



UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2017-UNAT-764

**Zachariah
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Rosalyn Chapman, Presiding Judge Dimitrios Raikos Judge Sabine Knierim
Case No.:	2016-1042
Date:	14 July 2017
Registrar:	Weicheng Lin

Counsel for Mr. Zachariah: Lennox S. Hinds

Counsel for Secretary-General: Amy Wood/Nathalie Defrasne

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/195, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 19 October 2016, in the case of *Zachariah v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 19 December 2016, and Mr. Mathew Zachariah filed his answer on 13 March 2017.

Facts and Procedure

2. The Dispute Tribunal made the following factual findings which the Appellant does not contest:¹

... The Applicant, a former staff member in the Publishing Section, Meeting and Publishing Division of the Department for General Assembly and Conference Management (“DGACM”), filed an application contesting the decision to abolish his post and, as a result, to terminate his permanent appointment.

... The Applicant was one of fourteen former and current staff members who, in March 2014, filed applications [before the UNDT] relating to the decision to terminate their permanent appointments following the abolition of a number of posts in DGACM. ...

...

Employment with the Organization

... The Applicant was a long-serving employee of the United Nations, having joined the Organization in 1994 and having worked for approximately 20 [sic] years. The Applicant received a permanent appointment effective 30 June 2009.

... The Applicant had been working as a Working Leader until 20 April 2014 at the TC-6 level, step 6. Effective 1 September 2014, the Applicant accepted early retirement at age 55.

15 August 2013 report of the ACABQ (A/68/7)

... On 15 August 2013, the Advisory Committee on Administrative and Budgetary Questions (“ACABQ”) published report A/68/7 (First report on the proposed programme budget for the biennium 2014–2015), in which it included proposals for specific posts to be abolished, including in DGACM.

¹ Impugned Judgment, paras. 1-2 and 10-23 (emphases in original).

... At para. I.107, the report recorded the ACABQ's enquiry as to the potential impact of post abolition on staff in the Publishing Section who might lose employment if the budget was approved. The report noted that the Department was "actively engaged" with [the Office of Human Resources Management (OHRM)] and other offices to "address the matter proactively":

Abolishments

I.106 A total of 99 posts are proposed for abolishment, including 4 General Service (Principal level), 56 General Service (Other level) and 39 Trades and Crafts posts, at Headquarters under subprogrammes 3 and 4, as follows:

...

(c) The abolishment of 39 Trades and Crafts posts and 22 General Service (Other level) posts in the Reproduction Unit and the Distribution Unit, reflecting the completion of the shift to an entirely digital printing operation ... ;

...

I.107 The Advisory Committee enquired as to the potential impact of post abolishment on staff and was informed that the staff in the Publishing Section who might lose employment would be affected if the proposed budget were approved. In anticipation of this possibility, the Department had been actively engaged, together with the Office of Human Resources Management and other relevant offices, to address the matter proactively. ...

I.108 The Advisory Committee recommends the approval of the proposed abolishment of 99 posts in the Department.

General Assembly resolution 68/246

... On 27 December 2013, the General Assembly approved the Secretary-General's proposed programme budget for the biennium 2014–2016,^[2] section 2 of which provided for the abolition of 59 posts in the Publishing Section of the Meetings and Publishing Division of DGACM.

Note of 30 December 2013

... On 30 December 2013, Mr. Yukio Takasu, the Under-Secretary-General for Management ("USG/DM"), sent a Note to the Chef de Cabinet, stating:

² This should read "biennium 2014-2015".

**Termination of appointments on abolition of posts –
DGACM staff members**

1. I refer to the attached recommendation by the USG/DGACM for the Secretary-General to terminate the appointments of a number of staff members currently serving with DGACM. This recommendation follows General Assembly decision 68/6 (Sect. 2) that led to the abolition of posts effective 31 December 2013.
2. DGACM has reviewed and is continuing to review possibilities to absorb affected staff members; in line with staff rule 9.6(e) and (f). While it was possible to otherwise accommodate some staff members encumbering posts slated for abolition, and while others have found alternative employment in the Organization, the attached list concerns staff members where this was not possible at this time.
3. Given DGACM's confirmation that consultation efforts with staff representatives and affected staff members have been undertaken and that staff rules 9.6(e) and (f) have been taken into account and complied with, I support the recommendation that the Secretary-General consider the termination of the appointments of the staff members listed in the attachment. Once the Secretary-General has taken a decision, such decision will be conveyed to the staff members through their parent department. In case of termination, this will be a termination notice pursuant to staff rule 9.7. Should any of these staff members secure alternative employment in the Organization prior to any termination taking effect, such termination would be rendered moot.
4. Please note that the authority to terminate for abolition of posts or reduction of the staff has been retained by the Secretary-General pursuant to Annex I of ST/AI/234/Rev.1. We would appreciate [the Executive Office of the Secretary-General (EOSG)'s] assistance in securing the Secretary-General's decision on this matter at the earliest convenience. Given the required standards for delegation of authority, most recently under judgement *Bastet* (UNDT/2013/172), please also assist in ensuring the decision is endorsed by the Secretary-General, preferable in the form of a memorandum. For use of any communication conveying delegations or administrative decisions, the tribunal has indicated its expectation that the name of the signatory must be spelled out if the signature is not readable, and that any such communication must display the functional title of the decision-maker.

5. A draft decision for the Secretary-General's consideration is attached.

Secretary-General's approval of termination of appointments

... By memorandum dated 31 December 2013, the Secretary-General approved the termination of the appointments of staff members listed in the USG/DM's proposal dated 30 December 2013, "on the grounds of abolition of posts pursuant to staff regulation 9.3(a)(i) and staff rule 9.6(c)(i)". Attached to the Secretary-General's memorandum was a table of 34 staff members on permanent appointments, indicating for each staff member their level, entry on duty; date of birth; age; retirement age; visa status; and nationality.

Termination letter of 31 December 2013

... By letter dated 31 December 2013, signed by the Executive Officer, DGACM, the Applicant was informed as follows:

On 27 December, the General Assembly approved the Secretary-General's proposed programme budget for the biennium 2014-2015, section 2 of which provides for the abolition of 59 posts in the Publishing Section of the Meetings and Publishing Division of the Department for General Assembly and Conference Management (DGACM).

I am writing to inform you that the post against which your contract is charged is one of the 59 posts that the General Assembly has abolished effective 1 January 2014 and that, as a result, the Secretary-General has decided to terminate your permanent appointment. The present letter, therefore, constitutes the formal notice of termination of your permanent appointment under staff rule 9.7.

You are strongly encouraged to apply for all available positions for which you believe you have the required competencies and skills. Should you submit an application, you are invited to so inform the DGACM Executive Office, which will support you in liaising with the Office of Human Resources Management with a view to giving priority consideration to your application.

In the event that you are not selected for a position, I regret to inform you that you will be separated from service not less than three months (90 days) of receipt of this notice, as per staff rule 9.7. However, you will be entitled to a termination indemnity in accordance with staff regulation 9.3(c).

My office will assist you in every possible way during this difficult time, and I sincerely wish you success with your applications.

Request for management evaluation

... On 4 February 2014, the Applicant filed a request for management evaluation of the decision to abolish his post and to terminate his permanent appointment.

24 February 2014 email

... On 24 February 2014, the Executive Officer of DGACM sent an email to the affected staff members, including the Applicant, stating (emphasis in original):

Colleagues,

Mr. Gettu [Under-Secretary-General, DGACM] expresses his gratitude to all who attended the meeting held last Wednesday on the 19th, and has asked that we reiterate two important points which were shared at the meeting for the benefit of colleagues who might not have attended:

First, that in light of the fact that the termination notices were given out over a period of several weeks in January, that the decision has been taken to separate all permanent staff as of 90 days from the date of the latest letter delivered which was 20 January. For all staff with permanent contracts who do not have an appointment, their separation date will be 20 April. Because that day falls on a Sunday, and the preceding Friday is the Good Friday holiday, any staff separating as of that date will be cleared by the Executive Office on Thursday, 17 April (last work day).

Second, that the deadline for the application to the temporary digitization posts has been extended, once again, until 28 February. Staff need to apply to a job opening in order to be considered for posts.

26 February 2014 contract extension

... By letter dated 28 February 2014, the Applicant was notified by the Management Evaluation Unit (“MEU”) that two days earlier they had been advised by the Administration of the extension of the Applicant’s appointment until 20 April 2014. The letter further stated that, since the extension of his appointment superseded the contested decision, it effectively rendered his request for management evaluation moot, and his management evaluation file would therefore be closed.

Filing of an application before the Tribunal

... On 21 March 2014, the Applicant filed the ... application [before the UNDT].

Subsequent job search

... The Applicant applied for one available post. He explained that the salary of the other posts that remained available to him were far less than the salary he received on the post he had encumbered and, given his financial obligations, he could not afford such loss. The Applicant was not selected for the post he applied for. [The Chief, Meeting Support Section,] Mr. Nandoe's evidence was that the post which the Applicant had applied for was a G-7 position in the printing operations, but was not selected because another candidate who scored higher in the evaluations was selected.

Termination of permanent appointment

... The Applicant testified that, had he retired on 20 April 2014, he would have lost a significant portion of his pension since he had not completed 18 years of service. Consequently, to avoid such loss, he requested the Administration to extend his contract for an additional four months so that he could reach 18 years of service. The Administration granted his request but specifically indicated that during that time he could not search for an alternative position. The Applicant testified that he had no reasonable alternative but to retire at the end of the four-month-extension. Effective 1 September 2014, the Applicant accepted early retirement at age 55, after delayed termination of his permanent appointment.

3. Mr. Zachariah brought an application before the UNDT challenging "[t]he decision to abolish Applicant's post, effective January 2014, and as a result to terminate Applicant's permanent appointment". The staff member "seeks the immediate rescission of the 31 December 2013 decision to terminate his appointment"; and "enforcement of the Administration's duties to search out and find an alternative suitable post to Applicant within the General Service in its duty station (New York Headquarters) to retain Applicant in preference on all other types of appointments".

4. On 19 October 2016, the UNDT issued Judgment No. UNDT/2016/195. Initially, the Dispute Tribunal found that the staff member's application was not moot and was receivable. On the merits, the UNDT found: (i) "General Assembly resolutions 54/249 and 68/246 did not have the effect of taking away the authority of the Secretary-General to terminate permanent appointments based on approved abolition of posts"³ and "there was no breach of General Assembly resolution 54/249";⁴ (ii) "the Secretary-General had the legal authority to terminate [Mr. Zachariah's] ... appointment";⁵ (iii) "the Organization committed material

³ Impugned Judgment, para. 69.

⁴ *Ibid.*, para. 71.

⁵ *Ibid.*, para. 78.

irregularities and failed to act fully in compliance with the framework set out in staff rules 13.1(d)-(e) and 9.6(e)”⁶ by subjecting Mr. Zachariah to the requirement of competing for available posts against other, non-permanent staff members; and (iv) by failing “to reassign [Mr. Zachariah] as a matter of priority to another post matching his abilities and grade”.⁷ The Dispute Tribunal ordered rescission of the decision to terminate Mr. Zachariah’s contract or, in lieu of rescission, two years’ net base salary minus any termination indemnity paid to him. In addition, the UNDT awarded USD 7,000 as “compensation for emotional distress”.⁸

5. On 19 December 2016, the Secretary-General filed the appeal of Judgment No. UNDT/2016/195. On 13 March 2017, Mr. Zachariah filed an answer.

Submissions

The Secretary-General’s Appeal

6. The UNDT erred in law and exceeded its competence by finding that Mr. Zachariah’s application was receivable as the DGACM notice to Mr. Zachariah of the General Assembly’s decision to abolish his post is not an appealable administrative decision that has a direct and negative impact on the staff member’s rights. Rather, the decision to terminate Mr. Zachariah’s appointment was contingent upon him not finding an alternative position; thus, the notice was preparatory and “hypothetical” in nature in that it depended on future events. In the absence of an appealable administrative decision, the UNDT did not have jurisdiction to entertain the application.

7. The Secretary-General further maintains that the UNDT erred in law and exceeded its jurisdiction by considering evidence that post-dated Mr. Zachariah’s request for management evaluation and that he had not challenged before the MEU. The UNDT’s jurisdiction is limited to matters presented to management evaluation.

8. The UNDT erred in law by finding that the Secretary-General failed to fully comply with Staff Rules 9.6 and 13.1. Staff Regulation 1.2(c), allowing for the lateral reassignment outside the normal selection process of staff affected by abolition of post, does not create a

⁶ *Ibid.*, para. 91.

⁷ *Ibid.*, paras. 84 and 90.

⁸ *Ibid.*, paras. 98 and 102.

right to such placement. In addition, the Administration is not precluded from assessing a permanent staff member's candidacy for a particular position in the context of a competitive selection exercise. On the contrary, an open, transparent process provides an appropriate means by which the Administration may evaluate a staff member's suitability, as required by Staff Rules 9.6 and 13.1. Moreover, the Administration cannot be faulted for not considering Mr. Zachariah for a position for which he did not even apply.

9. If the Administration were precluded from evaluating the suitability of a staff member for a position through competitive process, this would constitute a significant exception from the principle articulated in Article 101 of the United Nations Charter to secure the highest standards of efficiency, competence and integrity among staff. In the present case, the Administration offered career training and directly notified Mr. Zachariah of vacancies, some of which were restricted to the affected DGACM staff members; it also extended his appointment beyond the three-month notice period to afford him additional opportunities to apply for vacant positions. By contrast, Mr. Zachariah did not make even minimal efforts to cooperate by applying for positions for which he was eligible in view of his grade level, skills and competencies.

10. The UNDT erred in rescinding the decision to terminate Mr. Zachariah's appointment and in awarding in-lieu compensation at two years' net base salary without requiring Mr. Zachariah to provide evidence of his post-separation employment.

11. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment, except with respect to its findings that the Secretary-General had the legal authority to terminate Mr. Zachariah's appointment. In the alternative, the Secretary-General requests the Appeals Tribunal to vacate or reduce the award of compensation.

Mr. Zachariah's Answer

12. The UNDT did not err in receiving Mr. Zachariah's application. The notice of termination was not interlocutory; it was a final administrative decision. The fact that Mr. Zachariah was given ninety-day notice prior to the termination did not detract from the finality of the decision as the Administration was merely fulfilling its obligation to give notice under Staff Rule 9.7; no evidence was presented that there was another "final" notice forthcoming.

13. The UNDT did not err or exceed its jurisdiction when it admitted and considered evidence of the Administration's handling of Mr. Zachariah's applications following his request for management evaluation. The Secretary-General may not, on the one hand, introduce evidence of post-management evaluation actions and, on the other hand, claim that Mr. Zachariah cannot rebut that evidence. The UNDT has broad discretion under Article 18(1) of the UNDT Rules of Procedure to admit evidence. Consequently, the UNDT did not commit a reversible error when it considered and weighed that evidence.

14. The UNDT was correct in its legal conclusions and factual findings when it determined that the Secretary-General failed to fully comply with Staff Rules 9.6 and 13.1. It was unlawful under Staff Rules 9.6(e) and 13.1(d) for the Administration not to make a good faith effort to identify alternative posts for Mr. Zachariah, as a permanent staff member facing abolition of his post. The UNDT correctly found that there were available posts against which Mr. Zachariah could have been considered – without having to apply and compete for them – such as digital scanning posts that matched his experience but the Administration did not consider Mr. Zachariah for them, competitively or otherwise. The Administration placed other staff members in posts during the restructuring of DGACM through lateral transfer, but it did not consider lateral transfer for Mr. Zachariah.

15. Even assuming the Administration could require Mr. Zachariah to participate in competitive selection exercises, under Staff Rules 9.6(e) and 13.1(d), the Administration must distinguish between permanent staff and other categories of staff in these selection exercises. Instead, the Administration disregarded length of service and contract status. The Administration's efforts were not "minimally sufficient" to meet its obligations towards permanent staff members. Mr. Zachariah complied with the requirement of "reasonable cooperation" by (unsuccessfully) applying for posts.

16. Finally, the UNDT did not err in awarding compensation to Mr. Zachariah. The UNDT enjoys discretion to determine damages in each particular case. The Secretary-General misrepresents the record when he states that there was no evidence on the mitigation of loss through employment income. In fact, Mr. Zachariah testified at his oral hearing as to his financial situation and gave specific information with respect to his economic loss. The UNDT also correctly awarded compensation for emotional distress as it was best placed to assess and weigh the evidence before it. Mr. Zachariah requests that the Appeals Tribunal reject the appeal in its entirety and uphold the UNDT Judgment.

Considerations

Receivability

17. The Secretary-General contends that Mr. Zachariah's application does not contest an administrative decision which is subject to judicial review because he might not have been terminated if he had been able to find another position before the expiration of the notice period. The Dispute Tribunal rejected this contention, stating:⁹

... The letter of termination stated in no uncertain terms that the post against which [Mr. Zachariah] had been placed was abolished by the General Assembly effective 1 January 2014, and "as a result, the Secretary-General has decided to terminate [his] permanent employment". The letter further stated that it constitute[d] the formal notice of termination of [Mr. Zachariah's] permanent appointment" and that, "[i]n the event [Mr. Zachariah] [is] not selected for a position, ... [he] will be separated from service not less than three months (90 days) of receipt of this notice". This letter, without any doubt, affected [Mr. Zachariah's] terms of employment, as it resulted in the termination of his employment by abolishment of the post he encumbered, with a three-month notice.

18. As the Appeals Tribunal has often reiterated, for purposes of judicial review under the Dispute Tribunal's Statute, the Dispute Tribunal is to apply the definition of administrative decision set forth in *Andronov*:¹⁰

... There is no dispute as to what an "administrative decision" is. It is acceptable by all administrative law systems that an "administrative decision" is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules and regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

19. The key characteristic of an administrative decision subject to judicial review is that the decision must "produce[] direct legal consequences" affecting a staff member's terms and conditions of appointment; the administrative decision must "have a direct impact" on the

⁹ *Ibid.*, para. 36.

¹⁰ Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para. V.

terms of appointment or contract of employment of the individual staff member.¹¹ Additionally, the Dispute Tribunal may consider “the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision”.¹²

20. At the time Mr. Zachariah’s application was pending before the Dispute Tribunal, the General Assembly had approved the Secretary-General’s proposed programme budget for the biennium 2014-2015, section 2 of which provided for the abolition of 59 posts in the Publishing Section of the Meetings and Publishing Division of DGACM, including the post against which Mr. Zachariah’s contract was charged. The termination letter of 31 December 2013, resulting from the abolishment of Mr. Zachariah’s post, was a final decision of the Administration to terminate his permanent appointment with the Organization, as demonstrated by the language in the letter stating that “the present letter ... constitutes the formal notice of termination of your permanent appointment under staff rule 9.7”. The mere fact that Mr. Zachariah’s separation from service would not occur if he were selected for another position does not diminish the fact that the decision to terminate his permanent employment had been made. Thus, the termination letter of 31 December 2013 was a challengeable administrative decision.¹³

21. Considering these factors, we find that the Dispute Tribunal correctly determined that Mr. Zachariah was challenging an administrative decision that “produced direct legal consequences” affecting his employment; Mr. Zachariah’s post was abolished by the General Assembly and his position was terminated. The UNDT correctly found that Mr. Zachariah’s application was receivable and adjudicated the merits of his claims.

¹¹ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 49, citing *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058, para. 17.

¹² *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 50, citing *Bauzá Mercére v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-404, para. 18 and citations therein.

¹³ See *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481.

*Merits**(i) Evidence Post-Management Evaluation*

22. The role of the Dispute Tribunal in characterizing the claims a staff member raises in an application necessarily encompasses the scope of the parties' contentions:¹⁴

... The duties of [the Dispute Tribunal] prior to taking a decision include adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task. ...

... Thus, the authority to render a judgment gives the [Dispute Tribunal] an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review.

23. The Secretary-General submits that the UNDT erred in law and exceeded its jurisdiction by considering matters beyond the scope of Mr. Zachariah's request for management evaluation and the MEU's response. There is no merit to this complaint for several reasons. First, as quoted above, the UNDT has discretion to interpret the application broadly in light of numerous factors. It is the role of the Dispute Tribunal to adequately interpret and comprehend the application submitted by the moving party, whatever name the party attaches to the document,¹⁵ as the judgment must necessarily refer to the scope of the parties' contentions. Thus, the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review. As such, the Dispute Tribunal may consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed.¹⁶ The evidence about which the Secretary-General complains is relevant to the UNDT's interpretation of Mr. Zachariah's application.

¹⁴ *Massabni v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-238, paras. 2-3.

¹⁵ *Chaaban v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-611, para. 16; citing *Gakumba v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-591, para. 21 and citations therein.

¹⁶ *Chaaban v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-611, para. 18.

24. Second, the Secretary-General presented evidence of actions taken after the issuance of the notice to support his defense against Mr. Zachariah's application. As Mr. Zachariah aptly points out, the Administration may not produce evidence of events subsequent to the management evaluation request, on the one hand, and object to Mr. Zachariah offering rebuttal evidence, on the other hand.

25. Third, due to the unusual circumstances of the case, wherein the notice of termination was given months in advance of Mr. Zachariah's actual termination from service, it would have been foolhardy for the UNDT to refuse to admit evidence of events after the issuance of the notice of termination. Subsequent events could have, *inter alia*, rendered Mr. Zachariah's claims moot or affected the amount of damages he sought. For all these reasons, there is no merit to the Secretary-General's claim that the UNDT exceeded its jurisdiction or competence in allowing evidence from Mr. Zachariah of events subsequent to the response of the management to his request for evaluation.

(ii) *Termination*

26. The Administration has broad discretion to reorganize its operations and departments to meet changing needs and economic realities.¹⁷ As the Appeals Tribunal has recognized, "an international organization necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff".¹⁸ Nevertheless, even in a restructuring exercise, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members.¹⁹ In the present case, there can be little doubt that the retrenchment exercise was genuine and not improperly directed at Mr. Zachariah or any other specific staff member, as the General Assembly abolished a number of DCMGA posts before the notice of termination was sent. Mr. Zachariah does not suggest otherwise.

¹⁷ *Masri v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-626, para. 30; *Islam v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-115, para. 30; see also *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

¹⁸ *Matadi et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-592, para. 16, citing *Bali v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-450, para. 21 and citations therein.

¹⁹ *Ibid.*, citing *Hersh v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-433/Corr.1, para. 17.

27. The Administration may terminate the appointment of a permanent staff member whose post has been abolished or due to reduction of staff, provided it complies with the requirements set forth in applicable regulations and rules. Staff Rule 13.1(d) specifically sets forth a policy of preference for retaining a staff member with a permanent appointment who is faced with the abolition of a post or reduction of staff, stating:²⁰

... 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 effectively be 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 geographic distribution.

28. Staff Rule 13.1(e) provides that “[t]he provisions of paragraph (d) above insofar as they relate to staff members in the General Services 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”. Staff Rule 9.6(e) regarding termination for abolition of posts and reduction of staff expressly incorporates Staff Rule 13.1 and sets forth a similar policy of preference for the retention of permanent or continuing staff.²¹

²⁰ Emphasis added.

²¹ Staff Rules 9.6(e) and (f) provide (Emphasis added):

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.

29. At the hearing before the Dispute Tribunal, the Administration presented evidence that “Mr. Zachariah applied for the G-7 position for the printing operations (Job Number 27589), but was not selected. He was interviewed for the position but another candidate who scored higher in the evaluations was selected.” As he did not obtain another position, Mr. Zachariah was terminated, taking early retirement.

30. The Dispute Tribunal correctly concluded that Mr. Zachariah’s status as a permanent staff member provided him “with additional legal protections and guarantees”,²² as recognized historically within the Organization:²³

... It is important to keep in mind the reasons for the creation and existence of an institute of permanent staff in the context of an international organization such as the United Nations. Staff members of the Organization owe their allegiance to no national government. Having complied with all the necessary requirements and criteria for a permanent appointment, and having received such an appointment, they become entitled to certain legal protections and advantages as articulated in the Staff Regulations and Staff Rules, including as compared to staff on other types of appointments. This reasoning applies equally to permanent staff regardless of the type of their contractual arrangement (professional-level, general service-level, or other).

31. The Dispute Tribunal also properly concluded that the Administration had authority to terminate Mr. Zachariah as a permanent appointee under Staff Regulation 9.3(a)(i)²⁴ and Staff Rules 13.1(a)²⁵ and 13.1(d), “provided that it is lawfully done, i.e., that relevant conditions concerning preferential retention are satisfied”²⁶ but that the Administration did not comply with Staff Rule 13.1(d) in terminating Mr. Zachariah.²⁷ The UNDT aptly concluded:²⁸

... Staff rule 13.1 is clear that permanent staff on abolished posts, if they are suitable for vacant posts, should only be compared against only other permanent staff – it would be a material irregularity to place them in the same pool as continuing, fixed-term, or temporary staff members. Further, ... the advertising of a post with an invitation to apply

²² Impugned Judgment, para. 60.

²³ *Ibid.*, para. 62.

²⁴ Staff Regulation 9.3(a)(i) provides that “[t]he Secretary-General may, giving the reasons therefore, terminate the appointment of a staff member who holds a ... continuing appointment ... [i]f the necessities of service require abolition of the post or reduction of the staff ...”.

²⁵ Staff Rule 13.1(a) provides, in part, that “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”.

²⁶ Impugned Judgment, para. 77.

²⁷ *Ibid.*, paras. 82 and 88.

²⁸ *Ibid.*, para. 88.

does not give priority to affected staff, nor does it equate with a formal proposal to assign a permanent staff member to a new position....

32. The mandatory language of Staff Rule 13.1 – providing that staff members with permanent appointments “shall be retained in preference to those on all other types of appointments” – requires more than placing them in the same competitive pool as other applicants for a position.

33. The Dispute Tribunal found that as to Mr. Zachariah, who applied for one vacancy and “was required to compete competitively ... against non-permanent staff members”,²⁹ the Administration presented not “an iota of evidence ... that the required criteria were applied or considered, such as [Mr. Zachariah’s] contract status, suitability for vacant posts, special skills, length of service, competence and integrity, nationality, etc. ... [T]he main method of retention of staff was through a competitive process, without consideration of priority criteria such as contract type or seniority.”³⁰

34. The Appeals Tribunal agrees that Mr. Zachariah’s termination was unlawful, albeit without fully agreeing with the reasoning of the Dispute Tribunal. Initially, the Administration has the burden of showing that it complied with the Staff Rules in terminating Mr. Zachariah. As the UNDT found, the Administration did not meet its burden. Mr. Zachariah – and any 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. Mr. Zachariah did apply for a position, and the Administration does not claim that he was not qualified for that post.

35. Once the application process is completed, however, the Appeals Tribunal is of the view that the Administration is required by Staff Rule 13.1(d) to consider the permanent staff member on a preferred or non-competitive basis for the position, in an effort to retain the permanent staff member. This requires determining the suitability of the staff member for the post, considering the staff member’s competence, integrity and length of service, as well as other factors such as nationality and gender. Only if there is no permanent staff member who is suitable, may the Administration then consider the other, non-permanent staff members who

²⁹ *Ibid.*, para. 83.

³⁰ *Ibid.*, para. 86.

applied for the post. As this was not done for Mr. Zachariah, the UNDT properly concluded that the decision to terminate Mr. Zachariah was unlawful.³¹

(iii) *Remedies*

36. Pursuant to Article 10.5(a) of the UNDT Statute, the Dispute Tribunal rescinded Mr. Zachariah's termination and, in lieu of reinstatement, ordered two years' net base salary, less any amount of termination indemnity.³² The Secretary-General challenges the in-lieu compensation, arguing that Mr. Zachariah must show mitigation. That is not so. As we stated in *Eissa*,³³ "[in-lieu] compensation is not compensatory damages based on economic loss. Thus, there is no reason to reduce this award by the amount of the termination indemnity" or to require mitigation. Accordingly, we find that the UNDT erred in reducing Mr. Zachariah's in-lieu compensation by the amount of his termination indemnity, to which he has a right under the Staff Regulations and Staff Rules. The award of in-lieu compensation should be modified to strike the deduction for termination indemnity.

37. Mr. Zachariah testified that he did not earn any compensation after his termination due to his wife's illness. Plus, he was forced to sell his house and relocate to a less expensive area in order to keep his expenses to a minimum. He also stated that he was devastated by the loss of his job and the fact that he had no choice but to take early retirement. Based on Mr. Zachariah's testimony, the UNDT awarded him USD 7,000 as damages for emotional stress.³⁴ The Appeals Tribunal has recently confirmed that the concerned staff member's testimony by itself is not sufficient to establish that he suffered compensable harm.³⁵ Thus, the award of compensatory damages for emotional distress in the amount of USD 7,000 should be reversed.

³¹ *Ibid.*, para. 91.

³² *Ibid.*, paras. 96-97. See, e.g., *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092.

³³ *Eissa v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-469, para. 27. Any language to the contrary in *Bowen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-183, para. 3, is distinguishable as the parties in that case apparently agreed to the amount of in-lieu compensation awarded by the Dispute Tribunal.

³⁴ Impugned Judgment, paras. 95 and 98.

³⁵ *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742.

Judgment

38. The appeal is granted in part. Judgment No. UNDT/2016/195 is affirmed as to the rescission of the termination of Mr. Zachariah's contract; however, the award of alternative compensation to rescission is modified, so that the Secretary-General may elect to pay compensation in the amount of two years' net base salary without any reduction for termination indemnity, and the award of USD 7,000 as compensation is reversed.

Original and Authoritative Version: English

Dated this 14th day of July 2017 in Vienna, Austria.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Raikos

Entered in the Register on this 5th day of September 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar

Judge Knierim's Dissenting Opinion

1. I most respectfully dissent from the Judgment.

The Administration's duties under Staff Rule 13.1(d)

2. My colleagues are of the view that the Administration is required by Staff Rule 13.1(d), in a selection process, to consider a permanent staff member facing termination due to abolition of his or her post on a preferred and non-competitive basis for a position and that other, non-permanent staff members who applied for the post, may only be considered if there is no permanent staff member who is suitable among the applicants.¹

3. I do not agree. Staff Rule 13.1(d) does not order the Administration to give priority to permanent staff members and retain them once they are considered suitable. On the contrary, Staff Rule 13.1(d) specifically states that such priority may only be granted to permanent staff members under the condition that due regard has been given, *inter alia*, to relative competence (“... 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”). Giving due regard to relative competence necessarily requires the Administration to assess the permanent staff member’s competence in relation to all other staff members applying for a position. Under Staff Rule 13.1(d), the Administration is thus not only allowed but obliged to compare the permanent staff member’s competence to the competence of other applicants.

4. This does not mean that the Administration could never give priority to a permanent staff member who is less qualified than other, non-permanent staff members. The Administration, in my view, has to weigh the difference in competence, integrity and length of service (and possibly the geographical background) and then decide whether the permanent staff member shall be retained or not.

5. The consequence of the majority’s opinion is that the Administration—against the unambiguous wording of Staff Rule 13.1(d)—may not give such due regard to relative competence (and all other criteria) in a case where one permanent staff member is competing against other non-permanent staff members although they may be much better

¹ See para. 35 of the majority opinion.

qualified for the position in question. The present case shows that a permanent staff member could even force the Administration into promoting him or her to a higher grade level. Although Mr. Zachariah applied only for one position and at a higher grade level (G-7), the majority opinion considers that the Administration was obliged to choose (and consequently promote) him regardless of the fact that he was deemed less qualified for the position than other candidates.

6. The majority opinion is correct in seconding the Dispute Tribunal's finding that Mr. Zachariah's status as a permanent staff member provided him "with additional legal protections and guarantees", since permanent staff members, "[h]aving complied with all the necessary requirements and criteria for a permanent appointment, and having received such an appointment, ... become entitled to certain legal protections and advantages".² However, the UNDT also correctly specified that permanent staff members enjoy such special protections "as articulated in the Staff Regulations and Staff Rules"³ and therefore not beyond, let alone in contravention, of these provisions. The Staff Regulations and Rules explicitly provide for specific protections such as termination indemnity. They do not, in my view, stipulate a preferential treatment of permanent staff members to the extent envisaged by the majority opinion.

7. Therefore, I cannot blame, and do not want to punish, the Administration for having acted in accord not only with the wording of Staff Rule 13.1(d) but also with Article 101(3) of the Charter and General Assembly resolution 51/226, III.B.(5), which oblige the Secretary-General to ensure that the highest standards of efficiency, competence and integrity serve as the primary criteria in the recruitment of staff.

In-lieu compensation and termination indemnity

8. My colleagues modified the award of in-lieu compensation and struck the deduction for termination indemnity as they found that the UNDT erred in reducing Mr. Zachariah's in-lieu compensation by the amount of his termination indemnity.

9. In my opinion, this Tribunal did not have the authority to examine the lawfulness of the deduction for termination indemnity on appeal.

² Para. 30 of the majority opinion, referring to paras. 60 and 62 of the impugned Judgment.

³ *Ibid.*

10. Article 2(1) of the Appeals Tribunal Statute provides as follows:

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.

11. The Secretary-General was the only party to appeal the Judgment; Mr. Zachariah filed neither an appeal nor a cross-appeal. In his appeal, the Secretary-General did not assert that the UNDT, in deducting the termination indemnity from the in-lieu compensation, committed an error of law. Thus, I can find no basis for the Appeals Tribunal to examine this question *proprio motu* on appeal. The Secretary-General, although being the only appealing party, now finds himself obliged to pay an even higher in-lieu compensation to Mr. Zachariah than under the UNDT Judgment.

12. Assuming, *arguendo*, that the issue of in-lieu compensation was opened in *toto* by the Secretary-General's challenges against the UNDT Judgment and setting of in-lieu compensation, I still cannot agree with my colleagues. Usually, when the UNDT commits an error of law with regard to in-lieu compensation, we remand the case to the UNDT or set an appropriate in-lieu compensation ourselves. Neither was done here. The majority Judgment merely deals with the UNDT's error of deducting the termination indemnity from the in-lieu compensation but does not examine whether the two years' net base salary is an adequate amount of in-lieu compensation (obviously, the UNDT did not want to set an in-lieu compensation of two years' net base salary but a lower amount, as becomes apparent from its deduction of the termination indemnity). In my opinion, two years' net base salary as in-lieu compensation is far too high. When deciding on the amount of in-lieu compensation for an unlawful termination decision, the Tribunals should take into account all relevant facts of the case including the efforts of the Administration to retain the affected staff member and the staff member's efforts to find another suitable position within the Organization. In the present case, the efforts on the side of the Administration to find suitable positions for the affected staff members including Mr. Zachariah were substantial. From 2012, DGACM

implemented a hiring freeze on external recruitment in the General Service category. Additionally, the Administration offered career training and directly notified Mr. Zachariah of vacancies, some of which were restricted to the affected DGACM staff members; it also extended his appointment beyond the three-month notice period to afford him additional opportunities to apply for vacant positions. Deadlines were extended and the Organization allowed on an exceptional basis affected staff members in the Trades and Crafts category to be eligible for positions in the General Service category by waiving the requirements for the Administrative Support Assessment Test (ASAT). Not only did the Administration offer existing positions to the affected staff members but even created new job opportunities in distribution and digital printing (the Qatar posts). As a result, the Administration succeeded in retaining all but four of the 59 permanent staff members affected by the abolition of posts. Mr. Zachariah, on the other hand, applied only for one position above his grade level. Finally, it has to be taken into account that the Administration extended Mr. Zachariah's appointment by another four months for the sole purpose of enabling him to choose early retirement.

Original and Authoritative Version: English

Dated this 14th day of July 2017 in Vienna, Austria.

(Signed)

Judge Knierim

Entered in the Register on this 5th day of September 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar