

2017-UNAT-730, El-Kholy

UNAT Held or UNDT Pronouncements

UNAT considered an appeal by the Secretary-General. UNAT held that the central question before it was whether the Organisation complied with its obligation to Ms. El-Kholy to find her a suitable post. UNAT held that the Administration failed in its obligation to demonstrate that all reasonable and good faith efforts had been made to consider the staff member for available and suitable posts within UNDP before terminating her permanent appointment. UNAT held that the Administration's obligation to find a vacant and suitable post did not shift to the Appellant, regardless of the following: her failure to participate in the Job Fairs; the fact that she accepted a temporary assignment; or the fact that she was informed that she was affected by the structural change and the risk of separation of service due to the abolition of her post. UNAT held that it was for the Administration to prove that the staff member holding the permanent appointment was afforded due and fair consideration as required by the Staff Rules. UNAT noted that a number of posts were filled outside the scope of the Job Fairs by way of a lateral move or placement of an unassigned staff member holding a permanent appointment, which meant that those staff members were considered without having applied for them. UNAT questioned why Ms. El-Kholy was not afforded the same treatment. UNAT held that to consider that Ms. El-Kholy was supposed to apply for suitable and advertised posts, concurring with the same conditions as external candidates, would render moot her right of preference. UNAT held that not all reasonable and bona fide efforts were made to consider Ms. El-Kholy for available and suitable posts, as an alternative to the abolished one, with a view to avoiding to the greatest extent possible the separation of the staff member holding a permanent appointment. UNAT disagreed with UNDT's view that Ms. El-Kholy's failure to participate in the Job Fairs was a reason not to exceed the two-year limit; rather, UNAT held that it was a reason to reduce the amount of two-year cap to 18 months' net base salary. Noting that the purpose of compensation was to place the staff member in the position she or he would have been in had the Organisation complied with its contractual obligations, UNAT further noted that there was no evidence that Ms. El-Kholy found another position inside UNDP or the Organisation. UNAT rejected the Secretary-General's submission that the UNDT erred in not discounting from its award, Ms. El-Kholy's termination indemnity, as the objective of the termination indemnity, was to provide sufficient means of survival for the staff member to identify a regular placement in the labor market, not to restore the status quo ante. UNAT partially granted the appeal, insofar as the amount of in-lieu compensation was reduced to 18 months' net base salary, interest having been stated in the UNDT judgment, and affirmed the balance of the UNDT judgment, including the award of USD 2,000 as moral damages. UNAT denied Ms. El-Kholy's request for an award of costs.

Decision Contested or Judgment/Order Appealed

The Applicant contested the decision to terminate her permanent appointment by reason of an organizational restructuring. UNDT found that it was unlawful, ordering rescission, or, in lieu thereof, compensation in the amount of two years' net base salary, inclusive of USD 2,000 as moral damages.

Legal Principle(s)

While it is incumbent upon the staff member to establish the basis for in-lieu compensation, it remains the Administration's onus to establish a modifying fact, such as to provide evidence of gainful employment after separation, to support a reduction in the amount of compensation awarded.

Outcome

Appeal granted in part

Full judgment

[Full judgment](#)

Applicants/Appellants

El-Kholy

Entity

UNDP

Case Number(s)

2016-970

Tribunal

UNAT

Registry

New York

Date of Judgement

31 Mar 2017

President Judge

Judge Chapman

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Abolition of post

Priority consideration

Termination (of appointment)

Abolition of position

Applicable Law

Staff Rules

- Rule 13.1(d)
- Rule 9.6(e)
- Rule 9.6(g)

Related Judgments and Orders

UNDT/2016/102