry date on 30 June 2019. The Applicant requested management evaluation of this decision and is the subject of these proceedings. However, in support of his case, the Applicant raised several instances including the capacity assessment exercise and re-classification of his post to show that the impugned decision was pre-determined, improperly motivated and unlawful.

32. Pursuant to staff rule 11.2, the Tribunal has competence to receive cases that have previously been subject to management evaluation. This is necessary because the submission of a request for management evaluation of a decision ensures that the Administration has an opportunity to correct any errors in administrative decision without the need for judicial intervention¹⁶. The Tribunal finds, therefore, that the issue before it is the non-renewal of the Applicant's contract due to abolition of his post; whether the restructuring process, leading to the abolition of the post, was pre-determined, discriminatory, improperly motivated and abuse of authority.

¹⁶ *Servas* 2013-UNAT-349, para. 22.

Judicial Review

33. It is important from the outset to lay out the role of the Dispute Tribunal in exercising judicial review;

...[is] to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decisionmaker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General¹⁷.

34. Further, when judging the validity of the Secretary-General's exercise of discretion in administrative matters, such as was the case in this application, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General¹⁸.

Restructuring

35. It well settled jurisprudence that the Organization is accorded a broad discretion to re-organise its operations to meet changing economic conditions and operational needs, including by abolishing posts. The Tribunal will not interfere with

¹⁷ *Sanwidi* 2010-UNAT 804, para. 42.

¹⁸ *Ibid.*, para. 40.

a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However, even in a restructuring exercise, like any other administrative decision, the Administration has the duty to act fairly, justly, and transparently in dealing with staff members¹⁹.

36. The Administration is obliged to act without bias, prejudice, or improper motive in carrying out the restructuring exercise. If alleged, the staff member has an initial burden of establishing such factors played a role in the administrative decision²⁰.

37. The Dispute Tribunal can then consider whether relevant matters have been ignored and irrelevant matters considered and whether the decision is absurd or perverse²¹. Consequently, the Tribunal may interfere with an administrative decision, not to renew an FTA due to restructuring, if it is proved, that, it was done arbitrarily or capriciously, was motivated by prejudice or other extraneous factors or was flawed by procedural irregularity or an error of law²². The staff member has the burden of proving that the aforementioned factors played a role in the administrative decision.²³

Non-renewal of fixed-term contracts

38. The starting point of a judicial review of non-renewal of an FTA is that it carries no expectancy of renewal. The relevant legal provisions are as follows:

Article IV Appointment and promotion

Regulation 4.5

(c) A fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service;

¹⁹ *Russo-Got* 2021-UNAT-1090, para. 29; *Carrillo* 2021-UNAT-1163, para.34; *Timothy*2018-UNAT-847, para. 25; see also, *Nouinou* 2019-UNAT-902, para. 34; *Loeber* 2018-UNAT-844, para. 18.,

²⁰ *Porras* 2020-UNAT- 1068, para. 24, citing *Agha* 2019-UNAT-916, para. 17 and *Pirnea* 2013-UNAT-311, para. 32.

²¹ *Barud* 2022 UNAT 1204, para. 43, citing, *Nouinou* 2019-UNAT-902, para. 48; *He* 2018-UNAT-825, para. 43.

²² *Al-Refaea* 2019 UNAT 971, para. 36

²³ *Barud* 2021 UNAT 1204 paras. 32-33, citing *Said* 2015-UNAT-500, para. 34.

Rule 4.13

Fixed-term appointment

(c) A fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service, except as provided under staff rule 4.14 (b).

Rule 9.4

Expiration of appointments

A temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.

Rule 9.6

Termination

Definitions

(a) A termination within the meaning of the Staff Regulations and Rules is a separation from service initiated by the Secretary-General.

(b) Separation as a result of resignation, abandonment of post, expiration of appointment, retirement or death shall not be regarded as a termination within the meaning of the Staff Rules.

39. Based on the above Regulation and Rules, separation because of expiration of an FTA takes place automatically, without prior notice, on the expiration date specified in the letter of appointment²⁴. Although such is the position, jurisprudence has developed the principle, in order to ensure protection of staff member's contractual rights, that requires the Administration to provide a reasonable explanation when a staff member's FTA is not renewed²⁵. If the reason not to renew an appointment is related to abolition of post, the Administration must show that the abolition of the post followed a legitimate restructuring exercise²⁶. For instance, a

²⁴ *Porras* 2020-UNAT-1068, para. 23, citing *Koumoin* 2011-UNAT-119, para. 20.

²⁵ *Ncube* 2017 UNAT 721, para. 17, citing *Obdeijn* 2012 UNAT 201.

²⁶ *Gehr* 2011 UNAT 255.

restructuring shall be legitimate when the Administration demonstrates that the process adhered to the principles of equality, objectivity and transparency in dealing with the affected staff member²⁷.

Consultations

40. Where restructuring is likely to negatively affect staff members, the Administration has an obligation to consult the affected staff members and give them an opportunity to comment or give feedback on the proposed structure before implementation²⁸.

41. The test on individual consultations where restructuring would result in abolition of positions was set by this Tribunal and it is that:

Consultation does not necessarily include negotiation and certainly does not guarantee agreement, but it must be carried out in good faith. Consultation should occur before a final decision has been made so that the staff member has a proper opportunity to be heard without the matter having been pre-determined²⁹.

Oral Hearing

42. The Tribunal conducted an oral hearing pursuant to art. 16 of its Rules of Procedure at the request of the parties due to the complexities of the case. Hearing took over ten days from September 2021 to April 2022. This was mostly due to the time difference between the Tribunal seat and the parties' and their witnesses' respective locations across the world. The Tribunal could only sit for a maximum three hours in a day. The voluminous documentation supplied in the course of trial also contributed to the length of time taken to hear the case. The Applicant was unrepresented, and the Tribunal made allowances for extensions of time to allow him to prepare his case adequately.

²⁷ *Abdeljalil* 2019 UNAT 960, para. 33.

²⁸ See generally, *Matadi et al.* 2015 UNAT 592, para. 21.

²⁹ *Khalaf* UNDT/2015/123 para. 57, citing *Rees* UNDT/2011/156, *Gehr* UNDT/2011/142 and *Adundo et al.* UNDT/2012/188.

43. Four witnesses gave evidence. Over the course of the trial, it emerged that several documents raised in oral hearing were not available to the Applicant at the time the decision was made, and he requested that he be served with the documents for his perusal. The Tribunal and the Respondent agreed that some of the documents formed the basis of the impugned decision and hence were relevant. These were the background documents submitted by the Country Office to the Capacity Assessment Team for the capacity assessment exercise. In the following paragraphs the Tribunal has made reference to, summarized, and analyzed relevant documentary evidence adduced by the witnesses.

Applicant's request to call a witness

44. During the proceedings the Applicant requested the attendance of his former Supervisor so that she could be asked why she did not like the Applicant. He said she was a relevant witness because through cross-examining her he would establish that the impugned decision was biased because his former Supervisor did not want him in his position. Under art. 17(6) of the Dispute Tribunal's Rules of Procedure, the Judge has the discretion to decide whether the presence of a witness is required. The primary consideration is whether such a witness' testimony will be relevant to the issue to be decided³⁰ and aid the Tribunal in arriving at a fair decision. Further, under article 18(5) of the Rules of Procedure, the Tribunal may limit oral evidence as it deems fit. There are cases in which it is impossible, or inadvisable, for a witness to attend court³¹.

45. The Tribunal noted that calling a witness to be cross-examined on her motive for 'not liking a staff member' would turn the court room into a battlefield and probably distract attention from the issue at hand. The Applicant was entitled to and was allowed to substantiate his allegations of bias during oral hearing. It would then fall upon the Respondent to decide whether to call a witness to controvert the

³⁰ See generally, *Barud* 2020 UNAT 998, para. 24.

³¹ *Majut* 2018 UNAT 872, para. 74.

assertions of bias. The motion was disallowed on the ground that it was not advisable to have this witness attend court.

46. The Applicant stated that the reason for not renewing his position was not justified. He argued that he was discriminated against, that the Country Director abused his authority and that he was harassed by his supervisor. On 26 February 2018, the Applicant was invited to a meeting with his supervisor to be advised of a long-term strategy of PMU. The Applicant was not shown nor given an opportunity to provide feedback on the HR strategy.

47. On 8 March 2018, a notice of abolition of the Applicant's position was written and hand delivered to the Applicant on 9 March 2018 (barely a week after the meeting). There was no consultation prior to this notice he said. He tried to submit comments regarding the proposed restructuring, but his comments were not reviewed or taken into consideration. The meeting with the Head of PMU was not a consultation meeting or held with a view to solicit the Applicant's views but to inform him that a decision had been made to restructure PMU. The notice read;

... the Finance Specialist, P3, position is being abolished. A national position is being created as part of the long-term vision and strategy of the ZRBF to build capacity of national staff". You will be requested to support and train the new national staff during the transition period.

48. He believed that his immediate supervisor, the Head of PMU, did not like him because he had uncovered some financial anomalies in procurement, and he disagreed with some financial decisions. As a result, he was given a poor rating for his 2016 performance review. He was side-lined in decision making affecting the Finance Unit. For example, he did not participate in the preparation of the 2018 budget, and he was skipped over in favour of his subordinate in the chain of command because his supervisor did not want to deal with him. It was because of this animosity that his exit from the Organization was expedited.

49. The Applicant's witness, Mr. Kausiyo, stated that he was a direct supervisee of the Applicant from 2016 until the Applicant's separation. He asserted in cross

examination that because the Applicant's supervisor, the Head of PMU, did not have a good working relationship with the Applicant, she would ignore the chain of command and give instructions directly to him. He gave an example of where he prepared a note to file in a procurement in order to regularize the process, a function that should have been performed by the Finance Specialist. He believed that the Head of PMU did not like the Applicant because of disagreements relating to procurement and in particular recruitment of Partners in 2017 which the Applicant opposed. He believed that the capacity assessment exercise was predetermined to separate the Applicant.

50. The Respondent did not undermine this witness' testimony in cross examination or with any contrary evidence that there were disagreements between the Applicant and his Supervisor, the Head of PMU or that the Head of PMU ignored the chain of command and dealt directly with the witness who was the Applicant's junior to avoid any interactions with the Applicant.

51. The Respondent's first witness was one of the team members who conducted the capacity assessment exercise of the PMU in 2019, Mr. Teixeira. He said they followed the Terms of Reference³², reviewed documentation supplied to them, held consultations with institutions including PMU staff members and came up with an objective report which contained several recommendations one of which was to restructure the finance functions of PMU. The new functional structure did not have the Applicant's position, a national position was created instead. In his opinion, once the institutional set up of the programme is established and running, as you move forward, you phase out international posts to build national capacity. When asked what criteria he used to suggest phasing out the Applicant's international position and not the other two international positions, the witness said he did not review the Applicant's position but functions of the Finance Unit within PMU which had changed. He informed the Tribunal that he had no expertise in finance and that none

³² Reproduced above at para. 10.

of his team members possessed such expertise either but that the team was guided by relevant background documentary material and oral consultations. He emphasized that the team did not wish to be drawn into internal conflicts between the Applicant and his supervisor. Their consultations were restricted to functions of PMU and not individual assessments.

52. During cross examination, five factors were established to substantiate the Applicant's allegation that the decision to abolish his position was predetermined as follows.

a. The Team became aware during the consultations that there was a conflict between the Head of PMU, who was the Applicant's direct supervisor and that the Applicant held the position of Finance Specialist which had been abolished in the HR Strategy to create room for national staff³³.

b. The Team was aware or ought to have known during the assignment that the HR Strategy document sent in advance of the mission was prepared by the Head of PMU without input from or participation or consultation with the Finance Specialist or any member of the finance unit or donors³⁴.

c. Although the HR Strategy document was used in coming up with their findings and recommendations, the Report does not list it as one of the relevant documents utilized by the Team³⁵.

d. Although the Team referred to the HR Strategy document as a 'draft'³⁶ it had already been implemented through a decision communicated to the Applicant on 9 March 2018 that his position of Finance Specialist would be

³³ Mr. Teixeira's oral testimony, transcript dated 23 March 2022, pages 27 and 49.

³⁴ The Country Director confirmed that HR Strategy long term vision was not shared with anyone but the Capacity Assessment team.

³⁵ Trial bundle, page 203,

³⁶ Mr. Teixeira's oral testimony, transcript dated 23 March 2022, pages 33-34.

abolished³⁷.

e. The Team considered this HR strategy and adopted some of its recommendations, most notably, reducing the finance portfolio³⁸, although relevant documentary evidence including the ZRBF Annual Review Report prepared by DFID dated 31 October 2018 and the EU Result Oriented Monitoring (ROM) (Mission) Report³⁹ made no such recommendation⁴⁰ and the Team did not explain the position they took in direct reference to the HR Strategy document.

f. The only document and record to restructure the Finance Unit in the Team's custody was the HR Strategy, prepared by the Head of PMU which was not on the list of relevant documents and was not listed as an agenda in any of the interactions with any of the partners and stakeholders not least the PMU staff⁴¹.

g. It is noted that the interactive discussions with PMU staff do not mention the ZRBF organogram as an agenda although in the two meetings the Team had with the Head of PMU, the agenda was specific on the ZRBF organogram. The specification of the ZRBF organogram as an agenda in one meeting and its absence in another may lead to a conclusion that it was by design of the Team that the PMU staff interactions with the Team would not discuss the ZRBF organogram⁴².

53. In lieu of any ZRBF project-related reason for the restructuring, Mr. Teixeira stated that it was the "whole UNDP philosophy" *that once a programme is set up,*

³⁷ Notice of abolition of post.

³⁸ Trial bundle, page 60. Proposed functional structure.

³⁹ The EU commissioned a Results Oriented Monitoring ("ROM") Mission which helped the programme to identify some of its early results and also provided some key recommendations that fed into fine-tuning of the [current] programme DFID Annual Review Report, 2018, page 46 of the trial bundle.

⁴⁰ DFID Annual Report 2018, Organogram, EU ROM Report.

⁴¹ Trial bundle, page 204.

⁴² Trial bundle, page 204.

*you start implementation, the conceptualization that you need, previous, you don't need it anymore. So then, you have local capacity, you use local capacity*⁴³. The witness extended this philosophy to finance in these words, *an international financial person, you need when you develop the programme, that we need the expertise, high level expertise, and you may need an international. But when you move forward, the tendency for most of the organization, most of the UNDP programme, you nationalize as you move forward*⁴⁴. This notwithstanding, the witness could not show evidence-based proof that the ZRBF no longer required 'high-level capacity' in finance which according to the record was the most complex of the functions in PMU⁴⁵. The witness ruled out competence of the Applicant as the reason for the recommendation to nationalize his position, therefore any evidence (which was not produced in any case) purporting to have come from donors or members of Consortia that finance was the weakest link is immaterial to the abolition decision.

54. The second witness for the Respondent was the Country Director of UNDP Zimbabwe at the material time, Mr van Montfort. Prior to his joining UNDP Zimbabwe, a ZRBF PMU had been agreed upon by the donors as an implementing unit of the ZRBF. It among other staff consisted of three international staff members who were justified and budgeted for. Sometime in 2017, he instructed the Head of PMU to re-evaluate the evolution of ZRBF and come up with a long-term vision of PMU human capacity in line with the objectives of ZRBF. She in consultation with himself and the Deputy Country Director, developed an HR Strategy comprising the long-term vision of the PMU. In that Strategy, they felt that ZRBF had reached a stage where it no longer required an international finance position and so they abolished it and replaced it with a national position. On 8 March 2018, the Strategy was implemented in that aspect. The Applicant was given notice of separation through non-renewal of his contract beyond December 2018. The decision was put on hold in November 2018, pending the outcome of a capacity assessment exercise

⁴³ Transcript dated 25 March 2022, pages 32-33.

⁴⁴ Transcript dated 28 March 2022, page 38,

⁴⁵ DFID Annual report 2018.

which was conducted under the leadership of Respondent's witness number one above. The Country Office drew up the terms of reference for the exercise, submitted background documentation and wrote the covering document, called the scoping document, to facilitate the capacity assessment exercise. The capacity assessment report recommended nationalizing the Finance Specialist position which was at international level held by the Applicant. The SC endorsed the report and UNDP carried out the recommendation. A fresh notice of non-renewal of contract was issued to the Applicant in May 2019 that his contract would not be renewed beyond June 2019. He assisted the Applicant in his futile efforts to secure alternative employment.

55. This witness' testimony was mostly a repetition of why it was necessary to nationalize the international position. He made conjectures based on his knowledge of UNDP projects of how nationalizing an international position was cost effective and beneficial to the host country, but he did not produce any actual evidence in budgetary or operational terms to prove his theories in relation to the Applicant's abolished position. The Tribunal therefore found most of his testimony speculative, irrelevant, unsubstantiated, and too general to be accorded any weight. For example, he made several references to donor conversations where he was asked to justify why the finance position was international and not national. Just like the first witness for the Respondent, this witness produced no single document, email, minutes or notes to substantiate these conversations. Similarly, no record was adduced of his conversations or ZRBF reports that the programme was extended by one year and, *"we the donors, want you, UNDP, to find a way to reduce the cost on you [management costs]"*⁴⁶.

56. Regarding the HR Strategy document, he asserted that it, was a work in progress and he needed external and independent experts to review and finalise it, yet he did not procure services of any expert in finance to constitute the Capacity

⁴⁶ Transcript dated 29 March 2022, page 74.

Assessment Team⁴⁷. He was self-contradictory in that although he said the HR Strategy was not a final document, it needed eternal and independent ‘fresh eyes’, he went ahead and implemented it in March 2018 only to be put on hold eight months later in November 2018. Further, he was not able to show the authority under which he directed the Head of PMU to review the evolution of ZRBF and prepare a long-term vision for its implementation moving forward. Furthermore, he could not explain the rationale behind his argument that because the systems were up and running, then the Applicant and not the other two international staff members had to pave way for national capacity.

57. The Tribunal gathered the following facts from the second witness which support the Applicant’s allegations that the decision to abolish his position was premeditated and that the capacity assessment exercise was a mere tool to achieve a predetermined decision of restructuring the Finance Unit and separating the Applicant from service.

(1) Terms of Reference for the Capacity Assessment Team

58. Mr. van Montfort drew up the terms of reference for the capacity assessment exercise. In addition to the recommendation of DFID, the Respondent added another agenda which did not originate from ZRBF but from the country office namely, “*to review and finalise a long-term HR Strategy for the PMU*”⁴⁸. It is this item that was put in no uncertain terms that the position of Finance Specialist was not required. That it didn’t fit in the new organogram⁴⁹.

59. In adding this agenda to the terms of reference the witness was acting outside the DFID mandate because the record shows that ZRBF was a donor funded project

⁴⁷ He said he procured an expert in resilience and “deep operational country office management experience” in a number of African countries, an adviser who “understood what it was they were trying to deliver”. (Transcript dated 30 March 2022, page 24). The Team Leader said that his team had no one with project finance expertise because this was not a financial assessment (Transcript dated 28 January 2022, page 18).

⁴⁸ Management Evaluation Response, annex 3 to the application.

⁴⁹ See summary of facts and relevant documents above, at para. 3, Figure 1.

and the governing body for policy decisions was the ZRBF SC. In restructuring PMU using the method that he took, he failed to take into consideration the procedures set out in the UNDP legal framework for a lawful restructuring exercise. By inserting an agenda without producing any authority to do so from the governing body, the witness acted *ultra vires*. As per the project documents,

...the Steering Committee will be the highest body governing the ZRBF and will provide strategic leadership and governance oversight. The ZRBF Steering Committee is expected to make key policy decisions, guide the implementing partners and responsible parties in the execution of the projects, and ensure effective oversight through receiving regular reports and reviewing the results of project evaluations that will take place periodically⁵⁰.

60. The witness confirmed that the HR Strategy document which purported to be a product of the evolution of ZRBF was not shared with the SC, he did not show that any independent evidence-based report or results of project evaluations were prepared to back the HR Strategy long term vision assumptions and presented either to the SC or staff members of PMU before submitting it to the capacity assessment team for review. None of the project documents envisaged a restructuring in the Finance Unit.

(2) Background Information

61. The background material from the donors that was provided for the capacity assessment exercise made no reference to nationalizing the finance position or generally to restructure the PMU. This restructuring only appeared in the HR Strategy document which had been prepared by the Head of PMU and had already been implemented in part concerning abolition of the Applicant's position. In the scoping document from this witness to the Capacity Assessment Team the relevant part reads:

...the head of the PMU in consultation with the UNDP Country Director, looked at transitioning the ZRBF PMU from the start-up phase to the ramp-up phase, to ensure successful technical and financial support to and oversight of the Consortia partners

⁵⁰ Trial bundle, page 713.

(emphasis supplied) ... Taking into consideration the elements mentioned above (status of ZRBF, PMU functions, management funding, and time extension), **the following organogram was approved**⁵¹.

62. The HR Strategy document was at cross purposes with the DFID Annual Report 2018 which had an organogram that was approved by the donors at the inception of the programme in 2015 and reviewed in 2016, 2017 and 2018⁵². None of the recommendations in this report related to redesigning the organogram. The EU ROM Report which was also reviewed did not make any recommendation to restructure the PMU. On the contrary, this document was clear that ZRBF had not reached the stage where it could be run by the nationals. In the relevant parts on building national capacity and sustainability of ZRBF it states:

CROSS CUTTING ISSUES

Build national and local capacity – coordinated strategic planning around resilience:

Ultimately, resilience building should be led by national governments wherever possible, particularly in providing the enabling environment necessary for improving the absorptive, adaptive, and transformative capacities of households, communities and higher-level systems... The prospects for sustainability of the ZRBF are relatively good although whether the ZRBF can be fully taken over/managed by the government (MAMID) will depend on the political and economic development⁵³.

63. In relation to finance management, the report provides the complexities as follows:

The ZRBF as a multi-donor fund has a highly complex set-up with funds committed in an irregular pattern and with different donor requirements, which complicates the management and implementation of the programme. ZRBF also has to comply with the different donor

⁵¹ Organogram Zimbabwe Resilience Fund Management Unit – envisioned 1/1/2019 (page 9 HR Strategy document) Programme Management Unit (PMU) capacity requirements strategy, Trial bundle, from page 903, at page 911.

⁵² This annual review covers the period 1 July 2017 to 30 June 2018. This is the third annual review of the ZRBF. The second annual review was finalized in October 2017. (DFID Annual Review 2018).

⁵³ Page 723, ROM Report.

requirements in terms of reporting, financial issues, etc., which is both cumbersome and time demanding; for instance, DFID requirements of quarterly progress (financial) reports are extremely time-consuming for both the implementing partners and PMU. Moreover, for example DFID rules for commitment of funds have delayed activities (recruitment of staff) as DFID cannot avail funds in advance of need. **Despite the complex set-up, the programme is well-managed by the PMU and the Steering committee is well-functioning and provides good steering of the programme**⁵⁴. (Emphasis supplied).

64. Considering that the HR Strategy document was prepared by the Head of PMU, restructuring the Finance Unit, without consulting the Unit, nor shared with the donors or stakeholders and that it contradicted findings of donor reports on review of ZRBF, it was an unsafe document to use in the capacity assessment exercise. The Country Director, himself, opined in his oral testimony that, sharing “*the HR Strategy would have just confused people*”⁵⁵. It was not safe because there was a perception that its author, who was in conflict with her supervisee, might be biased. The perception here is real and the apprehension of bias not unfounded hence the Tribunal concurs with the Applicant that in as far as the capacity assessment report relied on the HR Strategy document to arrive at its decision to abolish the Finance Specialist position, that decision was arrived at by using irrelevant consideration, it was biased against him. The Tribunal finds that had the HR Strategy document not formed part of the guiding material for the capacity assessment exercise relating to finance functions, the outcome would have been different. Relying on the HR Strategy produced absurd and perverse results compared with the objectives of DFID’s recommendation and the donors’ expectations.

(3) Implementation of the recommendation

65. The capacity assessment exercise was concerned with the functional review of the PMU but evidence has shown that in as far as abolishing the Applicant’s position was concerned, the decision was a *fait accompli* regardless of the exercise. The

⁵⁴ Page 701, ROM Report.

⁵⁵ Transcript dated 30 March 2022, page 18.

decision was already made and implemented in March 2018 but put on hold for this exercise. There is no evidence that the Applicant was given the opportunity as an affected individual to comment on the proposed restructuring of his position from the beginning of the process or at any point in time, in violation of UNAT jurisprudence which requires that such consultations take place⁵⁶. He was told that, funds were not an issue and he already knew that because the ZRBF budget was already in place, he was told competence was not an issue and this was also proved by his performance assessments for the 2017 and 2018. The implementation of the recommendation did not take relevant factors into consideration, namely, the requirement to carry out genuine, transparent and good faith consultations. Further, the implementation was discriminatory as no objective criteria was used to separate the Applicant and not the other two international staff members. Further, the reclassification of the Finance Specialist position was flawed.

Reclassification of Position

66. As part of implementing the recommendation in relation to finance functions, the donor meeting of 3 May 2019, agreed that a process of re-classification be carried out for the proposed changes⁵⁷. The witness conducted the classification of Service Contracts for which he had delegated authority⁵⁸. However, there is no record of the authority under which nor the process that he utilized to re-classify an existing position which was encumbered by the Applicant⁵⁹. The Tribunal is inclined to believe the Applicant that none was conducted, not only because there is no record but also because the proposed classification review by BMS did not make any reference to the reclassification of the Finance Specialist position.

⁵⁶ *Matadi et al.*, para. 21.

⁵⁷ Trial bundle, page 235.

⁵⁸ Reply, annex 10, email correspondence between Mr. van Montfort and Ms. Lisa Lange of the UNDP Bureau for Management Services dated 18 and 22 May 2019.

⁵⁹ At page 235 of the trial bundle is the communication from BMS and makes no reference to reclassification of an existing position.

Abuse of Authority and Discrimination

67. Where discrimination is alleged to have influenced the impugned decision, the Tribunal must consider whether in arriving at the decision, similarly placed individuals were treated equally. In this case, the Tribunal will consider whether the selection of the individual whose position is declared redundant and abolished among several similarly placed individuals, followed a competence, integrity or length of service test, which under the staff rules is considered an objective criterion⁶⁰.

68. The Administration did not specify or cite any specific special measure, Regulation or Rule, or Administrative Instruction or minutes of the SC issued on: (1) restructuring PMU in order to create a job opportunity for a national (nationalization); (2) restructuring PMU to cut management costs and hence save funds for more beneficiaries; and (3) restructuring PMU because ZRBF had reached a point where it was time to hand over some functions to the nationals. The documentary evidence on the record points to the contrary that: (1) ZRBF was a donor funded project which had an agreed organogram providing for both national and international positions, with nationals taking up 85% of the positions in PMU management; (2) ZRBF had adequate resources to see the project successfully through to 2021 and (3) ZRBF was still experiencing challenges in particular relating to finance, in that the systems were not flowing as smoothly as alleged by the second witness.

69. By its failure to follow the Regulations and Rules for the restructuring and abolition of the Finance Specialist position, the Tribunal agrees with the Applicant that he was singled out among the three international staff members, to pave way for national staff without a legitimate objective criterion, and in violation of the clear organogram agreed to by ZRBF and in force at the material time⁶¹.

70. The Tribunal is persuaded by the Applicant's submissions corroborated by his supervisee at the material time and by the Country Director and confirmed by the

⁶⁰ Staff rule 9.6.

Capacity Assessment Team Leader that he had a sour relationship with the Head of PMU. He tried to report the situation to management in 2017 but up until the separation, his problems with his supervisor had not been resolved. The Applicant was side-lined and ignored by his supervisor in major activities involving his Unit. It is easy to infer that in the absence of any legitimate justification for the restructuring, the real reason was that his supervisor did not want him around. She wanted to get rid of him. It was an abuse of authority to prepare an HR Strategy with changes in the Finance Unit without consultation or disclosure to the ZRBF SC and without soliciting feedback from the Applicant being the major casualty of the exercise. The position of Finance Specialist was reclassified without specifying any procedure from the relevant legal framework applicable to UNDP . The Applicant has proved on a balance of probabilities that his separation was motivated by improper motive.

71. There were three international positions in PMU, and according to the Capacity Assessment Team Leader, international staff get replaced by national staff as a normal sustainability process and a means to empowering nationals, the Respondent was, however, not able to provide any criteria which he used to select the Applicant's position of the three international positions for abolition. Any of the three international staff members should have been given equal and fair consideration either to stay or to leave by applying an objective criterion in cases of abolition of posts, which is competence, integrity and length of service⁶². The Applicant has proved on a balance of probabilities that he was discriminated against in a pool of international staff members.

Judgment

72. The Applicant has proved that the process of restructuring of PMU leading to abolition of his post and hence non-renewal of his contract was arbitrary, capricious,

⁶² Staff rule 9.6 applies to abolition of posts that lead to termination, but the test can be applied where the abolition of post leads to separation through non-renewal of contract where similarly placed international staff have to pave way for national staff.

motivated by prejudice, procedurally irregular and an error in law. The application succeeds.

Award

73. The decision to not to renew the Applicant's contract is rescinded. Considering that the ZRBF project under which the Applicant's contract fell was to run to 2021, and a similarly placed international staff member, the Monitoring and Evaluation Specialist's position was budgeted for until the fourth quarter of 2021⁶³, the likelihood is that the Applicant's contract would have been renewed for the same duration. The Tribunal orders the Applicant's reinstatement from 30 June 2019 to 31 December 2021. In lieu of reinstatement, the Applicant shall be paid compensation as per art. 10.5(a) of the Tribunal's Statute, equivalent to 30 months' net base pay.

Moral damages

74. The Applicant has not sufficiently proved that he suffered moral damages as required by the Tribunals' jurisprudence that he must adduce independent testimony to corroborate his allegation that he suffered moral harm⁶⁴. This head of relief must fail.

Retroactive payments due to the United Nations Joint Staff Pension Fund

75. The Respondent shall retroactively make payments due to the United Nations Joint Staff Pension Fund for the reinstated period.

Termination indemnity

76. The Applicant sought an award of termination indemnity arguing that his services were terminated. The Respondent objected stating that the Applicant was separated from service at the end of his FTA and not terminated and that he did not

⁶³ Trial bundle, page 912. The HR Strategy (Overview of evolution of capacity).

⁶⁴ *Kallon*, 2017-UNAT-742.

seek request for management evaluation of the decision not to pay him termination indemnity. Whether the Applicant's separation was due to abolition of post or non-renewal of his FTA, the Tribunal following UNAT, finds that the decision of UNDP to abolish the Applicant's post and not to renew his FTA cannot be regarded as entirely discrete and separate issues. The decision not to renew arose from the abolition of post decision; put another way, had there not been a decision to abolish his post for nationalization reasons, a justification which he has proved to have been improperly motivated, it follows that his services were unlawfully terminated. In accordance with Annex III of the Staff Regulations and Rules (Termination Indemnity) the Applicant is entitled to termination indemnity by operation of the law, because his services were unilaterally terminated by the Respondent. This award is however ameliorated and cancelled off by the order for reinstatement which ensures that the Applicant's FTA will reach its specified expiry date.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 25th day of July 2022

Entered in the Register on this 25th day of July 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi