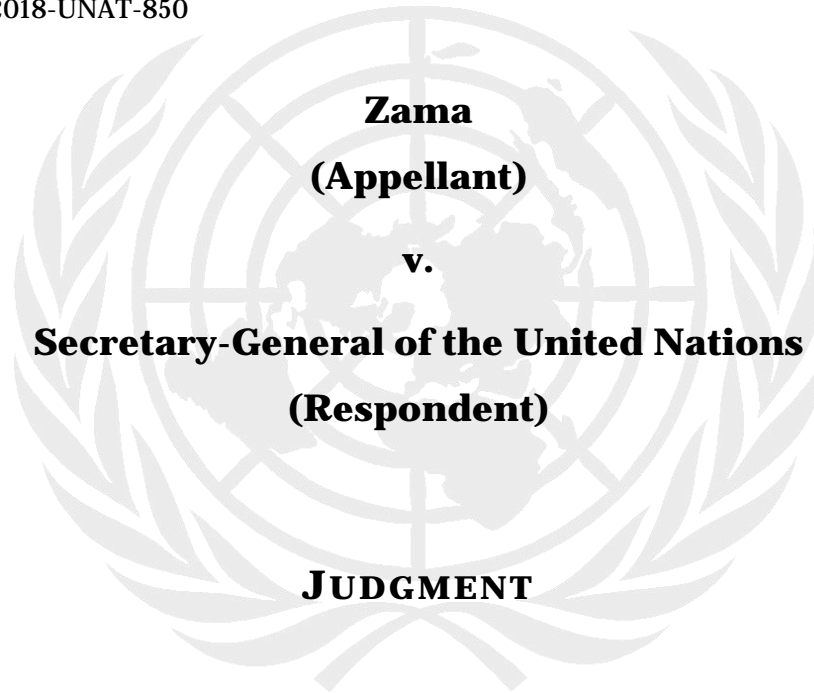




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-850



Zama

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge Dimitrios Raikos Judge Martha Halfeld
Case No.:	2018-1138
Date:	29 June 2018
Registrar:	Weicheng Lin

Counsel for Mr. Zama: Sètondji Roland Adjovi

Counsel for Secretary-General: Wambui Mwangi

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/084, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 31 October 2017, in the case of *Zama v. Secretary-General of the United Nations*. Mr. Fidelis Chi Zama filed the appeal on 8 January 2018, and the Secretary-General filed his answer on 19 March 2018.

Facts and Procedure

2. Mr. Zama began his service with the United Nations Population Fund (UNFPA) on 24 December 1979 and in 1996, he was granted a permanent appointment. On 22 October 2009, Mr. Zama was assigned as the Country Representative of UNFPA in Kenya. This posting was at the D-1 level, and he held the position in Kenya until he was posted to UNFPA's Sub-Regional office in Johannesburg, South Africa, on 5 April 2012 as the Technical Adviser on Population and Development.

3. In early March 2011, a shortage of condoms was raised as a public health concern in Marsabit County, Kenya. UNFPA, with its partner Kenya Red Cross, arranged to have condoms delivered to Isiolo to alleviate the concerns that were raised. For his part, Mr. Zama wrote to UNFPA's Director of the Africa Regional Office, Mr. Makinwa, and informed him of the temporary measure that was adopted by UNFPA Kenya to address the concerns in Marsabit. Mr. Zama was commended for his role and thereafter Mr. Makinwa constituted and dispatched a fact-finding team to investigate the condom shortage issue. The fact-finding team never disclosed the report of its findings to Mr. Zama.

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

5. On 6 January 2012, Mr. Makinwa wrote to Mr. Zama with concerns about the latter's capacity and competence to manage the condom issue and to manage an important office like the Kenya Country Office. Mr. Zama responded on 13 January 2012, and raised, among other issues, the conduct and reporting methods of the fact-finding team. He complained that the said fact-finding team did not give him a draft of its report for his comments; neither was a

copy of the final report shown to him. On 16 January 2012, Mr. Zama provided Mr. Makinwa with a detailed response to Mr. Makinwa's letter of 6 January 2012.

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

7. On 29 March 2012, before his performance appraisal was finalised and while matters raised in the appraisal were still being disputed, Mr. Zama was contacted by UNFPA's Chief of Recruitment, Ms. Serina Choo. Ms. Choo informed Mr. Zama that senior management had decided to reassign him before the end of his four-year tenure as Country Representative. She told Mr. Zama that in the alternative, he could opt to take an early retirement package of USD 150,000. Mr. Zama refused the early retirement package offer.

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

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

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

11. On 24 October 2013, the UNFPA Representative for the East and South African Regional Office (ESARO), Dr. Onabanjo, informed all ESARO staff members of a restructuring exercise that was about to commence at the two UNFPA Regional Offices in Africa. The e-mail from Dr. Onabanjo contained information pertaining to the restructuring process which entailed a job-matching exercise and a job fair. Staff members were also apprised of separation packages that they could apply for. By mid-November 2013, staff members were informed of the timelines for the job-matching exercise.

12. On 18 November 2013, Mr. Zama spoke to the Director of the Division of Human Resources (DHR), Mr. Michael Emery. The latter suggested that Mr. Zama consider a separation package as part of the restructuring exercise, which Mr. Zama declined. The DHR

then wrote to Mr. Zama and invited him to participate in the job matching exercise. Mr. Zama was particularly asked to consider three positions, which had been previously discussed with him.

13. The job-matching exercise for professional staff closed on 25 November 2013. Mr. Zama did not participate in the said job-matching exercise. The results of the job-matching exercise were communicated to the Executive Director of UNFPA on 4 December 2013 by memorandum. The said memorandum also stated that Mr. Zama refused to participate in the exercise.

14. Thereafter, the abolition of the Technical Adviser post which Mr. Zama had encumbered since his reassignment to the Sub-Regional office in Johannesburg was approved on 7 January 2014. On 15 January 2014, the DHR informed Mr. Zama that his post had been abolished. Mr. Zama was invited to use the six-month lead time to apply and compete for suitable vacancies within UNFPA. Mr. Zama's post was formally terminated by the UNFPA Executive Director on 4 March 2014.

15. On 21 April 2014, Mr. Zama received a letter indicating that his permanent appointment was to be terminated as of 31 July 2014. On 18 June 2014, Mr. Zama sought management evaluation of the decision to terminate his permanent appointment. Efforts to settle the dispute between the parties took place between July and November 2014. Throughout the mediation discussions, Mr. Zama was assisted by the Office of Staff Legal Assistance (OSLA). The Ombudsman closed the matter on 19 November 2014 after settlement discussions failed.

16. On 13 March 2015, Mr. Zama filed an application before the UNDT challenging UNFPA's decision to terminate his appointment.

17. On 31 October 2017, the UNDT issued its Judgment rejecting Mr. Zama's application. In reaching this outcome, the UNDT found that Mr. Zama's reassignment from his post as country representative in Kenya to the Sub-Regional office in Johannesburg was done before the contentious performance appraisal, which blamed him for UNFPA's embarrassment surrounding a condom shortage in Kenya. In addition, the UNDT concluded that the reassignment was based on UNFPA's condom crisis for which UNFPA blamed Mr. Zama. While the lawfulness of the reassignment was not the contested decision in issue, the UNDT

reviewed this for impact to the lawfulness of the abolition of post, which was the contested administrative decision.

18. With regard to the abolition of post, the UNDT found that the evidence did not establish a nexus between Mr. Zama's reassignment and the abolition of his post or termination that followed, and that the decision to abolish the post was duly authorized by the UNFPA Executive Director.

19. With regard to Mr. Zama's rights to be retained following the abolishment of his post on account of having a permanent contract, the UNDT found that Mr. Zama refused or neglected to apply for any available posts although there were at least three available P-5 positions that matched Mr. Zama's qualifications. The UNDT found the testimony of Mr. Bernasconi, a UNFPA human resources specialist at the relevant time, to be credible with regard to his testimony that he had encouraged Mr. Zama to apply to the available P-5 posts and informed Mr. Zama that, if selected, he would be paid at the D-1 level. The UNDT analysed the applicable law, namely, Staff Rule 9.6(e) and Staff Rule 13.1(d), and the UNFPA Personnel Policies and Procedures Manual (PPPM), and concluded that in the absence of Mr. Zama taking any first steps to show interest and discharge his good faith obligations to cooperate with UNFPA in seeking new placement for himself, UNFPA did not have a duty to do anything more to consider him for placement in another post. In light of the above, the UNDT rejected Mr. Zama's request for rescission, compensation, and legal costs.

Submissions

Mr. Zama's Appeal

20. Mr. Zama contends that the UNDT erred in fact and law. First, Mr. Zama argues that while the UNDT properly considered that he was reassigned because management faulted him for the condom crisis, the UNDT failed to draw the necessary negative inference from these established facts, which was that his dismissal was ill motivated.

21. Second, Mr. Zama argues that the UNDT erred in stating that he wrongfully sent a request for management evaluation to UNFPA through the Secretariat, whereas Mr. Zama deliberately, with the support of OSLA, sent the request to the Secretariat since UNFPA did not have an evaluation procedure or unit in place at the time (2012). The UNDT, thus, should have asked why UNFPA did not take any action despite the referral by the Office of the

Under-Secretary-General and, from this, should have drawn a negative inference against UNFPA. If UNFPA had taken action on Mr. Zama's request for management evaluation, it is reasonable to project that his pre-mature reassignment would have been overturned, and thus he would have remained in the Kenya Country Office and not been subject to the restructuring in South Africa.

22. Third, Mr. Zama argues that the UNDT failed to consider his testimony that the then incumbent of his former position of Country Representative of UNFPA in Kenya was the son-in-law of the then Secretary-General, which supported that the motive for his reassignment was ill intentioned against him. In addition, Mr. Zama argues that the UNDT used his testimony against him by exaggerating the substance. In finding Mr. Bernasconi's testimony that he had informed Mr. Zama that the latter would be paid at the D-1 level for a P-5 post credible, the UNDT failed to consider that Mr. Bernasconi did not have the authority for making such an offer and therefore it was unreasonable for the UNDT to trust this testimony.

23. Fourth, Mr. Zama argues that the UNDT erred in finding that UNFPA met its obligations as it failed to consider established facts such as the three instances where UNFPA invited him to take an early separation package, which contradicts the good faith obligation of UNFPA to find him a suitable post. UNFPA and Mr. Zama are not on equal standing in the discharge of their obligations of good faith and the powers of UNFPA were oppressively exercised over Mr. Zama by way of the following: the questionable reassignment from D-1 Resident Representative in the Kenya Country Office to the post of P-5 in Johannesburg, South Africa as a Technical Advisor; the abusive use of Mr. Zama's performance appraisal; the delay in the performance appraisal rebuttal process for over a year instead of three months; the use of funds to finance a condom mission report which was withheld from Mr. Zama; the use of the same report withheld from Mr. Zama by the rebuttal panel which later revealed that the original terms of reference had been falsified and the aspects relating to accountability by the Copenhagen Procurement Office had been deleted.

24. These all serve as facts establishing an improper motive to terminate his permanent appointment. UNFPA did not meet its obligations to place Mr. Zama on a suitable post even though his attributes fit the UNFPA operations world-wide: He has over thirty years' experience within UNFPA at both Headquarters and in the field, 13 years of which he served as a UNFPA Country Representative; he has obtained confirmed managerial competencies in complex humanitarian/post conflict settings and is bilingual in both English and French.

25. Lastly, Mr. Zama notes that it took the UNDT 22 months to issue its Judgment and such delay harmed his ability to obtain relevant after-service benefits and justice delayed is justice denied.

26. Mr. Zama requests that the Appeals Tribunal overturn the UNDT Judgment and grant his case on the merits or remand the case to the UNDT.

The Secretary-General's Answer

27. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss the appeal in its entirety. In support of his request, the Secretary-General asserts that the UNDT properly determined that whether the reassignment was justified was not properly before it. The UNDT correctly concluded that UNFPA had fulfilled its obligations under the Staff Regulations and Rules and UNFPA's legal framework on abolition of posts involving staff members with permanent appointments, and that the framework required those affected to apply for suitable posts. Mr. Zama received documentation on the restructuring, which included a detailed guideline on the process, an agreed separation plan, information about a job fair, and information informing him and all affected staff members that they must apply to available positions. More specifically, the UNFPA human resources specialist met with Mr. Zama and invited him to apply for three specific posts at the P-5 level and to apply to suitable posts at the job fair. He was also assured that he would receive the D-1 salary. Based on the evidence, the UNDT correctly found that UNFPA discharged its obligation under the legal framework.

28. The Secretary-General further argues that the UNDT correctly found that Mr. Zama failed to fulfil his own obligations to cooperate given his refusal to apply to vacancies or show interest as required by the legal framework and the jurisprudence of the Appeals Tribunal. The UNDT correctly found that Mr. Zama acted to the contrary—he refused to apply to posts brought to his attention and made it clear that he was not interested in the available posts. Having found no substantive legal or factual defects nor procedural violations, the UNDT correctly affirmed the contested decision. The Appeals Tribunal should therefore affirm the UNDT Judgment.

29. The Secretary-General argues that Mr. Zama failed to identify any error by the UNDT as required by the Appeals Tribunal Statute. In the absence of a compelling argument that the UNDT erred on a question of law or fact, the Appeals Tribunal's jurisprudence is that it will not lightly interfere with the UNDT's findings. Mr. Zama mainly raises the same arguments as before

the UNDT and his appeal is an attempt to reargue his case. Mr. Zama's appeal is therefore not receivable before the Appeals Tribunal.

30. Lastly, the Secretary-General notes that Mr. Zama claims there was a 22-month delay by the UNDT in rendering its Judgment. However, Mr. Zama has not provided any evidence of harm.

31. The Secretary-General requests that the Appeals Tribunal dismiss the appeal and affirm the UNDT Judgment.

Considerations

The 29 March 2012 reassignment decision

32. Most of Mr. Zama's submissions on appeal deal with the 29 March 2012 decision to reassign him from Kenya to South Africa. However, Mr. Zama is estopped, on appeal, from challenging the lawfulness of this decision. In his 13 March 2015 application to the UNDT, Mr. Zama only challenged the 21 April 2014 decision to terminate his appointment; the 29 March 2012 reassignment decision was not part of his application.

33. Besides, even if Mr. Zama had filed an application against the 29 March 2012 reassignment decision, his application would not have been receivable. Staff Rule 11.2 "Management evaluation" provides, in part:

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

...

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

(d) The Secretary-General's response, reflecting the outcome of the management evaluation, shall be communicated in writing to the staff member within 30 calendar days of receipt of the request for management evaluation if the staff member is stationed in New York, and within 45 calendar days of receipt of the request for management evaluation if the staff member is stationed outside of New York. The deadline may be extended by the Secretary-General pending efforts for informal resolution by the Office of the Ombudsman, under conditions specified by the Secretary-General.

Article 8 of the UNDT Statute reads, in part:

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices.

34. Mr. Zama did not properly request management evaluation. During the hearing before the UNDT, Mr. Zama stated that he addressed his 4 June 2012 request for management evaluation to the Management Evaluation Unit (MEU) within the Office of the Under-Secretary-General for Management, and received a letter dated 6 June 2012, which stated:

We wish to inform you that the UNFPA has delegated authority to conduct its own management evaluations. Please be advised that the MEU of the Office of the Under-Secretary-General for Management is not involved in any part of the management evaluation process for UNFPA staff members. Therefore, we request that you address all future correspondence regarding this matter to UNFPA only.

However, Mr. Zama did not address such a request for management evaluation to UNFPA within the regulatory time limits. His application to the UNDT would have therefore been non-receivable *ratione materiae*. Consequently, the 29 March 2012 decision stands and its legality cannot be challenged on appeal.

The 21 April 2014 termination decision

35. It follows that the only relevant issues with regard to the lawfulness of the 21 April 2014 termination decision are (i) whether the decision to abolish Mr. Zama's post was ill-motivated and was connected to the 2012 reassignment in a sense that Mr. Zama's post in South Africa was chosen for abolishment because of his management of the condom crisis in Kenya; and (ii) whether the Administration, during the restructuring process, fulfilled its duties towards Mr. Zama as a staff member on a permanent appointment.

36. The UNDT did not err in holding that there was no nexus between the 2012 reassignment and the abolition of Mr. Zama's post. Affected by the restructuring process were not only Mr. Zama's post but also a large number of positions in ESARO. In his witness statement dated 26 November 2015, which he confirmed during the hearing before the UNDT, Mr. Bernasconi stated that the "necessity to restructure the Africa offices was due to the need of focusing on advocacy and policy dialogue with fewer resources with a desired outcome to improve efficiency and cost containment", that "[p]erformance has not been a factor in the decisions on which posts should have been abolished", and that "[a]t no time there were any discussions on existing staff or their performance". He continued that "all three P[-]5 Technical Adviser Population and Development posts in Johannesburg were among the positions that had to be abolished and re-classified as new posts as an effect of the restructuring of the Regional Offices". On appeal, Mr. Zama did not present any reason to doubt Mr. Bernasconi's credibility as a witness or to otherwise allow the Appeals Tribunal to assume that the abolition of his position was in fact directly addressed towards him as a disguised disciplinary measure for his handling of the condom crisis in Kenya.

37. The UNDT did not err in finding that UNFPA fulfilled its duties towards Mr. Zama as a staff member on a permanent appointment and had no obligation to place him on a new post.

38. The relevant legal and administrative framework then in effect is the following:

Staff Rule 9.6

Termination

Definitions

(a) A termination within the meaning of the Staff Regulations and Staff 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.

Reasons for termination

(c) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds:

- (i) Abolition of posts or reduction of staff;
- (ii) Unsatisfactory service;
- (iii) If the staff member is, for reasons of health, incapacitated for further service;
- (iv) Disciplinary reasons in accordance with staff rule 10.2 (a) (viii) and (ix);
- (v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter of the United Nations, have precluded his or her appointment;
- (vi) In the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned.

(d) In addition, in the case of a staff member holding a continuing appointment, the Secretary-General may terminate the appointment without the consent of the staff member if, in the opinion of the Secretary-General, such action would be in the interest of the good administration of the Organization, to be interpreted principally as a change or termination of a mandate, and in accordance with the standards of the Charter.

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.

(g) Staff members specifically recruited for service with the United Nations Secretariat or with any programme, fund or subsidiary organ of the United Nations that enjoys a special status in matters of appointment under a resolution of the General Assembly or as a result of an agreement entered by the Secretary-General have no entitlement under this rule for consideration for posts outside the organ for which they were recruited.

Staff Rule 13.1

Permanent appointment

(a) A staff member holding a permanent appointment as at 30 June 2009 or who is granted a permanent appointment under staff rules 13.3 (e) or 13.4 (b) shall retain the appointment until he or she separates from the Organization. Effective 1 July 2009, all permanent appointments 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) (i) The central review bodies shall review recommendations for the termination of permanent appointments for unsatisfactory service under staff regulation 9.3 (a) (ii) and staff rule 9.6 (c) (ii);

(ii) No termination under staff rule 9.6 (c) (v) shall take place until the matter has been considered and reported on by a special advisory board appointed for that purpose by the Secretary-General. The special advisory board shall be composed of a Chairman appointed by the Secretary-General on the nomination of the President of the International Court of Justice and four members appointed by the Secretary-General in agreement with the Staff Council.

(c) Staff regulation 9.3 (b) and staff rule 9.6 (d) do not apply to permanent appointments.

(d) If the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts for which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments, provided that due regard shall be given in all cases to relative competence, integrity and length of service. Due regard shall also be given to nationality in the case of staff members with no more than five years of service and in the case of staff members who have changed their nationality within the preceding five years when the suitable posts available are subject to the principle of geographical distribution.

(e) The provisions of paragraph (d) 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 station.

(f) Staff members specifically recruited for service with the United Nations Secretariat or with any programme, fund or subsidiary organ of the United Nations that enjoys a special status in matters of appointment under a resolution of the General Assembly or as a result of an agreement entered by the Secretary-General have no entitlement under paragraph (e) above for consideration for posts outside the organ for which they were recruited.

UNFPA Personnel Policies and Procedures Manual (PPPM):

Protections in cases of abolition of post or reduction of staff:

7.2.6 Staff Rules 13.1 and 9.6(e) state the protections certain classes of staff members must be afforded in the event of abolition of their posts or reduction of staff. Staff Rule 13.1(d) provides:

“If the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts for which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments, provided that due regard shall be given in all cases to relative competence, integrity and length of service.”

Staff Rule 9.6(e) further provides:

“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; ... (iii) Staff members holding fixed-term appointments.”

Therefore, these protections are subject to the requirement (a) that a post on which the services of the staff member can be retained is “available” and (b) that the available post is “suitable”, having due regard to relative competence, integrity and length of service.

Availability of a post:

7.2.7 An “available post” is defined as a UNFPA post that is vacant. In addition, it shall extend to a post that is becoming vacant and will be filled within the notice period. The funding source of the post may differ from that of the abolished post.

Suitability of the post:

7.2.8 The post is “suitable” if the staff member in question has the core and functional competencies required for the available post, as assessed in the respective staff selection process, taking into account relative competence, integrity and length of service.

Equally suitable applicants:

7.2.9 Equally suitable applicants on abolished posts will be retained in service in the following order of preference:

- (a) Staff members holding permanent appointments;
- (b) Staff members holding continuing appointments;
- (c) Staff members holding fixed-term appointments.

7.2.10 If two or more staff members on abolished posts within the same category are under consideration, the most suitable applicant will be selected.

Action by the staff member:

7.2.11 Staff members subject to abolition of post shall apply to available UNFPA posts for which they believe they have the required competencies.

Actions by DHR or relevant managers in the field:

7.2.12 In addition, the following steps may be taken: (i) Draw the attention of such staff members to specific posts that are available and solicit an application to the post from the staff member; (ii) add the staff member in question to a list of applicants or to a shortlist for an available post even if the staff member did not submit an application for that post. This is done:

- (a) by DHR in cases of internationally recruited staff members and staff members in General Service category serving at Headquarters; and
- (b) by the Manager of the UNFPA field duty station in cases of staff members appointed in the General Service or National Officers categories at field duty stations.

39. Under the jurisprudence of the Appeals Tribunal, in a restructuring process, the Administration does not have an obligation to place affected staff members in new positions. The restructuring process can also be organized in a way that staff members have to apply for available suitable posts.¹ A permanent staff member 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 a permanent staff member with a position that would not be accepted.²

40. In the present case, it is not disputed that Mr. Zama did not apply for any position although UNFPA had informed all staff members affected by the restructuring process that they would be expected to apply for the newly created positions. Mr. Bernasconi, in his written statement and during the hearing before the UNDT, testified about his efforts to find a position for Mr. Zama and confirmed that he had invited Mr. Zama to apply for three P-5 posts at the new ESARO office, two of which were newly created posts replacing the three previous Technical Adviser Population and Development posts. We reject Mr. Zama's allegation that the UNDT should not have trusted Mr. Bernasconi's testimony as "the UNDT did not consider the authority of that witness as staff member to make such offers, especially in view of the arrangement of keeping (...) D-1 benefits on a P-5 position". The UNDT did not err when relying on Mr. Bernasconi's testimony. In his written statement, Mr. Bernasconi confirmed that he had invited Mr. Zama to apply to those P-5 positions and

¹ *Haimour & 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. 25-27.

² *Zachariah v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-764, para. 34. See, however, *El-Kholy v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-730, paras. 28-29.

added that “[i]t was also understood that, as for the post he was encumbering, he would have retained the same personal grade as D1 also on those positions. And [Mr. Bernasconi] also explicitly told him this. This is also a practice UNFPA follows as we have other staff currently on a different personal grade than their post grade and this can be checked against in the Monthly Global Staff Tables generated from Atlas.” During the hearing before the UNDT, Mr. Bernasconi reconfirmed that he had invited Mr. Zama to apply to the P-5 positions and had explicitly told him that he would retain the D-1 grade. He also reconfirmed that he had the full authority to make such a suggestion to Mr. Zama. Mr. Zama has not presented any arguments which would cast doubt on the credibility of Mr. Bernasconi and the truthfulness of his presentation of the facts.

41. UNFPA had no obligation to add Mr. Zama to a list of applicants or to shortlist him for an available post. The UNDT correctly pointed out that, while the staff member’s duty under paragraph 7.2.11 of the PPPM to apply to available posts is mandatory, paragraph 7.2.11 of the PPPM grants discretion to the Administration whether to “[d]raw the attention of such staff members to specific posts that are available and solicit an application to the post from the staff member” and/or to “add the staff member in question to a list of applicants or to a shortlist for an available post even if the staff member did not submit an application for that post”. As Mr. Zama had been expressly told and invited to apply for certain positions but refused to do so, the Administration could reasonably assume that Mr. Zama was not interested in participating in the selection process for these positions and that there was no need to add him to the list of applicants.

42. Contrary to Mr. Zama’s allegations, the offer of a separation package in the context of the restructuring process does not show bad faith on the part of the Administration. Mr. Bernasconi confirmed that an agreed separation programme was an option offered to all staff members affected by the restructuring process, conditions and eligibility being spelled out in the specific guidelines.

Alleged delay in the issuance of the UNDT Judgment

43. Article 2(1) of the Appeals Tribunal Statute reads:

The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case; or
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

44. We agree with Mr. Zama that the issuance of the Judgment only on 31 October 2017 constitutes a grave procedural error as the hearing took place in January 2016 and the closing arguments were filed on 15 February 2016. Section 7(b) of the Code of Conduct for the Judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal provides in part: “Judges must give judgement or rulings in a case promptly. Judgements should be given no later than three months from the end of hearing or the close of pleadings”.

45. However, we cannot grant Mr. Zama’s request to overturn the impugned Judgment on the sole ground of delay. We cannot see how this procedural error might have affected the decision of the case.

Judgment

46. The appeal is dismissed and Judgment No. UNDT/2017/084 is hereby affirmed.

Original and Authoritative Version: English

Dated this 29th day of June 2018 in New York, United States.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Halfeld

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

(Signed)

Weicheng Lin, Registrar