



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

Judgment No. 2020-UNAT-1021

**Lynn Elizabeth Collins
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge Graeme Colgan Judge Kanwaldeep Sandhu
Case No.:	2020-1351
Date:	26 June 2020
Registrar:	Weicheng Lin

Counsel for Ms. Collins:	George G. Irving
Counsel for Secretary-General:	Maryam Kamali

JUDGE MARTHA HALFELD, PRESIDING.

1. Ms. Lynn Elizabeth Collins, a former staff member of the United Nations Population Fund (UNFPA) at the P-5 level, filed an application before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) contesting the termination of her fixed-term appointment as a result of the abolition of her post. She claimed that the decision was based on improper motivations and that UNFPA failed to comply with its obligations to make all reasonable efforts to consider her for other available suitable posts. The UNDT issued Judgment No. UNDT/2019/164, dismissing the application on grounds that the contested decision was the result of a valid exercise of discretion and that UNFPA had complied with procedural requirements.
2. On appeal, the Appeals Tribunal grants the appeal, in part.

Facts and Procedure

3. The UNDT established the following facts:¹

... Before the termination of her appointment, the Applicant served as the Technical Advisor at the P-5 level with the HIV/AIDS Branch, Technical Division in UNFPA. The Applicant is an expert in linking/integrating HIV and sexual and reproductive health and rights.

... On 25 February 2016, the Director of the Technical Division sent an email to the HIV/AIDS Branch staff members, including the Applicant. The Director wrote that in the context of UNFPA's declining income, its senior management had been reviewing ways to maximize the use of the resources, and in the Technical Division, this meant a functional review of the Division's work, and at the level of human resources, this would begin by abolishing the post of Chief, HIV/AIDS Branch. The Director further noted that beginning 2017, the HIV/AIDS Branch would be integrated into the Sexual and Reproductive Health Branch.

... In September 2016, through the interoffice memorandum addressed to the UNFPA Executive Director, the Director of Technical Division noted that due to the resource mobilization shortfall for the 2016 Unified Budget, Results and Accountability Framework ("UBRAF") budget, funding allocations to all Cosponsors were reduced by 50 percent in 2016. The Director further noted that the UNAIDS Programme Coordinating Board meeting held in June 2016 presented an additional significant funding shortfall for 2017. The Director wrote that the Technical Division already decided not to renew 21 appointments and a few appointments were maintained through cost-sharing at the country and the regional level. In light of the substantial

¹ Impugned Judgment, paras. 3-13.

reduction of available funding in 2016-2017, the Director proposed two alternative scenarios to address the financial shortfalls. The Director noted at the outset that both scenarios have the same implications for the posts funded through UBRAF in the field, and the variations lie in the way headquarters posts would be affected: more incumbents would be affected by Scenario A whereas less funds would be available for programming activities under Scenario B:

a. Scenario A was guided by “a strategic approach” and proposed to abolish all headquarters posts in HIV/AIDS Branch, except one P-5, one P-4, and one P-2/P-3 posts. The Applicant’s post, which was funded from Regular Resources, was also proposed to be abolished. Under Scenario A, due to the abolition of several posts, more UBRAF funding would become available for programming activities.

b. In the Scenario B, only posts funded by UBRAF were considered for potential abolition of post and three posts funded from Regular Resources were excluded from such review. Under this scenario, all headquarter posts in HIV/AIDS Branch were to be abolished except four P-5 posts: three P-5 posts funded from Regular Resources, which included the Applicant’s post, and one P-5 post funded from UBRAF.

... In the interoffice memorandum dated 14 October 2016 addressed to the Executive Director, the Director of the Division for Human Resources (“Director, DHR”) recommended Scenario A on the basis that it would provide more funding for programmes as the less budget would be allocated to keep staff posts – USD915,518 would be available for programming under the Scenario A and USD616,819 would be available for programming under the Scenario B.

... On 29 and 30 November 2016, the Applicant spoke with the Director, DHR, to explore her options in anticipation of the proposed reorganization of the Technical Division. The Applicant submitted a detailed note to the Tribunal, which reflects her conversations with the Director, DHR. The Respondent does not dispute the Applicant’s record of the conversations but submits that any discussion was informal and exploratory, and no formal offers or promises were made by the Respondent.

... According to this note, during their first conversation on 29 November 2016, the Director presented three options: the Applicant (a) continues in her current capacity until she retires at the end of December 2017; (b) agrees on a date of separation with payout of termination indemnity; and (c) moves on to a different position not necessarily based in New York where her skillset could be utilized. The Director told the Applicant that the conversation was exploratory and that he was trying to be fair to everyone given potential funding constraints. The Director told her that the separation package would come from the Division of Human Resources budget.

... The Director and the Applicant talked again on the same day and the Applicant expressed her interest in continuing her service until her date of retirement and asked under what modalities she could continue in her current capacity. The Director responded that even if she were to continue in her current capacity, there would be changes such as: a different reporting line, the dissolution of the dedicated HIV/AIDS team, and the integration of HIV work into the broader sexual and reproductive health and rights portfolio. A possibility of a separation package was also discussed. Regarding the third option, namely the redeployment to a different post, the Applicant asked if there was a particular post being considered for her, and the Director said that there was nothing specific being considered but that such a position could be anything from deputy to regional adviser wherever there was a vacancy and it would potentially require a geographical move.

... On the following day, the Applicant spoke to the Director again and she informed him that she definitely wanted to continue in her current capacity. The Director responded that he would note her preference but that there was no guarantee.

... On 1 December 2016, upon the recommendation of the Director, DHR, the Executive Director decided to abolish the Applicant's post and terminate her fixed-term appointment effective 31 December 2016. The recommendation noted that "due to resources mobilization shortfalls for 2016", funding allocations were reduced by 50 percent in 2016 and were to be further reduced in 2017. Cognizant of this trend, a careful review of the HIV/AIDS posts was conducted under the following guiding principles: "strategic analysis of best way to advance the HIV/AIDS portfolio considering the Global Agenda, financial context and role of business units across the organization[, and] [p]rioritization of funding for the regions and [country offices] (with an emphasis on fast-track countries)".

... On 2 December 2016, the Applicant was notified that her post was abolished due to "organizational restructuring at UNFPA" and that the termination of her post was to take effect on 31 December 2016. She was further informed that staff rule 9.7 requires that a staff member with fixed-term appointment is to be given not less than 30 calendar days' written notice of termination. She was also told that under para. 7.2.4 of UNFPA Policies and Procedural Manual, Separation from Service Policy, she was entitled to receive a six-month written notice of abolition of the post and that since the policy allows the payment of cash for the remaining period in case of a shorter notice period, the Applicant was to receive cash for the remaining portion of the six months' notice period (in her case this amounted to five months).

... On 22 December 2016, the Applicant requested a management evaluation of this decision, and pending management evaluation, she submitted the application for suspension of action, which was granted by the Dispute Tribunal. The contested decision was subsequently upheld by management evaluation and the Applicant was separated from service on 28 January 2017.

4. On 19 November 2019, the Dispute Tribunal in New York issued Judgment No. UNDT/2019/164 in the case of *Collins v. Secretary-General of the United Nations*. The UNDT disposed of the application submitted by Ms. Collins, namely, Case No. UNDT/NY/2017/030 against the decision to terminate her fixed-term appointment.

5. The UNDT dismissed the application as it found that the decision to terminate Ms. Collins' appointment had been the result of a lawful exercise of discretion. The UNDT further noted that, although the Organization had not entirely fulfilled its obligations under Staff Rule 9.6(e) to find an available or suitable post for Ms. Collins, she had failed to cooperate in the process by not applying for vacant positions.

6. On 14 January 2020, Ms. Collins filed an appeal against the impugned UNDT Judgment and on 20 March 2020, the Secretary-General filed his answer. The case was registered as Case No. 2020-1351.

Submissions

Ms. Collins' Appeal

7. Ms. Collins claims that the UNDT failed to consider her experience of over twenty-five years of service, as well as her competence and exceptional performance appraisals, especially in the context of her expectation of retirement only 13 months away from the date of her termination. She states that the UNDT did not assess the impact on her termination of her working from home due to a medical condition, nor did it examine the evidence that the envisaged shortfall for the 2017 budget did not materialize. She further contends that only her post was identified for abolition with immediate termination, apart from that of the Chief of the HIV Branch, who was, however, reassigned to another post.

8. Ms. Collins also maintains that she had not been apprised of the two scenarios put forward to the UNFPA Executive Director, one of which contained the abolition of her post, despite the fact that it had been previously considered of importance. She also affirms that she had informal meetings with the Director of HR, in which she was offered three options, among which was the possibility to remain working in her capacity at that time, which she would have preferred. Nevertheless, the Director of HR proposed the abolition of her post with immediate termination of her contract, which did not engender actual cost savings, due to the amount of the termination indemnity which she received.

9. Specifically with regard to the termination of her appointment, Ms. Collins claims that the restructuring exercise was not documented and that she was given short notice of less than a month, during which she had to make decisions in relation to her pension, as well as carrying out her regular duties. Ms. Collins further alleges that the UNDT failed to examine possible placement opportunities for her, most of which were no longer available at the time when she was notified of her separation. She highlights the fact that it was more difficult to apply for other positions due to the fact that she was less than a year away from reaching normal retirement age in the Organization.

10. Referring to the UNFPA Policies and Procedures Manual: Human Resources - Separation from Service (UNFPA HR Manual), Ms. Collins contends that she was not retained in an alternative post or given a temporary placement and that paragraph 7.2.12, which establishes obligations for the Organization, was not complied with in her case. She further claims that the UNDT did not address the issue of her receiving a single financial payment as compensation, instead of her monthly salary during the standard six months' notice period, during which she would have been able to find a placement before the mandatory retirement age of 65.

11. Finally, Ms. Collins requests compensation for moral damages for the abrupt separation, as well as reinstatement and compensation until retirement age, and adjustment of her pension entitlements.

The Secretary-General's Answer

12. The Secretary-General submits that the UNDT did not err when it concluded that the decision to terminate Ms. Collins' appointment as a result of the abolition of her post was a lawful exercise of discretion. To the Secretary-General, there was no evidence of improper motives leading to the termination of her fixed-term appointment. Moreover, Ms. Collins was placed on Special Leave Without Pay until 31 December 2017, the date on which her fixed-term appointment was due to expire, and which allowed her to continue making payments to the Pension Fund. There was no guarantee of any extension of her fixed-term appointment beyond its expiry date.

13. Furthermore, the Secretary-General argues that the UNDT correctly assessed the Organization's efforts to find a suitable post for Ms. Collins, as required by Staff Rule 9.6(e), when it found that the Organization did not meet its obligations, but that Ms. Collins had not cooperated in applying for positions in a timely manner. Therefore, she did not cooperate fully with the

process, which would have been necessary in light of the Appeals Tribunal precedent established in *Timothy*² and *Hassanin*³.

14. The Secretary-General also submits that, even though i) Ms. Collins was nearing the age of retirement; ii) was allegedly given short notice; and iii) had possibly been told that there was no other post to accommodate her, these are merely speculative, and she ought to have applied for another position. Therefore, simply expressing a general interest in continuing to work is insufficient to support Ms. Collins' claims.

15. The Secretary-General maintains that the UNDT correctly exercised its jurisdiction and adds that Ms. Collins received a termination indemnity equivalent to nearly eleven months' pay on active service, as well as payment in lieu of notice of termination equivalent to six months' pay on active service. She also enjoyed Special Leave Without Pay until 31 December 2017 for pension purposes and did not suffer any loss of pension benefits from early retirement reduction factors.

16. The Secretary-General states that there is no evidence for compensation for moral damages and the appeal is not a proper forum for Ms. Collins to reargue her case.

17. The Secretary-General requests that the Appeals Tribunal affirm the impugned Judgement and dismiss the appeal in its entirety.

Considerations

18. Ms. Collins appeals against both main findings in the UNDT Judgment concerning i) the lawfulness of the abolition of the post; and ii) the lawfulness of the termination of her appointment. The crucial issue for consideration and determination is therefore whether the UNDT erred in fact or in law when it did not rescind the decision to terminate Ms. Collins' fixed-term appointment as a result of the abolition of her post. The Appeals Tribunal will consider these issues in turn.

² *Timothy v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-847.

³ *Hassanin v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-759.

Lawfulness of the abolition of the post

19. The UNDT was correct when it discerned the applicable law in the present case as being set out in the UNFPA HR Manual, as well as Staff Regulation 9.3(a)(i) and Staff Rule 9.6(e).

20. Staff Regulation 9.3(a)(i) in force in 2016, the year when Ms. Collins' appointment was terminated, regulated that the Secretary-General might, giving the reasons therefor, terminate the appointment of a staff member who held a fixed-term appointment in accordance with the terms of his or her appointment, or, if the necessities of service required abolition of the post or reduction of the staff. Paragraph (c) of the same Regulation established an obligation for the Secretary-General, in order for him to terminate an appointment, that the staff member "shall be given such notice and such indemnity payment as may be applicable under the Staff Regulations and Staff Rules".

21. Staff Rule 9.6(c)(i) in force at the relevant time (ST/SGB/2016/1) established, in relevant parts, the abolition of posts or reduction of staff among the reasons for termination of appointment. In turn, paragraph (e) of the same Rule, under the heading "Termination for abolition of posts and reduction of staff", established that, 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 could be effectively utilised, "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".⁴

22. Specifically, within UNFPA, the UNFPA HR Manual states on the relevant matter of Separation from Service the following:⁵

7.2 Termination following abolition of post or reduction of staff:

7.2.1 An appointment or a number of appointments may be terminated if the necessities of service require abolition of post or reduction of staff (Staff Regulation 9.3(a)(i) and Staff Rule 9.6(e)).

⁴ Paragraph (e) makes an exception referring to paragraph (f) and Staff Rule 13.1, which, however, do not apply to the present case, since they relate to continuing appointments.

⁵ Original emphases.

Necessities of service:

7.2.2 The determination as to whether the necessities of service require the abolition of a post or the reduction of staff leading to the termination of the incumbent's appointment rests within the discretion of the UNDP/UNFPA Executive Board and/or the Executive Director.

7.2.3 Reasons for abolishing a post or reducing the staff may include, but are not limited to:

- (a) changing programme requirements;
- (b) expiration of finite mandates (such as, for example, country programme cycles or technical assistance projects) or tasks (other projects) in respect of which the appointment was made;
- (c) downsizing, restructuring or closing offices;
- (d) lack of funding;
- (e) changes in the functions, duties and responsibilities underlying a post if such changes are treated as an abolition of the current post and the establishment of a new post in accordance with the UNFPA Policies and Procedures Manual; Human Resources; Posts.

Informing the concerned staff member:

7.2.4 A staff member who encumbers a post that has been identified for abolition leading to the termination of his or her appointment shall be so informed six months prior to the abolition of the post. If the abolition of the post becomes effective earlier than six months after the staff member has been so informed, the staff member should be retained on an alternative post or other funding arrangement (*e.g.* "supernumerary post") until the expiration of the six-month time frame, or the remaining time may be commuted into cash.

7.2.5 The staff member shall be informed about the post abolition in writing (*e.g.* by letter, memorandum or e-mail). If such information was first given verbally, for example in a meeting with the Director, DHR, his/her designee or a Line Manager, it should be followed-up in writing; the six month time frame referred to above shall apply as of the date of such written information furnished to the staff member.

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.

Review by DHR of a manager's selection proposal or decision:

7.2.13 Should a staff member have applied to an available post but have not been proposed or selected by the Line Manager, DHR may review whether the Line Manager has given appropriate consideration to the question as to whether the available post is suitable for the non-placed staff member. Should DHR conclude that appropriate consideration has not been given, DHR may request the Line Manager to reconsider his or her selection proposal or decision.

Feedback for the staff member:

7.2.14 A staff member subject to abolition of the post who unsuccessfully applied to another post may contact the relevant human resources officer servicing his administrative unit and solicit verbal feedback as to his/her performance in the selection process (*e.g.* in the job interview) and suggestions for improvement.

Locally recruited staff:

7.2.15 Regarding staff members subject to local recruitment, Staff Rule 9.6(f) provides: "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."

Specific exercises concerning abolitions of posts/reductions in work force:

7.2.16 The Director, DHR, retains the right to establish special procedures, including the establishment of a panel to advise on payments to staff members over and above the termination indemnity contemplated in Annex III to the Staff Regulations, with regard to specific exercises concerning abolition of posts or reduction in work force, typology or the overall restructuring of the Fund. Such special procedures must comply with Staff Rules 13.1 and 9.6(e).

23. In her appeal here under examination, Ms. Collins firstly claims that the UNDT failed to take into account relevant individual factors before deciding not to reassign her. She also claims that the anticipated reduction of funds foreseen for 2017 did not actually materialize due to a financial recovery in the unit in late 2016.

24. The reference to the 39th Meeting of the UNAIDS Programme Co-ordinating Board in which mention was made to “provide the Co-sponsors the same level of core UBRAF funds in 2017 as in 2016” does not help Ms. Collins: first, because her contract was funded by regular resources, not UBRAF funding⁶; and second, and more importantly, because the minutes reveal that the meeting was held between 6 and 8 December 2016, a few days after the 1 December 2016 decision to terminate her appointment had been made and communicated to her.⁷

25. In the context of the ongoing budgetary shortfall when the contested administrative decision was taken, it was reasonable to expect some kind of retrenchment by the Administration. Nevertheless, an administrative decision to terminate a fixed-term appointment can be challenged on the grounds that the Organization had not acted fairly, justly, or transparently with the staff member, or was motivated by bias, prejudice or improper motive.⁸ The staff member has the burden of proving that such factors played a role in the administrative decision.⁹

26. When judging the validity of the Secretary-General’s exercise of discretion in administrative matters, as in the case of a termination of a fixed-term appointment, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate.¹⁰ The UNDT can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Dispute Tribunal to substitute its own decision for that of the Secretary-General.¹¹

27. The letter that communicated the abolition of Ms. Collins’ post and the termination of her appointment, dated 2 December 2016, reveals its motivation as being the “organisational restructuring at UNFPA”.¹² In the context of the present case, it is logical to conclude that the

⁶ Impugned Judgment, para. 5.a.

⁷ In any event, Ms. Collins’ argument that the recovery of the UBRAF funding for 2017 would enfeeble the grounds of budgetary shortfall, on which the decision to abolish the post had been taken, seems to go against her own statement before the UNDT that UBRAF’s budget reduction could not be a reason for said abolition, since her post was funded by regular resources (Impugned Judgment, para. 35).

⁸ *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 32.

⁹ *Ibid.*

¹⁰ *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-949, para. 27.

¹¹ *Ibid.*

¹² Annex 2 to the UNDT application.

organizational constraint derives from financial restrictions, as was authorized by Sub-section 7.2.2 and 7.2.3(c) and (d) of the UNFPA HR Manual.

28. The evidence establishes that the Organization acted fairly and transparently towards Ms. Collins when it decided to abolish her post. There is nothing on the record that would put under suspicion the decision to abolish the post she occupied. Which post to abolish and whether or not to merge departments falls within the discretion of the Organization and the Appeals Tribunal will not interfere with this lightly, since no improper motives have been evidenced in the present case.¹³ The UNDT was thus correct when it held that it would not have valid grounds to interfere with the UNFPA decision, even if the abolition of Ms. Collins' post had been unwise because the significance of her role had not been fully understood.¹⁴

29. For the same reason, whether or not there was an actual cost saving resulting from the abolition of the post when compared with the termination indemnity, is inconsequential for the purposes of assessing the legality of the decision. Conceivably poor managerial decisions are not sufficient grounds to justify judicial recourse by a staff member.

30. In this regard, Ms. Collins' personal skills, however strong or necessary they might have been, were not considered relevant in the decision to abolish her post and terminate her appointment. This factor alone does not constitute sufficient basis to reverse the administrative decision. For this to occur, the UNDT would need to have been provided with adequate evidence of improper motives, which did not happen in the present case. Ms. Collins' sole allegation that her post was the only one in her division singled out to be abolished without reassignment cannot be construed as tantamount to discrimination against her. There is no such evidence to this effect on the record. On the contrary, the UNDT was correct in its determination that all the elements taken into consideration allow the conclusion that the budgetary shortfall was the sole reason for restructuring the design of divisions within UNFPA, which resulted in the abolition of Ms. Collins' post and the termination of her appointment.¹⁵ Moreover, any possible allegations of discrimination should have been challenged in observance of the appropriate procedure set out by the Bulletin for protection against discrimination.

¹³ Impugned Judgment, para. 38.

¹⁴ *Ibid.*, para. 37.

¹⁵ *Ibid.*, para. 27.

31. Against this factual background, the UNDT was correct in its finding that “UNFPA considered various factors in the restructuring and relied on correct information (i.e. which post was funded from which funding source) in reaching its conclusion”.¹⁶ The UNDT was also correct in its finding that the organizational restructuring that was undertaken, consisting of the integration of the HIV/AIDS Branch into the Sexual and Reproductive Health Branch and the review of the Technical Division’s posts including the abolition of the post then occupied by Ms. Collins, was genuine and was supported by the facts.¹⁷

32. For these reasons, we find that the UNDT did not err in law or in fact, resulting in a manifestly unreasonable decision, when it found that the decision to abolish the post was lawful.

Lawfulness of the termination of the appointment

33. The UNDT Judgment acknowledged that the matching exercise conducted by the Organization to find an available and suitable new position for Ms. Collins was too general and was based solely on job description, and therefore did not count as an effort to find a suitable post for Ms. Collins. As a consequence, it did not meet UNFPA’s obligations under Staff Rule 9.6(e).¹⁸ However, the UNDT held that, according to the jurisprudence established in *Timothy*¹⁹, the Organization’s obligation under Staff Rule 9.6(e) to make reasonable efforts to find a suitable post is premised on the requirement that the affected staff member show an interest in a new position by applying fully and in a timely manner for the position.²⁰

34. In her appeal, Ms. Collins argues that she had been given every indication that her services could be continued. She maintains that the short notice of less than a month before her separation, coupled with the fact that most of the positions advertised were no longer open when she was informed of her separation, was not considered by the UNDT. She also claims that the UNDT did not address the issue of her receiving compensation, instead of the standard six-month notice, which would have allowed her to find, while still working, a possible placement until the mandatory retirement age of 65.

¹⁶ *Ibid.*, para. 35.

¹⁷ *Ibid.*, paras. 25 and 27.

¹⁸ *Ibid.*, para. 43.

¹⁹ Reference is made to *Timothy v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-847.

²⁰ Impugned Judgment, para. 44.

35. The UNFPA HR Manual cited above establishes some sort of protection for staff members whose post is abolished, referring to Staff Rule 9.6(e), which provides that a post for which the services of the staff member can be retained must be “available” and “suitable” for the candidate, taking into consideration relative competence, integrity and length of service. For this purpose, Sub-sections 7.2.7 and 7.2.8 provide details about the concepts of “availability” and “suitability” of a post.

36. The application of Staff Rule 9.6(e) in similar situations has already been reviewed by the Appeals Tribunal. In *El Kholly*, the Appeals Tribunal established that 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”.²¹ In *Timothy*, the Appeals Tribunal reaffirmed that 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.²²

37. The jurisprudence qualified in *Timothy* makes it clear that, 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.²³ Staff members facing termination due to abolition of their post while holding protection under Staff Rule 9.6(e) must show an interest in a new position by fully and in a timely manner 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.²⁴ Thus, if the Administration informs the affected staff members that they are expected to apply for suitable available positions, they are obliged to cooperate fully and make an

²¹ *El-Kholly v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-730, para. 24.

²² *Timothy v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-847, para. 32. See also *El-Kholly v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-730, para. 31; *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.

²³ *Timothy v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-847, para. 35. 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, para. 25; *Smith v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-768, para. 30.

²⁴ *Fasanella v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-765, para. 31.

effort in good faith in order for their applications to succeed. This includes a duty to apply within the deadlines and to respect the formal requirements.²⁵

38. In the present case, the Secretary-General submits that the general interest that Ms. Collins demonstrated to continue to work before being separated from service was not enough, as her obligation was to effectively apply for any available posts that would be suitable for her, which in his view she did not do. For the Secretary-General, having failed to apply, Ms. Collins did not fully cooperate with the matching exercise.

39. The Appeals Tribunal finds that, as a general rule, the UNDT's interpretation, underpinned by the Secretary-General's arguments, would be the most appropriate in light of our previous jurisprudence. Indeed, according to Sub-section 7.2.11 of the UNFPA HR Policies and Procedural Manual, staff members subject to abolition of post *shall* apply for available UNFPA posts for which they believe they have the required competences. Ms. Collins undoubtedly did not apply.

40. Nonetheless, Sub-section 7.2.12 provides an extra obligation on the part of UNFPA, which would justify distinguishing the present case from those mentioned above, where such explicit obligation did not exist. As cited above in this Judgment, this particular provision in the Manual establishes the actions required to be taken by the DHR or relevant managers in connection with the application for available posts by the staff member subject to abolition of post. In this regard, the DHR *may* (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*; and also (ii) add the staff member in question to a shortlist for an available post *even if the staff member did not submit an application for that post*.

41. Although the UNDT did not explicitly refer to Sub-sections 7.2.11 or 7.2.12, it is clear that, in its view, the staff member's *obligation to apply*, arising from the former, *precedes* the UNFPA's *duty to conduct the matching exercise* deriving from the latter. The standard meaning of the verbs *shall* and *may* in those distinct Sub-sections might well justify such an interpretation. Nonetheless, the discretion arising from the verb "may", which has been bestowed upon the DHR or manager of the UNFPA field duty station, is not unfettered and, as in any discretionary

²⁵ *Timothy v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-847, para. 45. Also *Smith v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-768, para. 30.

decision, must be exercised lawfully, reasonably, fairly, proportionately and correctly in its procedure.²⁶

42. The Appeals Tribunal has already established that in cases where there is no obvious absurd, perverse, discriminatory, capricious or any other unreasonable justification on the part of the Administration for a decision, the burden of proof rests with the staff member concerned. In other words, if the Administration is able to even minimally show that the staff member concerned was given full and fair consideration, then the presumption of law is satisfied.²⁷ Moreover, this Tribunal has long held that stated reasons for a decision are essential for the Tribunals to exercise its judicial review of administrative decisions, assessing whether they were arbitrary, capricious, or unlawful.²⁸

43. It follows that the assessment of whether or not the Organization has exercised its discretion lawfully shall be made on a case by case basis. In situations such as the present one, it is necessary to interpret the law teleologically, beyond its literal meaning. Sometimes the word *may* must be read in context, in order to determine if it means an act which is either optional or mandatory, for it may be an imperative.²⁹ When discretion is exercised, the Administration cannot exonerate itself from its duties based solely on the wording of its rules. More is needed to demonstrate that the Organization's attitude is fair, reasonable, proportionate and considerate to the particular case and, in a word, lawful.

44. In the present case, what would be the purpose of establishing the duty to present possible posts for any staff member to apply for if we considered his or her previous application as a precondition for such an obligation? And, more significantly, what would be the point of imposing on the Administration the obligation to add a staff member in question to a shortlist for an available post, "even if the staff member did not submit an application for that post", if

²⁶ *Smith v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-785, para. 30; *Nikolarakis v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-652, para. 30; *Scheepers et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-556, para. 55; *Dhanjee v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-527, paras. 29-31; *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-966, para. 20; *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 42.

²⁷ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 42.

²⁸ *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, paras. 35 and 36. What is more, when a justification is given by the Administration for the exercise of its discretion, it must be supported by the facts (*Islam v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-115, para. 29).

²⁹ Source: <https://dictionary.law.com>.

we found that such an obligation was premised on a previous application by the same staff member? In other words, the staff member's duty to apply must be understood in the context of UNFPA's obligations to help him or her to apply.

45. It is beyond question that the Administration did not undertake any of the actions prescribed in Sub-section 7.2.12. It did not draw Ms. Collins' attention to any specific posts that were available, nor solicit her application for any of those posts.³⁰ In addition, it did not add Ms. Collins to a shortlist for any available posts even when she had not submitted an application for that post. It is true that some informal discussions took place on 29 and 30 November 2016 between the Director, DHR and Ms. Collins about the possible courses of actions offered to her. However, nothing resulted from those meetings in terms of actual employability opportunities for Ms. Collins.

46. During those discussions, the Director, DHR, outlined to Ms. Collins three distinct options that could be offered to her, and, although there might have been some emphasis on the acceptance of a financial package, the first option was, according to the undisputed notes of those meetings, to continue in her current capacity until she retired at the end of December 2017.³¹ When Ms. Collins chose to continue in her capacity, the Director, DHR made it clear that no guarantee of continuation could be afforded to her. However, having incontestably demonstrated her interest in continuing to work, which was the first of the options informally offered to her, it was natural that Ms. Collins might have had expectations to continue, particularly in light of the fact that the Director, DHR, noted her preference and mentioned some possible changes for her going forward, such as the fact that she would no longer have a dedicated HIV team, a broader portfolio and different management lines.

47. It is therefore understandable that Ms. Collins could have been surprised when, without any communication following the aforementioned meeting, she was informed, on 2 December 2016, that the same Director, DHR, had formally proposed the abolition of her post, only one day after their meeting, together with the termination of her fixed-term appointment as of 31 December 2016, with no suggestion of possible specific posts available for her to apply for,

³⁰ The UNFPA vacancy announcements for positions at the P-4, P-5 and D-1 levels show that there were posts available that could somehow have been considered to be suitable to Ms. Collins, particularly when related to technical advising in sexual and reproductive health or gender-based violence or even social demographic survey.

³¹ The other two options related to an agreement on a date of termination with pay-out of termination indemnity; or moving on to a different position not necessarily based in New York where Ms. Collins' skill set could be utilised.

nor of her being shortlisted for an available post, irrespective of whether or not she had applied for it.

48. Under these distinct circumstances, the commutation of the six-month notice into compensation, while permissible,³² had the inevitable effect of shortening to less than a month the period in which Ms. Collins could have applied for another post while still working. More fundamentally, the Administration did not provide Ms. Collins or the UNDT/Appeals Tribunal with any explanation for having decided to commute this period into compensation. Nor did it explain why it failed to comply with the obligations arising from Sub-section 7.2.4 of the UNFPA HR Manual during the matching exercise held, a fact which was eventually considered to be flawed by the UNDT itself.³³ As previously discussed, in not providing reasons for its decision, the Organization has failed in its duty to demonstrate that its discretion in these particular decisions was not exercised arbitrarily, capriciously, or unlawfully.

49. In this context, and also considering Ms. Collins' long service since 2002, after which she was due to retire a year later, on 31 December 2017, the Appeals Tribunal finds that the Administration has not met its burden to minimally demonstrate that Ms. Collins was given full and fair consideration in the matching exercise. Instead, it acted arbitrarily and thus failed to exercise its discretion lawfully. The termination of Ms. Collins' appointment was hence unlawful and must be rescinded.

50. The natural consequence of such a rescission is Ms. Collins' reinstatement with all legal consequences, had she not been separated. Pursuant to Article 9(1)(a) of our Statute, the Appeals Tribunal shall indeed set an amount of in-lieu compensation that the Secretary-General may elect as an alternative for the rescission.

51. In determining the amount of compensation, the Appeals Tribunal has considered the nature of the irregularities and the fact that Ms. Collins has received, apart from the termination indemnity, payment in lieu of notice of termination equivalent to six months' pay on active service. Since her fixed-term appointment was supposed to end on 31 December 2017, Ms. Collins did not

³² When the abolition of the post becomes effective earlier than six months after the person has been so informed, Sub-section 7.2.4 of the UNFPA HR Manual allows the Administration to choose between retention on an alternative post or payment in cash.

³³ Impugned Judgment, para. 43.

receive the last six months' net base salary of her appointment, which is therefore set as the alternative compensation to the rescission.

Other claims

52. In light of the fact that Ms. Collins was placed on Special Leave Without Pay following the decision to terminate her contract, she was able to continue making payments into her Pension Fund until retirement age at the end of 2017. There is thus no reparable loss in terms of her pension entitlements that would justify any further compensation.

53. The Appeals Tribunal will not award compensation for moral damage, as Ms. Collins has not provided any evidence of this, as is required by Article 9(1)(b) of the Appeals Tribunal Statute.

Judgment

54. The appeal is upheld in part and Judgment No. UNDT/2019/164 is modified, insofar as the decision to terminate Ms. Collins' appointment is rescinded. As an alternative to the rescission, the Secretary-General may elect to pay compensation in lieu at the amount of six months' net base salary, which shall be paid within 60 days of this Judgment becoming executable. Should the total sum not be paid within the 60-day period, interest will accrue on the total sum of the six months' net base salary at the US Prime Rate until the eventual date of payment.

Original and Authoritative Version: English

Dated this 26th day of June 2020.

(Signed)

Judge Halfeld, Presiding
Bournemouth, United Kingdom

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Sandhu
Vancouver, Canada

Entered in the Register on this 27th day of July 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar