



**UNITED NATIONS APPEALS TRIBUNAL**  
**TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2018-UNAT-847

**Timothy**  
**(Respondent/Applicant)**

**v.**

**Secretary-General of the United Nations**  
**(Appellant/Respondent)**

**JUDGMENT**

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Before: Judge Dimitrios Raikos, Presiding  
Judge John Murphy  
Judge Sabine Knierim

Case No.: 2017-1135

Date: 29 June 2018

Registrar: Weicheng Lin

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Counsel for Ms. Timothy: Brandon Gardner, OSLA

Counsel for Secretary-General: Amy Wood

**JUDGE DIMITRIOS RAIKOS, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/080, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 29 September 2017, in the case of *Timothy v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 28 November 2017, and Ms. Karen Timothy filed her answer on 26 January 2018.

**Facts and Procedure**

2. The following facts are uncontested:<sup>1</sup>

... In 1998, the Applicant commenced employment with the United Nations. On 1 September 2004, the Applicant was appointed as a Senior Administrative Associate in [the Liaison Office of the United Nations High Commissioner for Refugees (LONY and UNHCR, respectively) in New York], where she served until her separation.

... On 13 October 2011, the Applicant was given an indefinite appointment in UNHCR retroactive to 1 July 2009. Her indefinite appointment letter stated in pertinent part as follows:

**TENURE OF APPOINTMENT**

The indefinite appointment is governed by the Staff Regulations and Staff Rules and in particular by Staff Rule 13.2. The indefinite appointment has no specific expiration date and does not carry any expectancy of conversion to any other type of appointment.

The indefinite appointment may be terminated by the High Commissioner in accordance with the relevant provisions of the Staff Regulations and Staff Rules, in which case you shall be given a three-month period of notice. Should your appointment be terminated, you will receive such indemnity as may be provided for under the Staff Regulations and the Staff Rules. There is no entitlement to either a period of notice of an indemnity payment in the event of dismissal for misconduct pursuant to Chapter X of the Staff Rules.

... On 11 January 2016, the Director of LONY sent a letter to the Applicant which stated:

...

As a result of a comprehensive review of the LONY structure, a number of positions are proposed for change [...] it is proposed to discontinue the position you currently encumber, 10008112, Snr. Admin. Associate, G7 [...].

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<sup>1</sup> Impugned Judgment, paras. 3-27.

There is a six[-]month notification period, and you will be formally notified once Headquarters makes the final decision. There will be newly created positions for which you are encouraged to apply and further details will be provided as they are finalized.

... On 29 January 2016, the Director of LONY sent a letter to the Applicant informing her that her post would be abolished on 1 August 2016. The letter noted:

...

[T]he Office will seek confirmation from the Assignment Committee whether a comparative review process will be required [...] you are encouraged to apply widely for suitable vacant positions from now on and to contact [human resources personnel]. She will be glad to explain the various options that may be available to you.

... On 19 February 2016, the Applicant sent a letter to the Department of Human Resources Management (“DHRM”) within UNHCR requesting suspension of the abolishment as she and her husband as non-U.S. citizens would be forced to leave the U.S. within 30 days leaving behind her two U.S. citizen daughters. The Applicant explained in her letter that her husband had recently suffered a stroke and the loss of medical insurance would exacerbate the circumstances. The Applicant did not receive a reply.

... In an annex to her application [to the UNDT], the Applicant provided a table setting forth 18 UNHCR job vacancies to which she applied between April and September 2016. The positions to which she applied were at the FS-5, G-5, P-2, P-3 and P-4 levels and located in numerous duty stations throughout Africa, the Middle East, North America, Europe and Asia. According to the Applicant, the Administration did not inform her of the status of 17 of the 18 applications.

... On 12 August 2016, the Applicant was informed that she was one of two final candidates under consideration for the GS-5 Senior Admin/Finance Assistant in the LONY office of UNHCR. Thereafter, the Applicant learned that her former colleague holding a fixed-term appointment was selected for the post instead of her.

... On 16 September 2016, the Applicant received an email from Director of DHRM, UNHCR attaching a letter dated 13 September 2016. The letter stated:

...

I am writing to inform you that in light of the abolition of your position, the Headquarters Assignments Committee (AC) met on 25 August 2016 and in accordance with Staff Rule 9.6 (e), (f) and IOM/066-FOM/067/2012, undertook a review of the availability of suitable positions in the LO New York in which your services could be utilized. Following a careful review of the relevant documentation including the Minutes of the AC meeting, the Deputy High Commissioner approved the

AC's findings that there were no suitable positions available against which your services could be utilized and therefore against which a comparative review could take place. I have therefore decided, in accordance with paragraph 14 of IOM/066-FOM/067/2012 to terminate your Indefinite Appointment under the terms of Staff Regulation 9.3(a) (i) for abolition of post.

... The letter further provided the Applicant with a choice between her indefinite appointment being terminated on 30 September 2016 with compensation in lieu of notice, or, in the alternative, termination on 31 December 2016 in order to remain in service during the three month notice period, allowing her to extend her Pension Fund and medical insurance coverage accordingly. The Applicant was informed that, in light of the abolition of her position and in the absence of suitable positions, the second option would be served on Special Leave with Full Pay.

... On 25 September 2016, the Applicant informed DHRM that she selected termination on 31 December 2016.

... On 10 November 2016, the Applicant submitted a request for management evaluation.

... On 8 December 2016, the Deputy High Commissioner decided to uphold the contested decision to separate the Applicant from service.

... On 17 January 2017, the Applicant filed [his] application [before the UNDT].

... On 18 January 2017, the Registry transmitted the application to the Respondent, instructing him to file his reply by 17 February 2017.

... On 18 January 2017, the case was assigned to the undersigned Judge.

... On 8 February 2017, the Respondent filed his reply.

... On 20 March 2017, by Order No. 43 (NY/2017), the Tribunal instructed the parties, *inter alia*, to file relevant information and supporting documentation.

... On 24 March 2017, the Respondent submitted a "Motion for Interpretation of Order [No.] 43 (NY/2017) and Motion for Extension of Time" requesting clarification to paragraphs 7(a) and 7(e) of Order No. 43 (NY/2017) which instructed the Respondent to produce various documents as follows (emphasis added):

a. a table of all available posts located in UNHCR in New York and *in the field* at the Applicant's level or at a lower level with similar and/or comparable job descriptions together with a copy of the job description and vacancy announcements for each post from 29 January 2016 to the present;

...

e. a list of all temporary positions in the GS category *in the field* from 26 January 2016 to the present;

... In particular, the Respondent requested the Tribunal to clarify the “precise scope of its request with regard to field offices”, stating in his motion as follows:

[8] UNHCR has 470 field offices in 128 countries and thousands of positions in the General Service category at the GS-7 level and below. Therefore, it would be excessively difficult for the Respondent to comply with the Tribunal’s request in these two paragraphs.

[9] In any event, pursuant to [s]taff [r]ule 4.4(a), staff members belonging to the General Service category must be recruited locally. Unless they have legal status in a particular duty station, they cannot be offered positions in the General Service category. Consequently, the availability of posts in the General Service category in the field is not relevant to the facts of this case.

... The Respondent further indicated that pursuant to staff rule 4.4(a), staff members belonging to the General Service category must be recruited locally and that he considered the requested information for the General Service category in the field irrelevant, stating that, “the availability of posts in the General Service category in the field is not relevant to the facts of this case”. With regard to para. 7(h) of Order No. 43 (NY/2017), which requested the Respondent to produce documents relating to positions that remained in UNHCR in New York, the Respondent proposed providing a staffing table for the UNHCR Liaison Office in New York, but requested the Tribunal to specify a time period for the staffing table.

... On 6 April 2017, by Order No. 70 (NY/2017), the Tribunal denied the Respondent’s motion for interpretation as unwarranted, noting that the Respondent did not indicate what aspects of paras. 7(a) and 7(e) of Order No. 43 (NY/2017) were unclear or ambiguous, but rather indicated that producing such documents [was] difficult. The Tribunal’s original instructions remained and the Tribunal further instructed the Respondent to produce documentation containing the special circumstances and conditions determined by the Secretary-General, and by UNHCR, based on which staff members who have been recruited to serve in posts in the General Service and related categories may be considered internationally recruited, if any, pursuant to staff rule 4.5(c). The Respondent was instructed to inform the Tribunal if the Applicant was considered to be internationally recruited on or after 1 September 2004 pursuant to staff rule 4.5(c). With regard to the time period for the proposed staffing table, the Tribunal instructed the Respondent to provide the requested information for the positions that remained in UNHCR in New York from the date the Applicant’s post was abolished (13 September 2016) to the present. The Respondent was granted an extension to comply with Order No. 43 (NY/2017) and the requested documents in para. 12 of Order No. 70 (NY/2017) by 24 April 2017.

... On 24 April 2017, the Respondent filed his submission pursuant to Order No. 43 and Order No. 70 (NY/2017).

... On 1 May 2017, pursuant to Orders No. 43 and 70 (NY/2017), the Applicant filed a submission setting forth her comments to the Respondent's 24 April 2017 submission.

... On 15 May 2017, the parties filed a joint submission responding to Order Nos. 43 and 70 (NY/2017) indicating that the parties are not amenable to resolving the matter informally either through the mediation division or through *inter partes* discussions. The parties also informed the Tribunal that they did not require the production of additional evidence or a hearing on the merits, and thus agreed to the matter being decided on the papers alone.

... On 18 May 2017 and 24 May 2017, the Respondent and Applicant, respectively, filed their closing submissions.

3. On 29 September 2017, the UNDT issued Judgment No. UNDT/2017/080. The UNDT found that the decision to terminate Ms. Timothy's appointment for abolition of post and to separate her from the Organization had not been taken in line with the mandatory legal framework and was unlawful. The UNDT made the following legal findings:

- Pursuant to Staff Rule 9.6(e)(i), subject to availability of suitable posts, Ms. Timothy had the right to be retained in service and UNHCR had the correlative obligation to retain her in any of the suitable posts in which her services could have been effectively utilized with due regard to her relative competence, integrity and length in service.
- Since Staff Rule 9.6(e)(i) does not include any express reference for a staff member to be retained in the order of preference exclusively to available suitable posts at the same level with the one occupied at the date of abolition of post, the text is to be interpreted as referring to all the available suitable posts, at the same *and* lower grade level. This requirement covers suitable posts within the parent organization exclusively at their duty station only for staff members in the General Service and related categories. Conversely, staff members at the Professional level and above are to be considered for available suitable posts in the entire parent organization, not limited to their duty station.
- The interpretation given by UNHCR at paragraph 5 of the UNHCR Comparative Review Policy for Locally Recruited Staff (Comparative Review Policy), a document which is hierarchically inferior to the Staff Rules, unlawfully limits the scope and area of application of Staff Rule 9.6(e) to the available suitable posts only at the staff member's duty station and only at the same level as the abolished post.

- A staff member who is to be retained in the order of preference established in Staff Rule 9.6(e) is not required to be fully competent, but to have a relative competence for the new suitable post where he or she is to be retained. A staff member holding a continuous or indefinite appointment is to be presumed to have at least a relative competence for any similar or inferior positions available in the job family and/or job network to which the one occupied prior to the abolition of his or her post belonged, competence which can be later completed within a reasonable period through training courses, if necessary.
- A staff member holding a continuing or indefinite appointment has the highest level of legal protection from being terminated. He or she has the right to be retained either in any suitable positions vacant at the date of abolition or reduction of staff, or in any suitable positions occupied at the date of abolition or reduction of staff, by (a) staff members recruited through competitive examination for a career appointment serving on a two-year fixed-term appointment, (b) staff members holding fixed-term appointments, or (c) staff members with temporary appointments.
- Under Staff Rule 9.6(e), the Administration firstly has the duty to timely provide a staff member affected by abolition of post or reduction of staff with: (a) a list of all posts, at the staff member's duty station, occupied at the date of abolition by staff members with a lower level of protection than that afforded to the staff member affected, if any; and (b) all the vacant suitable positions at the same level or lower level, if any. Secondly, the Administration has to provide a formal offer together with the list or as soon as possible after the notification of the list in order for the staff member to be able to evaluate all the options and to timely express his or her interest.
- A staff member affected by abolition of post or reduction of staff has the right to be considered and retained for any available suitable position on a preferred or non-competitive basis in the mandatory order established by Staff Rule 9.6(e), without having to go through a competitive selection process, including without applying for vacant job openings, based on the staff member's relative competence, integrity, length in service and where required, his or her nationality and gender.

4. The UNDT concluded that the decision to separate Ms. Timothy as a result of abolition of her G-7 step post was unlawful for the following reasons:<sup>2</sup>

a. Prior to taking the comparative review, UNHCR in New York did not verify that there were no staff members on fixed-term and/or temporary appointments undertaking similar functions to those of the Applicant's position (which was to be abolished) and whose contract discontinuation would have ensured position(s) for the Applicant and would have prevented the Applicant's separation;

b. During the comparative review process the Applicant, who held an indefinite appointment, was matched only against suitable available posts at the same level with her abolished post at the G-7 level, step 10, in New York, and she was not matched against all the lower available suitable posts in New York;

c. The Applicant was not considered and retained for any of the available suitable posts on a non-competitive basis, but she had to apply for such posts. Further, she was among two candidates considered for a GS-5 level post within LONY, but instead of being preferred and retained for this available post on a non-competitive base, the Applicant was subject to a full [...] competitive selection process and the selected candidate was a staff member with a fixed-term appointment, instead of the Applicant (who was owed a mandatory preference in accordance with staff rule 9.6 (e) (i)). Further the Applicant was not considered on a non-competitive base for the other 17 vacant positions in the parent organization that she applied for;

d. There is no evidence that any UNHCR staff members holding indefinite appointments at the GS-7 level were affected by the restructuring process and therefore were to be considered for available posts before or simultaneously with the Applicant;

e. The complete list of available suitable post(s) was not timely provided to her and there was no formal offer issued by the Administration before, during or even after the comparative review to retain the Applicant by assigning her to one of the available suitable positions in General Service, either occupied by non-permanent staff members or vacant (at the same level or lower) in LONY or at the Professional level either occupied by non-permanent staff members or vacant (at the same level or lower) in the parent organization, according with the mandatory order of preference established by staff rule 9.6(e)(i).

5. The UNDT noted that since Ms. Timothy had passed the G to P exam, the Administration had the obligation to retain her, not only on any available suitable posts at the G-7 level or at a lower level available in UNHCR in New York, but also on any available suitable posts at her professional level in the entire parent organization, both at the Headquarters and in the field, including New York. The termination decision was therefore also unlawful because Ms. Timothy

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<sup>2</sup> *Ibid.*, para. 71.



was not retained on any suitable available posts at her Professional grade level or lower within the parent organization, including but not limited to the New York office.

6. The UNDT granted the following relief:<sup>3</sup>

b. The contested decision is rescinded and the Respondent is to retain the Applicant with retroactive effect from 31 December 2016 in any current suitable available post(s): (a) occupied by a non-permanent/non-indefinite staff member, or vacant either at the General Service level (at the GS-7 level or lower) at UNHCR in New York (her duty station), as identified in the job family(s) and/or job network(s) to which the Applicant belonged prior to the abolition of her post, if applicable to UNHCR; *or* (b) occupied by a non-permanent/non-indefinite staff member, or vacant either at [...] her Professional ("P") level or lower in the parent Organization (UNHCR), as identified in the job family(s) and/or job network(s) to which the Applicant belonged prior to the abolition of her post, if applicable to UNHCR;

c. In case the issuance of the decision to retroactively retain the Applicant from 31 December 2016 will no longer [be] possible within the deadline established by the Tribunal due to unforeseen circumstances, which are to be fully disclosed to the Applicant, pursuant to art. 10.5 (a) of the Statute, as an alternative to the rescission of the decision and to the specific performance ordered by the Tribunal, the Respondent may elect to pay to the Applicant a compensation of 12 months[] net-base salary. In addition, the Applicant shall receive compensation in the amount equal to the contributions (hers and that of the Organization) that would have been paid to the United Nations Joint Staff Pension Fund for this period;

d. The Respondent is to pay the Applicant a compensation of three months of net base salary as moral damages;

e. The awards of compensation shall bear interest at the U.S. Prime Rate with effect from the date this judgment is executable until payment of said awards. An additional five per cent shall be applied to the U.S. Prime Rate 60 days from the date this judgment becomes executable.

7. The UNDT based its award of moral damages on the unlawful termination decision as well as the unlawful discontinuation of Ms. Timothy's indefinite appointment which was expected to continue until her retirement. The UNDT considered all factual elements together with the nature of the breach and concluded that harm was caused to Ms. Timothy's dignity and career potential.

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<sup>3</sup> *Ibid.*, para. 95.

## **Submissions**

### **The Secretary-General's Appeal**

8. Staff Rules 9.6 and 13.1 set out the process that must be undertaken when a staff member is to be separated from service as a consequence of abolition of post and reduction of staff. In considering the legal obligations established by these provisions, the Appeals Tribunal held that the framework involves a two-step process, namely: (i) the Administration must determine the availability of suitable posts; and (ii) if such suitable posts are available, the Administration shall engage in a comparative exercise to retain affected staff members in a prescribed order of preference, with staff holding permanent appointments afforded the highest level of priority, taking into account in all cases the staff members' relative competence, integrity and length of service. The UNDT therefore exceeded its competence and erred in law in finding that although no suitable posts were available in LONY against which Ms. Timothy could be compared, the decision to terminate her appointment was nonetheless unlawful.

9. The UNDT erred in law in holding that a staff member affected by abolition of post has a right to be retained against a position for which he or she is not fully competent. The Appeals Tribunal has consistently recognized the paramount importance of maintaining the highest standard of efficiency, competence and integrity in matters of selection and appointment of staff, including in cases where a staff member alleges that he or she was not given the priority consideration to which he or she was entitled. Priority consideration is not a promise or guarantee to be appointed or receive what one is considered a priority for. The analogous principle that a staff member must be "fully competent" to perform the core functions and responsibilities of a position has likewise been affirmed by the Appeals Tribunal.

10. Moreover, the "relative competence" referenced in Staff Rules 9.6 and 13.1 should not materially amend the requirement that a staff member must be "fully competent" to perform the core functions and responsibilities of a position to be considered suitable. Rather, the term "relative competence" is employed in this context with the objective of enabling the Organization to retain the most qualified staff within the prescribed order of preference. Where two staff members are similarly situated, e.g. two staff members holding permanent appointments whose posts have been abolished, and where only one suitable position is available, the Administration must compare the competencies of the two staff members in order to determine which staff member should be retained.

Such understanding is consistent with Article 101 of the United Nations Charter, the plain meaning of the word “relative” and the Appeals Tribunal’s jurisprudence.

11. The UNDT exceeded its competence and erred in law by holding that a permanent staff member affected by abolition of post has a right to be retained against a position encumbered by a staff member on a fixed-term or other category of appointment. According to the UNDT’s reasoning, the Administration would be obliged to terminate the appointment of a staff member on a fixed-term appointment to accommodate the placement in that position of a staff member with a continuing or permanent appointment. However, the legal framework does not allow for the termination of a staff member’s fixed-term appointment on this basis and the UNDT has no authority to create a new basis for termination of such appointments. Moreover, an “available” post for purposes of Staff Rules 9.6 and 13.1 has been recognized by the Appeals Tribunal as being a post which is vacant or soon to become vacant, e.g. by way of an anticipated retirement.

12. The UNDT exceeded its competence and erred in law by holding that the UNHCR Administration was required to consider the availability of all lower level posts in both the general services and professional categories at headquarters and in the field. Pursuant to Staff Rule 9.6(f) as mirrored in Staff Rule 13.1, the Administration’s obligation under Staff Rule 9.6(e) to find alternative employment for a staff member in the General Service category whose post has been abolished shall be deemed to have been satisfied, if such staff member has received consideration for suitable posts within his or her parent organization at his or her duty stations. Under the UNHCR Comparative Review Policy, “suitable positions” are posts at the staff member’s duty station, at the staff member’s grade level and within the same functional group. In accordance with the Appeals Tribunal’s jurisprudence, the Administration is not required to compare a staff member affected by abolition of post against posts outside of the category of his or her position then held. Finally, the fact that Ms. Timothy may have passed the professional level exam is immaterial in that it was uncontroverted that the post that was abolished and was then encumbered by Ms. Timothy was in the General Service category.

13. The UNDT erred in holding that a staff member affected by abolition of post has a right to be considered for a position for which the staff member did not apply. This holding is in direct contradiction to the established jurisprudence which establishes that affected permanent staff members are expected to fully cooperate in the process and when requested by the Administration to apply for positions and make a good faith effort in order for their applications to succeed.

14. The UNHCR Administration fully complied with its obligations as set forth in the Staff Rules before a final administrative decision was taken to terminate Ms. Timothy's appointment. On 25 August 2016, the UNHCR Assignments Committee met in accordance with the requirements in the UNHCR Comparative Review Policy. The Assignments Committee made note in the minutes from that meeting that there were no available suitable positions against which Ms. Timothy could have been compared. Moreover, UNHCR sent letters to twelve United Nations agencies in New York asking that each consider Ms. Timothy for employment. UNHCR was not required to undertake such steps, but did so in a good faith effort to accommodate Ms. Timothy.

15. The UNDT's award of damages is unsupported by evidence and amounts to an unlawful award of exemplary or punitive damages. The UNDT erred in finding that Ms. Timothy's rights were violated and thus, the UNDT further erred in awarding compensation on that basis. Should the Appeals Tribunal find that the Administration did not meet its legal obligations, it should nevertheless find that the UNDT erred in law and procedure in awarding Ms. Timothy compensation for moral damages without the requisite evidence of harm, in direct contravention to the statutory requirements set forth in Articles 10(5)(b) and 10(7) of the UNDT Statute as well as the established jurisprudence. The UNDT erred in law by holding that the determination that Ms. Timothy's due process right had been violated automatically entitled her to compensation and failed to consider the Appeals Tribunal's case law requiring a causal link between a procedural irregularity and the resulting demonstrated harm to a staff member as a condition for imposing liability on the Administration.

16. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment except for the finding that the decision to abolish Ms. Timothy's post was lawful.

### **Ms. Timothy's Answer**

17. The Secretary-General failed to demonstrate that the UNDT erred in its determination that the Administration failed in its obligation to make a good faith effort to find Ms. Timothy a suitable alternative position upon the abolition of the post she encumbered, pursuant to Staff Rules 9.6(e) and 13.1, as well as the jurisprudence of the Tribunals.

18. The UNDT correctly held that Ms. Timothy should have been matched against lower level posts in New York. Staff Rule 9.6(e) does not limit the consideration in process of retention to posts at the current grade. As a result, any unilateral policy adopted by UNHCR must neither

conflict with, nor place limits upon, the intention of Staff Rule 9.6(e) and its corresponding jurisprudence, which requires that the Administration place these staff members on lower level posts when suitable. Any policies unilaterally issued by UNHCR must comply with the Staff Rules.

19. Staff Rules 9.6(e) and 13.1(d) are absolute and cannot be modified or interpreted to limit Ms. Timothy's rights as an indefinite appointment holder. The UNDT therefore correctly held that Staff Rule 9.6(e)(i) did not include any express reference for the staff member to be retained in the order of preference exclusively to available posts at the same level as the one occupied at the date of abolition of the post and therefore considered that the text was to be interpreted as referring to all available suitable posts, at the same level and/or inferior level which must be taken into consideration for the legal mandate to be respected.

20. Regarding Ms. Timothy's suitability for two posts in LONY that Ms. Timothy had applied for, it should be noted that both of them had very similar duties and responsibilities as the GS-7 Senior Administrative Associate positions which she had been encumbering. Any questions about her suitability should have been overcome by the fact that for both posts she was deemed a finalist. The Administration should have placed Ms. Timothy in either of the vacant posts in LONY for which she had the relevant skills and competencies without the need for a competitive process, in accordance with Staff Rule 9.6(e) and its relevant jurisprudence.

21. Under Staff Rule 13.1 and in accordance with the Appeals Tribunal's jurisprudence, permanent staff on abolished posts, if suitable for vacant posts, should be compared against only other permanent staff and it would constitute a material irregularity to place them in the same pool as holders of posts with a lower level of protection. It is clear from the record that the Administration failed to consider Ms. Timothy on a preferred or non-competitive basis for the GS-5 Senior Administrative/Finance Assistant post. As she was shortlisted and deemed suitable by meeting the competencies for the position, her candidature should have been seriously considered and accepted. Instead, after unnecessarily commencing a competitive recruitment process and declaring Ms. Timothy a finalist, UNHCR proceeded to select a fixed-term appointment holder for the position, in violation of the Administration's obligations under Staff Rule 9.6(e) and the relevant jurisprudence.

22. Turning to the GS-5 Senior External Relations Assistant post, where both of the candidates were holders of indefinite appointments, the Administration was obliged, at the minimum, to have selected the higher scoring candidate from the written examination, instead of choosing neither of

them and re-advertising the post. By not selecting Ms. Timothy and re-advertising the post, UNHCR failed to take any reasonable steps to place her in this suitable alternative post.

23. Ms. Timothy asks that the Appeals Tribunal reject the appeal in its entirety.

### Considerations

#### *Termination*

24. The issue to be determined in this appeal is whether the UNDT erred in ruling that the termination of Ms. Timothy's indefinite appointment, effective 31 December 2016, was unlawful because she did not receive proper consideration as an indefinite appointee, and that the Administration committed material irregularities and failed to act fully in compliance with the relevant legal provisions.

25. The Administration has broad discretion to reorganize its operations and departments to meet changing needs and economic realities.<sup>4</sup> According to the Appeals Tribunal's well-settled jurisprudence, "an international organization necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff".<sup>5</sup> This Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff.<sup>6</sup> Even in a restructuring exercise, like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members.<sup>7</sup> In the present case, however, Ms. Timothy does not question that the discontinuation of the position she encumbered, as the result of a comprehensive review of the LONY structure and the decision to change a number of positions, was genuine and not improperly directed at her.

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<sup>4</sup> *Smith v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-768, para. 26; *Fasanella v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-765, para. 23; *Masri v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-626, para. 30.

<sup>5</sup> *Fasanella v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-765, para. 23, citing *Matadi et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-592, para. 16, citing, in turn, *Bali v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-450, para. 21 and citation therein.

<sup>6</sup> *Fasanella v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-765, para. 23.

<sup>7</sup> *Ibid.*, citing *Matadi et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-592, para. 16, citing, in turn, *Hersh v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-433/Corr.1, para. 17.

26. The Administration may terminate the appointment of a staff member on a number of grounds, including abolition of posts or reduction of staff (Staff Rule 9.6(c)(i)). In such cases, the Organization must follow the requirements set out in the Staff Regulations and Rules.

27. Staff Rules 9.6(e) and (f) read as follows:

**Termination for abolition of posts and reduction of staff**

(e) Except as otherwise expressly provided in paragraph (f) below and staff rule 13.1, if the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post or the reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in the following order of preference:

- (i) Staff members holding continuing appointments;
- (ii) Staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment;
- (iii) Staff members holding fixed-term appointments.

When the suitable posts available are subject to the principle of geographical distribution, due regard shall also be given to nationality in the case of staff members with less than five years of service and in the case of staff members who have changed their nationality within the preceding five years.

(f) The provisions of paragraph (e) above insofar as they relate to staff members in the General Service and related categories shall be deemed to have been satisfied if such staff members have received consideration for suitable posts available within their parent organization at their duty stations.

28. Staff Rule 13.2 provides as follows:

**Rule 13.2 Indefinite appointment**

(a) A staff member holding an indefinite appointment as at 30 June 2009 shall retain the appointment until he or she separates from the Organization. Effective 1 July 2009, the staff member's indefinite appointment shall be governed by the terms and conditions applicable to continuing appointments under the Staff Regulations and the Staff Rules, except as provided under the present rule.

(b) Staff members holding an indefinite appointment may resign by giving 30 days' written notice.

(c) The Secretary-General may at any time terminate the appointment of a staff member who holds an indefinite appointment if in his or her opinion such action would be in the interest of the United Nations. Staff regulation 9.3 (b) and staff rule 9.6 (d) do not apply to indefinite appointments.

29. The Comparative Review Policy sets out the “principles and procedures” to be followed by UNHCR in cases of anticipated termination of appointments for abolition of posts and reduction of staff for staff members in the General Service and National Officer categories pursuant to Staff Rule 9.6(e) and (f). It reads in relevant parts:<sup>8</sup>

2. As UNHCR is an organization which frequently needs to adjust its structure and presence both in the field and at Headquarters, based on the operational requirements, post discontinuations are an unavoidable occurrence. Staff members whose posts are discontinued will not automatically be separated. Where staff remain without a position following a staffing review and the most recent Assignments Committee (AC) posting session, the Deputy High Commissioner (for Headquarters in Geneva) or Representative/Head of Office (outside Geneva) will decide whether a comparative review needs to take place.
3. A comparative review will, in principle, cover one duty station rather than all duty stations in one country. Regional Hubs and out-posted Headquarters units will neither be combined with any regular UNHCR office at that duty station, nor with headquarters, for the purposes of a comparative review. The authority to approve a comparative review beyond one duty station in the Field rests with both the relevant Director and the Director of DHRM. In exceptional circumstances, where there is agreement between the Representative and/or the Heads of Offices in one country, both the relevant Director and the Director of DHRM may approve one joint comparative review to be conducted for all relevant positions in the country.

#### **Comparative Review Principles**

4. Prior to undertaking a comparative review, the concerned office should verify that there are no staff members on temporary appointments or affiliate workforce undertaking similar functions to those of the discontinued position(s) and whose contract discontinuation would mitigate the need for a comparative review.
5. A comparative review process is the means by which staff members encumbering positions which are to be abolished, and who hold indefinite or fixed-term appointments not expiring on or before the effective date of the abolition of the relevant position, will be matched against suitable posts according to a set of criteria relating to the staff members’ suitability for such posts. The “suitable posts” are interpreted, for the purpose of the comparative review, as posts at the staff member’s duty station and at the staff member’s grade level and within the same functional group as per the

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<sup>8</sup> Internal footnotes omitted.



position title (Annex I lists the different functional groups and for the purposes of this policy, groupings under Level Three shall apply). In the absence of suitable positions against which a comparative review may take place, upon confirmation by the Assignments Committee (AC), the incumbent of the abolished position will be separated as per applicable procedures.

30. The purpose of Staff Rule 9.6(e) is to mitigate the effects of retrenchment on staff members holding non-temporary appointments, insofar as suitable posts are available “in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service”.<sup>9</sup>

31. Staff Rule 9.6(e) specifically sets forth a policy of preference for retaining a staff member with a continuing appointment who is faced with the abolition of a post or reduction of staff,<sup>10</sup> and creates an obligation on the Administration to make reasonable efforts to find suitable placements for the redundant staff members whose posts have been abolished.<sup>11</sup> As such, a decision to abolish a post triggers the mechanism and procedures intended to protect the rights of a staff member holding a continuing post, under the Staff Rules and the Comparative Review Policy, to proper, reasonable and good faith efforts to find an alternative post for him or her who would otherwise be without a job. Failure to accord to the displaced staff members the rights conferred under the said provisions will constitute a material irregularity.

32. Therefore, the Administration is bound to demonstrate that all reasonable efforts have been made to consider the staff member concerned for available suitable posts. Where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given.<sup>12</sup>

33. Staff Rule 9.6 expressly states that in all cases due regard must be given to relative competence, integrity and length of service. Thus, skills and length of service are paramount criteria in any contemplated selection for retrenchment. However, the Staff Rule sensibly provides that the selection criteria are subject to the qualification that suitable posts be available. In other

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<sup>9</sup> *El-Kholy v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-730, para. 24.

<sup>10</sup> *Comp. Fasanella v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-765, para. 24.

<sup>11</sup> *El-Kholy v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-730, paras. 25 and 31.

<sup>12</sup> *Ibid.*, para. 31. See also *Haimour and Al Mohammad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-688, paras. 23 and 24.

words, the criteria of skills retention and favouring staff members holding continuing appointments can only be implemented, if there are suitable posts available that permit UNHCR to achieve its policy.

34. The Comparative Review Policy gives effect to Staff Rule 9.6 and effectively and consciously embodies the preferred policy of the Rule.<sup>13</sup> Paragraph 5 of the Comparative Review Policy contemplates a process by which staff members holding indefinite and fixed-term appointments are matched against suitable posts - defined in the paragraph to mean posts at the same duty station, at the same grade level and within the same functional group as per the position title. If there are no vacant suitable posts, the staff member whose post has been abolished will be separated.

35. Nevertheless, while efforts to find a suitable post for the displaced staff member rest with the Administration, the person concerned is required to cooperate fully in these efforts.<sup>14</sup> Any staff member holding an indefinite appointment facing termination due to abolition of his or her 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 the staff member with a position that would not be accepted.<sup>15</sup>

36. In the present case, the Secretary-General submits that the UNDT's finding that a staff member affected by abolition of post has a right to be retained against a position for which he or she is not fully competent constitutes an error of law.

37. In this regard, the UNDT opined:<sup>16</sup>

... The Tribunal considers that a staff member who is to be retained in the order of preference established in staff rule 9.6(e) is not required, according to this provision, to be fully competent for the alternative post where s/he is to [be] retained, but to have a *relative* competence for the new suitable post, as clearly specified in staff rule 9.6. A staff member holding a continuous/indefinite appointment is to be presumed that s/he has at least a relative competence for any similar or inferior positions available [in the job family(s) and/or job network(s) to which the one(s) occupied prior the abolition of her/his post

<sup>13</sup> *De Aguirre v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-705, paras. 35 to 37.

<sup>14</sup> *Haimour and Al Mohammad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-688, para. 25; *Smith v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-768, para. 30.

<sup>15</sup> *Fasanella v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-765, para. 31.

<sup>16</sup> Impugned Judgment, para. 59 (original emphasis).

belonged (if applicable)], competence which can be later completed during a reasonable period through training[/]retraining courses, if necessary.

38. We do not share the view of the first instance Judge. Undoubtedly, the Administration is required by Staff Rule 9.6(e) to consider the indefinite position holder on a preferred basis for the available suitable position, in an effort to retain him or her in service. However, this requires, as per the clear language of this provision, determining the suitability of the staff member for the post, considering the staff member's competence, integrity and length of service, as well as other factors such as nationality and gender.<sup>17</sup> If the redundant staff member is not fully competent to perform the core functions and responsibilities of a position, the Administration has no duty to consider him or her for this position.

39. Therefore, the UNDT erred on a question of law by finding that it suffices, in order for the staff member to be retained in service, pursuant to Staff Rule 9.6(e), to have a relative competence for the new suitable post and the staff member is not required to be fully competent for the alternative post where he/she is to be retained. Besides, to hold otherwise would compromise the highest standards of efficiency, competency, and integrity required in selecting the best candidate for staff positions under Article 101 of the United Nations Charter,<sup>18</sup> which are of paramount importance for the Organization.

40. Further, the Secretary-General submits that the UNDT exceeded its competence and erred in law by finding that an indefinite appointment holder affected by abolition of post has a right to be retained against a position encumbered by a staff member on a fixed-term or other category of appointment.

41. On this issue, the UNDT relevantly found as follows:<sup>19</sup>

... Furthermore[,] a staff member holding a continuing/indefinite appointment has the highest level of legal protection from being terminated. S/he has the right to be retained either in any suitable positions vacant at the date of abolition or reduction of staff, or in any suitable positions occupied at the date of abolition, or reduction of staff, by staff members recruited through competitive examination for a career appointment serving on a two[-]year fixed-term appointment, by staff members holding fixed-term appointments and by staff members with temporary appointments.

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<sup>17</sup> *Smith v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-768, paras. 33 and 34; *Fasanella v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-765, para. 32.

<sup>18</sup> *Megerditchian v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-088, para. 28.

<sup>19</sup> Impugned Judgment, paras. 60 to 62.

... Staff member(s) recruited through competitive examination for a career appointment serving on a two[-] year fixed-term appointment have a lower level of protection than the staff members with continuing/indefinite appointments, and s/he has the right to be retained in any suitable positions vacant at the date of abolition or reduction of staff, or any suitable positions occupied at the date of abolition or reduction of staff, by staff members holding fixed-term appointments and temporary appointments.

... Staff members holding fixed-term appointments have the right to be retained in any suitable positions vacant at the date of abolition or reduction of staff, or occupied at the date of abolition or reduction of staff by staff members with temporary appointments.

42. The Appeals Tribunal finds that the UNDT's conclusions that the redundant staff members who enjoy a higher level of legal protection from being terminated have the right to be retained either in any suitable positions vacant at the date of abolition or reduction of staff, or in any suitable positions occupied at the date of abolition, or reduction of staff, by staff members having a lesser level of protection in this regard, are legally not correct. As correctly contended by the Secretary-General, under the legal framework envisaged by Staff Rules 9.6(e) and (f) and the Comparative Review Policy, the Administration is bound to consider the redundant staff members only for suitable posts that are vacant or likely to become vacant in the future<sup>20</sup> and to assign the affected staff members holding continuing or indefinite appointments on a preferred basis in the order of preference prescribed in Staff Rule 9.6(e).

43. In the course of its Judgment, the UNDT held that:<sup>21</sup>

... Further, the Tribunal underlines that staff member(s) affected by abolition of post or reduction of staff has the right to be considered and retained for any of the available suitable positions as detailed above on a preferred or non-competitive basis in the mandatory order established by staff rule 9.6 (e). Therefore, the staff member(s) is entitled to be retained without having to go through a competitive selection process for the available suitable post(s), including without applying for vacant job opening(s) since such a step represents the beginning of any competitive selection process based on the staff member(s) relative competence, integrity, length in service and where required to (...) his/her nationality and gender.

... The Tribunal considers that a competitive review process may be justified only when two or more identical posts are to be restructured and because there are no sufficient similar available suitable posts for all staff members at the same level affected by the abolition and at least two of them insist to be retained on the same post. In this case, it may be necessary to give due regard to the staff members['] relative competencies for new posts,

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<sup>20</sup> See *El-Kholy v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-730, para. 29.

<sup>21</sup> Impugned Judgment, paras. 64 and 65.

integrity and length in service and therefore to compare them in order to decide who is to be retained in the highest position(s) available.

44. The Secretary-General submits that the UNDT's holding that a staff member affected by abolition of post has a right to be considered for a position for which he or she did not apply, is in direct contradiction to the established jurisprudence and constitutes a reversible error of law.

45. We agree with the Secretary-General that it is lawful and reasonable for the Administration to expect affected indefinite appointment holders to cooperate fully in the process. As already mentioned, a staff member holding a continuing or indefinite appointment facing termination due to abolition of his or her post must show an interest in a new position by timely and completely applying for the position. So, if the Administration informs the affected staff members that they are expected to apply for suitable available positions, they are obliged to fully cooperate and make a good faith effort in order for their applications to succeed. This includes a duty to apply within the deadlines and to respect the formal requirements.<sup>22</sup>

46. Based on these considerations, we find erroneous the UNDT's holding that staff members are entitled to be retained without having to apply for vacant job opening(s) since such a step represents the beginning of any competitive selection process based on the staff members' relative competence, integrity, length in service and where required, nationality and gender.

47. Once the application process is completed, however, the Administration is required by Staff Rule 9.6(e) and (f) and the Comparative Review Policy to consider the continuing or indefinite appointment holder on a preferred or non-competitive basis for the position, in an effort to retain him or her.<sup>23</sup> This requires determining the suitability of the staff member for the post, considering the staff member's competence, integrity and length of service, as well as other factors such as nationality and gender.

48. In his appeal, the Secretary-General contends further that the UNDT exceeded its competence and erred in law by holding that the UNHCR Administration was required to consider the availability of all lower level posts in both the general services and professional categories at headquarters and in the field.

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<sup>22</sup> *Smith v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-768, para. 30.

<sup>23</sup> *Comp. Fasanella v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-765, para. 32.

49. Specifically, the Secretary-General argues that the UNDT exceeded its competence and erred in law by improperly expanding the scope of the Administration's obligation to identify an available position against which Ms. Timothy could have been considered for retention. The UNDT held that Ms. Timothy should have been matched, not only against posts within the same category and grade as the post that the Appellee had been encumbering prior to its abolition, but "against all the lower available posts in New York".<sup>24</sup> Moreover, the UNDT held that, based on Ms. Timothy's assertion that prior to her separation "she [had] passed the exam for the Professional level",<sup>25</sup> the G-to-P exam, the Administration had an obligation to identify "available suitable posts at [Ms. Timothy's] professional ("P") level in the entire parent organization, both at Headquarters and in the field".<sup>26</sup>

50. In considering the provisions of Staff Rule 9.6(e) the UNDT ruled that they refer to all staff members, internationally or locally recruited, since the text makes no specific reference to any of these categories.<sup>27</sup>

51. The UNDT went on to conclude that the interpretation given by UNHCR in the provisions included in the Comparative Review Policy for Locally Recruited Staff Members, according to which the "suitable posts' are interpreted, for the purpose of the comparative review, as posts at the staff member's duty station and at the staff member's grade level and within the same functional group as per the position title",<sup>28</sup> "is therefore incorrect and unlawful"<sup>29</sup>. The UNDT based its conclusion on the fact that the Comparative Review Policy for Locally Recruited Staff Members, though inferior to the Staff Rules in the normative hierarchy, unduly limited the scope and the area of application of Staff Rule 9.6(e) only to the available suitable posts at the staff members' duty station and only at the same level with the abolished post.<sup>30</sup>

52. Consequently, the UNDT found that the decision to separate Ms. Timothy as a result of abolition of her G-7 post was unlawful, *inter alia*, because during the comparative review process she, who held an indefinite appointment, was matched only against suitable available posts at the

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<sup>24</sup> Impugned Judgment, para. 71 a.

<sup>25</sup> *Ibid.*, para. 77.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*, para. 66.

<sup>28</sup> Comparative Review Policy, para. 5.

<sup>29</sup> Impugned Judgment, para. 70.

<sup>30</sup> *Ibid.*, paras. 67 to 70.

same level with her abolished G-7 post, in New York, and she was not matched against all the lower available suitable posts in New York.<sup>31</sup>

53. The starting point in interpreting the provisions of Staff Rule 9.6(e) and the Comparative Review Policy are the principles of interpretation set out by the Appeals Tribunal in the case of *Scott*:<sup>32</sup>

The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author.

54. The interpretation of a rule is made within the context of the hierarchy in which the rule appears.<sup>33</sup> A staff member's appointment is subject to the Staff Regulations and Rules, and also incorporates the relevant administrative issuances issued by the Organization. In general terms, administrative issuances set out instructions and procedures for the implementation of the Staff Regulations and Rules. Just as a Staff Rule may not conflict with the Staff Regulation under which it is made, an administrative issuance may not conflict with the applicable Staff Regulation or Rule which it implements. Finally, in interpreting the terms of a staff member's appointment, we may also draw upon general principles of law insofar as they apply to the international civil service.<sup>34</sup>

55. As we have noted above, the aim of the Comparative Review Policy was to set out the principles and procedures to be followed by UNHCR in order to satisfy its obligations under Staff Rule 9.6(e) and (f). UNHCR's obligations under Staff Rule 9.6(e) towards staff members whose appointments are terminated due to abolition of posts or reduction of staff are subject to the "availability of suitable posts in which their services can be effectively utilized". For staff members

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<sup>31</sup> *Ibid.*, para. 71 b.

<sup>32</sup> *Scott v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-225, para. 28.

<sup>33</sup> *De Aguirre v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-705, para. 44, citing *Mashhour v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-483, para. 22.

<sup>34</sup> *De Aguirre v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-705, para. 44, citing *Assale v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-534, para. 34, in turn, citing *Hunt-Matthes v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-444/Corr.2, para. 26.

in the General Services and related categories, Staff Rule 9.6(f) states that the provisions of Staff Rule 9.6(e) are deemed to be satisfied if such staff members have received consideration for “suitable posts” available within their parent organization at their duty station.

56. It is true that the phrase “suitable posts” in Staff Rule 9.6(e) and (f) is not defined in the Staff Rules. The Appeals Tribunal has found that the provisions on classification of posts and staff under Chapter II of the Staff Regulations and Rules guide us in the interpretation of this phrase and that in order to give effect to the requirement in Staff Rule 9.6(e) and (f) regarding the “availability of suitable posts” in which the affected staff member’s services “can be effectively utilized”, the “suitable posts” must, at least, belong in the same category to that encumbered by the redundant staff member.<sup>35</sup>

57. However, with the exception of said mandatory requirements established by Staff Rule 9.6(e) and (f) and the jurisprudence of the Appeals Tribunal, i.e. that “suitable posts” be available within their parent organization at their duty station and belong in the same category to that encumbered by the redundant staff member, nothing in the language of Staff Rule 9.6(e) and (f) indicates that the (right and at the same time) obligation of the Administration to consider the redundant staff member for suitable posts, vacant or likely to be vacant in the future, is limited to the staff member’s grade level. On the contrary, by applying the general principle of interpretation *ubi lex non distinguit, nec nos distinguere debemus*, i.e. where the law does not distinguish, neither should we distinguish, the Administration is under an obligation to make proper, reasonable and good faith efforts to find an alternative post for the displaced staff member at his or her grade level or even at a lower grade, if, in the latter case, the staff member concerned has expressed an interest.

58. It follows from the above, that the specific provision of paragraph 5 of the Comparative Review Policy, which interprets the term “suitable posts”, for the purpose of the comparative review, as posts at the staff member’s duty station and at the staff member’s grade level and within the same functional group as per the position title, is, at this point, as correctly found by the UNDT, in conflict with the applicable Staff Rule 9.6(e) and (f) which it implements, on account of narrowing its scope of application, thereby not advancing its aforementioned purpose to mitigate the effects of the retrenchment. Thus, contrary to the Secretary-General’s contention, Ms. Timothy should have been considered not only for suitable available posts at the same level with her

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<sup>35</sup> *De Aguirre v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-705, paras. 47 and 54.



abolished G-7 post, in New York, but also for all the lower available suitable posts in New York, for which she had expressed her interest by way of application thereto.

59. However, the UNDT's finding that Ms. Timothy should have also been considered for available suitable posts covering the entire parent organization, including but not limited to her duty station (New York), because she had passed the exam for the Professional level,<sup>36</sup> is erroneous since the abolished post she was encumbering at the critical time fell into the General Services category (G-7 level) and not into the Professional category. Therefore, it is immaterial from this point of view whether or not she had passed the exam for the Professional level at some point.

60. Furthermore, in the present case, it results from the evidence on record that following the letter dated 11 January 2016, whereby the Director of LONY informed Ms. Timothy that "[a]s a result of a comprehensive review of the LONY structure, a number of positions are proposed for change", including the GS-7 level post then encumbered by her, Ms. Timothy applied for a number of different positions with UNHCR during the period from April 2016 through September 2016. In an annex to her application to the UNDT, Ms. Timothy submitted a table setting forth eighteen (18) UNHCR job vacancies to which she applied during this period, including positions at the FS-5, G-5, P-2, P-3 and P-4 levels. Of the eighteen positions to which she applied two belonged to the General Services category. Besides, Ms. Timothy was a finalist for both vacancies within LONY, one at the GS-5 level, the position of Senior Administrative and Finance Assistant in LONY - for which a fixed-term appointee was selected - and the other vacancy also at the GS-5 level, the External Relations Assistant post within LONY - for which she applied along with another indefinite appointment holder, but neither was selected and the post was re-advertised.

61. Under these circumstances, the UNDT rightly concluded that the decision to terminate Ms. Timothy as a result of the abolition of her G-7 post was, in this respect, unlawful, because during the comparative review process she, who held an indefinite appointment, was matched only against available suitable posts at the same level as her abolished G-7 post, in New York, and she was not considered and retained for any of the available lower level posts she had applied for on a non-competitive basis, despite being among two candidates considered for a GS-5 level post within LONY.<sup>37</sup>

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<sup>36</sup> Impugned Judgment, paras. 58 and 77.

<sup>37</sup> *Ibid.*, para. 71 b-c.

62. Indeed, we are satisfied that Ms. Timothy fully cooperated in the relevant process and diligently applied for 18 UNHCR job vacancies, including two within LONY, one at the GS-5 level, the position of Senior Administrative and Finance Assistant in LONY and the other one, also at the GS-5 level, the External Relations Assistant post within LONY. Nevertheless, once the application process had been completed, Ms. Timothy was not considered by the Administration, as required by Staff Rule 9.6(e) and (f) and the Comparative Review Policy - to the extent the latter has been determined earlier in this Judgment to be consistent with this Staff Rule - on a preferred or non-competitive basis for said positions, although she was short-listed and had been assessed qualified by meeting the competencies for them. Nor does the Administration argue that Ms. Timothy did not have the necessary qualifications for these posts.

63. Thus, contrary to the Secretary-General's contentions, we hold that the UNDT was correct in concluding that the Administration's decision to terminate Ms. Timothy was unlawful, since it did not fully comply with its obligations under Staff Rule 9.6(e) and (f) to make all reasonable and *bona fides* efforts to consider Ms. Timothy for available suitable posts, as an alternative to the abolished one. Therefore, the Secretary-General's appeal fails in this regard.

#### *Compensation*

64. The Secretary-General challenges the UNDT's award of three months' net base salary as compensation for moral damages. In particular, the Secretary-General avers that the UNDT erred by awarding compensation in the absence of any evidence of harm.

65. This Tribunal has held that while not every violation of due process rights will necessarily lead to an award of compensation, the staff member who has suffered damage, in the form of neglect and emotional stress, is entitled to be compensated. The award of compensation for non-pecuniary damage does not amount to an award of punitive or exemplary damages designed to punish the Organization and deter future wrongdoing.<sup>38</sup>

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<sup>38</sup> *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-787, para. 59; *Benfield-Laporte v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-505, para. 41, citing *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042, para. 33.

66. However, General Assembly resolution 69/203, adopted on 18 December 2014, amended Article 10 of the UNDT Statute. Article 10(5) of the UNDT Statute now states in relevant part:<sup>39</sup> “As part of its judgement, the Dispute Tribunal may only order one or both of the following: (...) (b) Compensation for harm, *supported by evidence*, which shall normally not exceed the equivalent of two years’ net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.”

67. In the instant case, the UNDT found that the moral damage (non-pecuniary damage) was caused to Ms. Timothy “as a result of the unlawful termination decision, which breached her right to be retained according to the mandatory provisions of [Staff Rule] 9.6(e)(i) and 9.6(f) and the harm caused to her by the unlawful discontinuation of her indefinite contract with UNHCR”.<sup>40</sup> Further, the UNDT held that “[s]ince the Applicant did not indicate that she suffered mental distress and/or anxiety, the Tribunal considers that all factual elements together with the nature of the breach constitute[...] sufficient evidence in the present case to conclude that harm was caused to the Applicant’s dignity and to her career potential”.<sup>41</sup>

68. We find that the UNDT erred in awarding compensation for moral damage when Ms. Timothy did not even state that she suffered mental distress or present any evidence, to prove that she suffered any kind of harm as a result of the procedural irregularities.

69. We find further that Ms. Timothy has not attained the threshold required for proof of harm to receive an award of compensation in accordance with the provisions of Article 10(5) of the UNDT Statute. Generally speaking, the testimony of an applicant alone without corroboration by independent evidence (expert or otherwise) affirming that non-pecuniary harm has indeed occurred is not satisfactory proof to support an award of damages.<sup>42</sup> As Ms. Timothy’s testimony was the only documented evidence to support the harm to her reputation and general well-being,

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<sup>39</sup> Emphasis added.

<sup>40</sup> Impugned Judgment, para. 93.

<sup>41</sup> *Ibid.*, para. 93.

<sup>42</sup> *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-787, para. 64; comp. *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742 where four Judges, and hence a majority, supported this view in two separate opinions: Concurring Opinion by Judge Sabine Knierim, para. 2, and Joint Partial Dissent by Judge Deborah Thomas-Felix, Judge Richard Lussick and Judge Rosalyn Chapman, para. 12.

the UNDT committed an error of law in stating that this alone was sufficient to sustain an award of compensation under Article 10(5)(b) of the UNDT Statute.

70. In view of the forgoing, we grant the Secretary-General's appeal in part.

**Judgment**

71. The appeal succeeds, in part. The UNDT Judgment is hereby modified and substituted as follows. The contested decision to terminate Ms. Timothy's indefinite appointment is rescinded. As an alternative to the rescission of said decision the Administration may elect to pay to Ms. Timothy a compensation of 12 months' net base salary. All other claims of Ms. Timothy before the UNDT are rejected.

Original and Authoritative Version: English

Dated this 29<sup>th</sup> day of June 2018 in New York, United States.

*(Signed)*

Judge Raikos, Presiding

*(Signed)*

Judge Murphy

*(Signed)*

Judge Knierim

Entered in the Register on this 10<sup>th</sup> day of August 2018 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar