

# UNDT/2020/032, Nugroho

## UNAT Held or UNDT Pronouncements

The Tribunal is aware that one thing is a budgetary provision, although assessed as operational, and that another thing is the concrete effective availability of the funds to be used to cover staff costs. In this case, however, the Respondent, who bears on this issue the burden to prove the specific and concrete financial situation, gave no evidence about the alleged cash problems or inconsistency of the budget. The decision by the Organization to terminate the Applicant's continuing appointment is therefore not justified and unlawful. Furthermore, the decision was not preceded by the due notice provided under staff rule 9.7. The failure to provide due and timely notice is in general relevant for the compensation to be given to a staff member lawfully dismissed (but without notice), and it is not relevant in the present case, where the decision by the Organization to separate the Applicant was unlawful. Although the above written reasons are sufficient to rule in favour of the Applicant, it is worth also to recall that in this case the Organization did not act in compliance with staff rules 9.6(e)(i) and 13.1(d), which require it to retain the Applicant's services against suitable alternative posts. Firstly, according to the established principles, the obligation of the Organization to find suitable alternative position to a redundant staff member does not imply that any position available should be offered to the staff member, given that in any case the position to be offered must be suitable for the employee in accordance with his/her professional profile. As UNAT recalled, the redundant staff member must be fully competent to perform the core functions and responsibilities of the available position. However, the Organization has the obligation to assess the staff member's suitability for the available post considering only the specific criteria set up in the above mentioned rules, which are, as well as the features of the position (as to its functions and responsibilities), the staff member's competence, integrity and length of service, as well as other factors such as nationality and gender. Secondly, being this assessment based on objective criteria, it does not involve a discretionary evaluation and it is reviewable in court therefore, the Tribunal can verify its lawfulness. Thirdly, once the Organization calls the staff member to apply for a position, so finding him/her suitable, or otherwise identifies a suitable position, the attribution of the position has to be made outside of a competitive procedure. This is so for at least two reasons: firstly, because the Organization cannot call a competition to appoint new people if it has the problem of redundant personnel secondly, because the provision of a specific effort by the Organization to find a suitable alternative position is a specific obligation, to which the staff member has a specific right that must differentiate his/her position from that of other candidates. To allow the Applicant to apply for new positions and have him take part in a competitive selection does not fulfil the obligation of the Organization set up in the recalled rules. The UN Appeals Tribunal, in dismissing the appeal towards said UNDT Judgment in ElKholy 2017-UNAT-730, confirmed these principles and the need to cover the posts by way of a lateral move or placement of unassigned staff members holding a permanent appointment, and not only after a specific application following a knowledge from public announcements. The obligation of the Organization to find a suitable position to a redundant staff member entails the right of the latter to a lateral move to a position suitable in relation of the above mentioned criteria and to the profile of the staff member, while it excludes that the assignment to the new position could be subjected to a new competitive evaluation or to a new assessment of the skills of the staff member. Remedies The Tribunal considers it appropriate to order the rescission of the decision to separate the Applicant from service. In accordance with art. 10.5(a) of its Statute, the Tribunal will set an amount of compensation that the Respondent may elect to pay as an alternative to rescission of the decision. Considering the length of the Applicant's service, the short notice for termination given to him, and the budget provision contained in the respective Report for the whole year of 2018, and at a provisional level for 2019, and the fact that despite the existence of a suitable vacant post at the Applicant's duty station in his department no consideration was given to maintaining his services by lateral transfer, the Tribunal sets the amount of compensation at two years' net base salary. Given that the results from the medical certificate filed by the Applicant are generic and that the

Applicant did not provide evidence of the moral damage suffered with the specificity required by the UNAT case law, the claim for compensation for moral damage is dismissed.

#### Decision Contested or Judgment/Order Appealed

The Applicant contests the decision to terminate his continuing appointment, which entailed his separation from service on 6 August 2018.

#### Legal Principle(s)

A staff member holding a continuing or indefinite appointment has the highest level of legal protection from being terminated (Timothy 2018-UNAT-847). Staff rules 9.6(e) and 13.1(d) imply that the Organization shall not terminate the appointment of a staff member whose post has been abolished, at least if he or she holds an appointment of indeterminate duration, without first taking suitable steps to find him/her alternative employment. It follows from the language of staff rule 13.1(a), 13.1(d), and staff regulation 9.3(a)(i) that contracts of permanent staff may be terminated by the Secretary-General, provided that it is lawfully done, i.e., that relevant conditions concerning preferential retention are satisfied (Fasanella UNDT/2016/193 (para. 76)).

#### Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Nugroho

Entity

UNODA

Case Number(s)

UNDT/GVA/2018/058

Tribunal

UNDT

Registry

Geneva

Date of Judgement

27 Feb 2020

Duty Judge

Judge Buffa

Language of Judgment

English

French

Issuance Type

Judgment

Categories/Subcategories

Abolition of post

Termination

Applicable Law

Staff Regulations

- Regulation 1.2(c)

Staff Rules

- Rule 13.1
- Rule 9.6
- Rule 9.7

#### UNDT Statute

- Article 10.5

#### Related Judgments and Orders

2018-UNAT-847

UNDT/2016/193

UNDT/2019/175

UNDT/2017/080

UNDT/2016/204

UNDT/2016/102

UNDT/2016/181

2017-UNAT-730

2019-UNAT-926

2017-UNAT-787

2017-UNAT-764

2017-UNAT-742