



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

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Judgment No. 2017-UNAT-730

**El-Kholy  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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**Before:** Judge Martha Halfeld, Presiding  
Judge Rosalyn Chapman  
Judge John Murphy

**Case No.:** 2016-970

**Date:** 31 March 2017

**Registrar:** Weicheng Lin

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**Counsel for Ms. El-Kholy:** George Irving

**Counsel for Secretary-General:** Amy Wood

**JUDGE MARTHA HALFELD, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/102, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 22 July 2016, in the case of *El-Kholy v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 20 September 2016, and Ms. Heba El-Kholy filed her answer on 13 October 2016.

**Facts and Procedure**

2. Ms. El-Kholy began her career with the United Nations Development Programme (UNDP) in 1998, at the P-4 level, at UNDP's Headquarters in New York and was promoted to the P-5 level in 2002 and to the D-1 level in 2005. She was granted a permanent appointment on 30 June 2009. With effect from 10 March 2012, she was appointed to the post of Director, Oslo Governance Centre (OGC) (D-1), Democratic Governance Group (DGG), Bureau for Development Policy (BDP), in Oslo, Norway. The majority of Ms. El-Kholy's performance evaluations during the 16 years of her career rated her as exceeding expectations and outstanding. For the cycle 2013/14, she received an overall rating of "very good".

3. In November 2012, the Norwegian Government indicated that it planned to cut its funding in 2013 to the UNDP's Governance Thematic Trust Fund (DGTTF), through which the OGC was funded, by USD 3.5 million. In July 2013, Mr. Martinez-Soliman, the Deputy Assistant Administrator and Deputy Director, BDP, visited Norway to discuss the future of OGC with the Norwegian Government.

4. By e-mail dated 22 August 2013, Mr. Martinez-Soliman informed Ms. El-Kholy that structural changes within OGC were needed due to funding concerns for 2014, and that those changes would also affect the profile of the post of Director, OGC, she encumbered.

5. Ms. El-Kholy was not involved in the discussions with the host government; BDP's senior management (including Mr. Martinez-Soliman who acted also as Director, BDP since September 2013) considered it inappropriate to involve staff. Ms. El-Kholy considered that excluding her as Director, OGC was unjustified and had a potentially negative impact on her position and team. Concerned about what she regarded as the lack of transparency and secrecy surrounding the restructuring discussions, Ms. El-Kholy contacted the Director of the UNDP Ethics Office in October 2013 and January 2014. Also in January 2014, Ms. El-Kholy

verbally raised concerns with the Director, Bureau of Management (BOM), and in writing with the Director, Office of Human Resources (OHR), regarding what she viewed as improper treatment towards her by Mr. Martinez-Soliman.

6. By e-mail of 13 February 2014, Mr. Martinez-Soliman informed Ms. El-Kholy of the decision to abolish her post “because of the need to move forward into a year of transition leading to the phasing out of OGC [and that] the decision was based on the urgent need to revitalize the partnership with Norway and to develop a different programme for [OGC]”.<sup>1</sup>

7. The UNDT found as follows:<sup>2</sup>

... By letter dated 20 February 2014, ... [the] Officer-in-Charge, OHR, formally notified [Ms. El-Kholy] that her post as Director, DGG/BDP, would be abolished with effect from 31 March 2014. She was also informed that she would be placed on the status of “between assignment”, and was encouraged to apply for vacancies at UNDP and other sister agencies. The letter further informed [her] that the three months job search period would start on the date of the letter, and run through to 31 May 2014. She was also told that as of 1 April 2014, she would become part of the Business Solutions Exchange (“BSE”). Finally, [Ms. El-Kholy] was advised of the options she would have should she not find a new assignment by the end of the three months search period, namely to undertake a fully funded temporary assignment; to avail herself of accrued annual leave; to serve the one-time three-month separation notice period which would allow her to remain on the payroll while continuing to search; to take Special Leave without Pay (“SLWOP”) and continue applying for vacancies as an internal candidate. She could also request Early Retirement if she was 55 years of age or older.

... By email of 22 February 2014, [Ms. El-Kholy] was provided with a note explaining the significance of the BSE status. The note clarified that the BSE consisted of a talent pool composed of long-serving international staff members, who were between assignments, like herself, and whose posts were abolished. (...)

... By email of 7 March 2014, [Ms. El-Kholy] indicated that the terms of reference for the post of Senior Advisor, Gender, offered to her by the BDP Gender team, to be based in Brussels, Belgium, were not suitable. By email of 18 March 2014, [Ms. El-Kholy] further declined a post of Senior Gender Advisor, with the BDP Gender team, in Bruges, Belgium. These posts were temporary assignments.

... On 31 March 2014, [Ms. El-Kholy] left her post.

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<sup>1</sup> Impugned Judgment, para. 11.

<sup>2</sup> *Ibid.*, paras. 12-42.

... By letter dated 31 March 2014, the State Secretary, Ministry of Foreign Affairs, Norway, thanked [Ms. El-Kholy] for her close cooperation and relentless commitment to strengthen the relevance of OGC. He also stressed that “thanks to [[Ms. El-Kholy]’s] efforts, [they] now have solid results and experiences to build on as UNDP and the Ministry of Foreign Affairs have renewed [their] commitment to continuing the partnership on the UNDP Oslo Governance Centre”.

... By letter of 31 March 2014, OHR/BOM informed [Ms. El-Kholy] that a fully funded temporary assignment had been identified for her as Senior Advisor to the Executive Coordinator and Deputy Executive Coordinator of the United Nations Volunteers (“UNV”) programme in Bonn. [Ms. El-Kholy] accepted that post, and took up the one-year temporary assignment on 3 April 2014. The letter noted that the assignment was for a defined period of one year, that it will start on 1 April 2014 and will expire on 31 March 2015 and there will be no possibility of extension. It further stated that “[i]n the event that [[Ms. El-Kholy]] [did] not find a regular assignment by the conclusion of the temporary assignment, i.e. by 31 March 2015, the options available to [her] as articulated in the letter from [OHR/BOM] of 20 February 2014, remain[ed] in effect”.

... By email of 10 April 2014, [Ms. El-Kholy] wrote to Ms. Helen Clark, the UNDP Administrator, summarizing her positive achievements as Director, OGC. In her concluding paragraph, she expressed her deep concerns about the manner in which the restructuring was carried out and the way in which she was treated. (...)

... It would appear that [Ms. El-Kholy] did not receive a response from the UNDP Administrator, or anyone acting on her behalf. (...)

... At the time, significant structural changes were taking place within UNDP. The Executive Board had approved a new Strategic Plan for 2013, requiring the Organization to improve its institutional effectiveness. UNDP conducted a structural review, so as to align the organizational structure of UNDP with the strategic direction set out in that Plan. This resulted in a reduction of the overall number of UNDP staff, and those affected by the structural change were put on notice of the possible consequences of these changes and informed that to safeguard their interests they should participate in the forthcoming competitive Job Fairs in order to obtain suitable alternative posts.

... Staff members who were in the BSE were also affected by the structural change which is governed by the UNDP People Realignment Policy and Processes (“the Realignment Policy”). Section V of the Realignment Policy states that “[u]pon commencement of the realignment process, all staff within scope of the structural change will, in principle, be affected unless otherwise notified by their manager and should begin seeking alternative placement. This includes staff members who are currently in the Business Solution Exchange”.

... On 21 May 2014, [the Director, BOM] sent an email entitled “Structural Change: Notification to affected staff”, advising relevant staff, including [Ms. El-Kholy] that the posts they encumbered were within the scope of the change exercise and that they were therefore in principle affected by the structural change. He encouraged staff to talk to their managers and HR Business Partner to make sure they have all the information to fully apprehend the implications of the process on their positions. The email further stressed that “[s]taff who are unable to secure a position by the conclusion of the relevant structural change exercise will be separated in accordance with the provisions of the UN Staff Regulations and Rules and the UNDP People Realignment Policy and Processes which are applicable during this exercise”.

... On 8 June 2014, [Ms. El-Kholy] filed a complaint with the UNDP Office of Audit and Investigations (“OAI”) alleging harassment and abuse of authority on the part of Mr. Martinez-Soliman.

... By letter of 8 July 2014, [the] Deputy Director (Investigations), OAI, informed [Ms. El-Kholy] that OAI had determined that her complaint did not amount to abuse of authority or harassment that would constitute misconduct, hence an investigation was not warranted, and the case had been closed.

... On 16 July 2014, [Ms. El-Kholy] sent a request for management evaluation of the decision to reinstate the post of Director, OGC (D-1), and to reinstate recruitment for it.

... By email of 21 July 2014 to staff members affected by the [S]tructural Change, including [Ms. El-Kholy], the Assistant Administrator announced the launching of the Job Fairs, indicating the sequence of application dates, with a round of applications for D, P-6 and P-5 team leader positions for the period 28 July to 4 August 2014.

... By email of 25 July 2014 from the OHR, BOM, UNDP, [Ms. El-Kholy] was informed that pursuant to the Realignment Policy, as a person affected by the structural change, she was eligible to apply for positions in the first round of the structural change Job Fairs, and given instructions on how to apply.

... On 27 July 2014, [Ms. El-Kholy] responded to the email, indicating that she had seen it only then, since she had been on leave and out of the country until 25 July 2014. She stated that she was unable to access the site, and requested a telephone conversation with the Officer, OHR, BOM, UNDP, who had sent her the email of 25 July 2014. That conversation took place on 28 July 2014. [Ms. El-Kholy] was offered a one-day extension of the deadline for application.

... By email of 31 July 2014, [Ms. El-Kholy] informed [the Director, BOM] that although there were a number of positions in the Job Fair that suited her profile, she had decided not to participate in it, since she could not be expected, if selected, to start in a new post so soon after her recent relocation. In that email, [Ms. El-Kholy] also

sought clarification as to whether her current status was related to the on-going structural changes.

... By email of 6 August 2014, entitled “RE: Participation on the structural change job fairs”, the Officer-in-Charge (“OIC”), Chief Integrated Talent Management, OHR, BOM, UNDP, informed [Ms. El-Kholy] that although she had decided not to take part in the first round of the D-1 job fair, “any positions not filled in the first round of the job fairs [would] be re-advertised in a second round and that [she would] remain eligible to apply at that time as well, should [she] so choose”.

... [The Director, BOM] responded to [Ms. El-Kholy]’s request for management evaluation on 27 August 2014, stressing that further to the restructuring exercise of OGC, her post had been abolished and it was anticipated that it would be replaced by a different function of Head of Research (D-1), and that the job description for that post was yet to be determined, pending approval of the OGC project document and funding commitments from Norway and other donors, and the classification process. Hence, no recruitment process had been initiated. He further noted that any management evaluation request with regard to the abolition of the post of Director, OGC, was time-barred.

... On 20 October 2014, [Ms. El-Kholy] was informed by OHR/BOM that it had been decided to give all permanent appointment holders an additional opportunity to apply for the remaining vacant positions following the structural change job fair exercise. By email of 26 October 2014, [Ms. El-Kholy] responded that she had carefully reviewed the vacant posts, but had not found any position matching her profile.

... On 7 November 2014 a vacancy announcement for a D-1 Director, OGC was issued. It seems that the new position had been approved by OHR on 6 November 2014. [Ms. El-Kholy] did not apply for this post.

... On 13 November 2014 [Ms. El-Kholy] applied for the D-2 post of “Special Representative of the Administrator, Programme of Assistance to the Palestinian People”. She was shortlisted and interviewed for that post, but not recommended. This [was] the subject of a separate [proceeding before the UNDT].<sup>[3]</sup>

... On 7 December 2014, [Ms. El-Kholy] sent a further request for management evaluation of what she regarded as a decision to reinstate her previous post of Director, OGC, further to its alleged abolition earlier that year.

... [T]he Assistant Administrator and Director, BOM, UNDP, responded to [Ms. El-Kholy]’s second request for management evaluation on 28 January 2015, stating that the new post of Director, OGC, was substantially different from the post of

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[3] *El-Kholy v. Secretary-General of the United Nations*, Judgment No. UNDT/2016/101, issued on 21 July 2016 (selection exercise procedurally flawed but did not adversely impact staff member’s chances for promotion; awarded USD 1,000 in moral damages; not appealed).

Director, OGC, previously encumbered by [Ms. El-Kholy]. He reiterated that her claim that that post had been reinstated was unfounded, and pointed out that she had elected not to apply for the new position. She filed an application against the decision to reinstate the post of Director, OGC.<sup>[4]</sup>

... By letter dated 12 February 2015, [Ms. El-Kholy] was informed that since she remained without a regular placement following the closure of the structural change Job Fairs, during which she had not applied for a position, her appointment would be terminated on 30 June 2015. The letter stated that the decision was made in accordance with staff rule 9.6(c)(i). [Ms. El-Kholy] was informed that she could apply for agreed separation, and of the possibility of receiving compensation in lieu of notice.

... On 9 April 2015, [Ms. El-Kholy] sent a request for management evaluation of the decision to terminate her appointment.

... By letter of 9 April 2015, [Ms. El-Kholy] informed the Assistant Administrator and Director, BOM, that she had opted to serve two out of the three months of termination notice and receive compensation in lieu of the remaining month of notice period.

... On 19 May 2015, the Associate Administrator, UNDP, responded to [Ms. El-Kholy]'s request for management evaluation.

... In light of [Ms. El-Kholy]'s decision concerning her notice period, her appointment ended on 31 May 2015 and she was separated on that date.

... She filed [her] application on 22 July 2015, and the [Secretary-General] filed his reply on 24 August 2015. After a case management discussion and several case management orders, by which the [UNDT] sought to obtain clarification as to the efforts made to retain the services of [Ms. El-Kholy], it asked the parties whether they would agree to a decision being rendered on the papers. Both parties agreed.

8. On 22 July 2016 the UNDT issued its Judgment. It held that the decision to terminate Ms. El-Kholy's permanent appointment by reason of an organizational restructuring was not in compliance with its obligations under Staff Rule 9.6(e) read together with Staff Rule 13.1(d) and was, thus, unlawful. The UNDT ordered rescission or, in lieu thereof, compensation in the amount of two years' net base salary, inclusive of USD 2,000 as moral damages.

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[4] *El-Kholy v. Secretary-General of the United Nations*, Judgment No. UNDT/2016/028, issued on 13 April 2016 (dismissing application as non-receivable *ratione materiae*; not appealed).

## **Submissions**

### **The Secretary-General's Appeal**

9. Contrary to the UNDT's Judgment, the record before the UNDT demonstrates that the Administration fully complied with its obligations under Staff Rules 9.6(e) and 13.1(d) before the decision was taken to terminate Ms. El-Kholy's appointment due to the abolition of her post. The decision was lawful and the holding of the UNDT should be vacated in this respect.

10. The Administration offered Ms. El-Kholy three positions, the last of which she accepted which provided her an additional year to find a regular placement. It also afforded her the opportunity to participate in the Job Fairs. This demonstrates the Administration's good faith.

11. As the UNDT found, Ms. El-Kholy failed to avail herself of the opportunity to secure employment through the Job Fairs which were a reasonable mechanism for assisting the Administration in meeting its obligations. Requiring the Administration nonetheless to consider Ms. El-Kholy's suitability for all available positions in UNDP, including those to which she did not apply or express interest, unduly broadens the scope of these provisions and places an undue burden on the Administration, particularly during a large organizational restructuring.

12. The UNDT's holding effectively makes the Administration liable for Ms. El-Kholy's failure to participate in the Job Fairs. This is contrary to relevant jurisprudence that requires staff members to cooperate fully with efforts to secure them alternative positions. Ms. El-Kholy should have applied for the positions she was interested in and considered herself as meeting their requirements. Her reason for not participating (i.e., her recent relocation to Bonn) is not a valid justification, especially as her position there was of a temporary nature.

13. The UNDT also erred in law and procedure when it awarded Ms. El-Kholy two years' net base salary as compensation. It erred, first, by failing to discount the termination indemnity she received upon separation. This resulted in Ms. El-Kholy being placed in a better position than she would have been had the contested decision been rescinded. The UNDT further erred by disregarding established jurisprudence requiring a staff member to mitigate damages through post-separation employment. The award is, therefore, unduly excessive and speculative.



14. The Secretary-General requests that the UNDT Judgment be vacated with respect to its conclusion that the Administration failed to fulfill its obligations and, in the alternative, to reduce the compensation awarded.

**Ms. El-Kholy's Answer**

15. The UNDT made no error when concluding that the Administration failed to meet its obligations. The appeal misconstrues and omits salient facts, fails to demonstrate any reversible error and merely advances the same arguments. It is an abuse of the administration of justice.

16. The Secretary-General attempts to reopen factual issues under the guise of questioning the UNDT's legal reasoning and application to the facts of Ms. El-Kholy's case. He is essentially asking the Tribunal to depart from the longstanding interpretation that the Administration's efforts to find suitable alternative employment are to be conducted in good faith to avoid "to the greatest extent possible" dismissal and dislocation of a permanent staff member.

17. The suggestion that the Administration should be relieved of its statutory obligations due to the organization-wide restructuring is flawed. In any event, Ms. El-Kholy's post was abolished prior to UNDP's structural change, and abruptly so. The failure to afford her any consideration for the post that replaced hers was just one of other violations of its good faith obligations.

18. The attempt to shift responsibility to Ms. El-Kholy—that it was her obligation to apply for posts—contradicts the record and its claims amount to a litany of excuses. The Job Fairs occurred just after she committed to a one-year appointment; she was notified only two days prior to its closing; and, she was never informed she would be terminated if she did not apply. The positions offered were all temporary and not suitable, and there was no evidence Ms. El-Kholy was afforded any preference for the two highly suitable positions for which she did apply.

19. There was no error by the UNDT in its award of compensation. A termination indemnity is an accrued benefit not intended to compensate for wrongful termination. There was no obligation in this case for the UNDT to consider mitigation of damages. The award is not excessive when considering Ms. El-Kholy's legitimate expectation of retiring with a full pension.

20. Ms. El-Kholy requests that the appeal be dismissed and that she be awarded USD 5,000 in costs plus interest since the execution of the UNDT's Judgment.

### Considerations

21. As was the case before the UNDT, the sole and central question before the Appeals Tribunal is whether the Organization complied with its obligation vis-à-vis Ms. El Kholy, who held a permanent appointment, to find another suitable post, pursuant to Staff Rules 9.6(e), 9.6(g) and 13.1(d).

22. Staff Rule 9.6 provides, in part:<sup>5</sup>

(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.

(...)

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

23. Staff Rule 13.1(d) provides:<sup>6</sup>

(d) If the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts for which their services can be effectively utilized, staff members with permanent appointments *shall be retained* in preference to

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<sup>5</sup> Emphasis added.

<sup>6</sup> Emphasis added.

those on all other types of appointments, provided that due regard shall be given in all cases to relative competence, integrity and length of service. Due regard shall also be given to nationality in the case of staff members with no more than five years of service and in the case of staff members who have changed their nationality within the preceding five years when the suitable posts available are subject to the principle of geographical distribution.

24. 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”.

25. In the present case, like the UNDT, we hold that the Administration failed in its obligation to demonstrate that all reasonable and good faith efforts had been made to consider the staff member concerned for available and suitable posts within UNDP under Staff Rule 9.6(g), before taking the decision to terminate her permanent appointment.

26. The Administration submits that it complied with its obligations by offering Ms. El-Kholy three temporary positions in Brussels, Bruges and Bonn<sup>7</sup> and the opportunity to participate in the Job Fairs. The Administration also submits that, as noted in its 19 May 2015 response to Ms. El-Kholy’s management evaluation request, the decision to terminate her permanent appointment was the “legitimate result of (her) failure to participate in the UNDP Structural Change Job Fairs”. The Administration further submits that Ms. El-Kholy should have applied to the team leader positions closest to her qualifications and previous post, during the first round of the Job Fairs, between 28 July and 4 August 2014, shortly after her moving to Bonn. It further notes that Ms. El-Kholy applied for other posts outside the Job Fairs, but was unsuccessful, either because she was not short-listed or because she was not recommended for selection when she was short-listed.

27. It is true that the organization of the Job Fairs can be regarded as a good collective approach to help the 1,700 staff members potentially affected by UNDP’s structural changes to find alternative suitable posts.<sup>8</sup> It is also true that Ms. El-Kholy could have been more cooperative in applying for those posts in the Job Fairs, which she herself considered suited her profile (as per her e-mail dated 31 July 2014).

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<sup>7</sup> As noted above, Ms. El-Kholy accepted the last offer for a non-renewable one-year appointment in Bonn.

<sup>8</sup> Impugned Judgment, para. 71.

28. Nevertheless, Ms. El-Kholy had a permanent appointment; consequently, she enjoyed a “special status in matters of appointment” pursuant to Staff Rule 9.6(g), and the restructuring exercise was the object of more than a two-year period of discussion, since November 2012.

29. More importantly, the failure on the part of Ms. El-Kholy to participate in the Job Fairs does not shift the Administration’s obligation to find a vacant and suitable post onto her shoulders. Neither does the fact that Ms. El-Kholy accepted the temporary assignment in Bonn or that she was informed that she was affected by the structural change and about the risk of separation from service due to the abolition of her post.

30. While it is true that she did not apply for any posts during the Job Fairs, it is also true that she did not refuse any particular offer to her after she had moved to Bonn, on a temporary assignment. The Administration did not produce evidence of having answered her e-mail dated 26 February 2014, in which Ms. El-Kholy requested to stay in Oslo until the end of May (period of provisional redundancy) and also inquired about existing vacant and suitable posts, following the abolition of her own post. She had to leave Oslo by the beginning of April.

31. It is for the Administration to prove that the staff member holding a permanent appointment was afforded due and fair consideration as required by Staff Rules 9.6(e), 9.6(g) and 13.1(d). Moreover, the use of the words “shall be retained” in Staff Rule 9.6(e) creates an obligation on the Administration, which has not discharged its burden in this case in light of the existing suitable posts at the time of the events. In other words, the Job Fairs alone do not fulfill the Administration’s obligation under the Staff Rules and does not satisfy Ms. El-Kholy’s individual entitlement to be duly and fairly considered for any suitable and vacant post within UNDP, around the time that her temporary assignment was due to end.

32. To that effect, and in response to an order during the proceedings before the UNDT, the Administration revealed that several posts at the P-5 and D-1 level 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 means that those staff members were considered without having applied for them.<sup>9</sup> Why did Ms. El-Kholy not have the same treatment and was instead supposed to apply for those posts whose existence she could only have known about from public announcements?

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<sup>9</sup> *Ibid.*, para. 81.

33. Furthermore, the new post of Director of the OGC itself, previously occupied by Ms. El-Kholy, was subject to external recruitment after the announcement of November 2014. It is true that Ms. El-Kholy did not apply for it. Nevertheless, 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 deriving from Staff Rules 9.6(e), 9.6(g) and 13.1(d). Therefore, more important than the great similarity of the job descriptions between the previous and the new post, as mentioned by the UNDT,<sup>10</sup> is the fact that the Administration failed in its obligation to consider Ms. El Kholy's suitability for the new post; particularly so, when we consider that her performance evaluations during her 16 years of career exceeded expectations and were considered outstanding.<sup>11</sup>

34. In view of the foregoing, there is no doubt that Ms. El-Kholy was informed that she was affected by the structural change and about the risk of separation from service due to the abolition of her post. However, the real question is whether she was offered suitable available posts with UNDP during the search period, in light of the preference established by Staff Rules 9.6(e), 9.6(g) and 13.1(d). As previously mentioned, the answer is "no". Not all reasonable and *bona fide* efforts had been 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.

35. The Secretary-General requests that the Appeals Tribunal reduce the amount of the in-lieu compensation awarded.

36. The Appeals Tribunal notes that, at the date of its deliberations, Ms. El-Kholy had been separated from her employment for 22 months (since 31 May 2015, after her short-term assignment), because of her decision to receive compensation in lieu of the remaining month of the notice period. The Tribunal also notes that Ms. El-Kholy could have demonstrated more cooperation by applying for one of the suitable posts in the Job Fairs.

37. While we otherwise agree with the UNDT's Judgment, we do not agree with its view that Ms. El-Kholy's failure to participate in the Job Fairs is a reason to not exceed the two-year limit. In our view, it is a reason to reduce the amount of the two-year cap. Therefore, we order that the amount of two years' net base pay be reduced to 18 months' net base salary. In all the

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<sup>10</sup> *Ibid.*, para. 83.

<sup>11</sup> *Ibid.*, para. 84.

circumstances, we consider that this award would be an adequate remedy for the loss of her permanent appointment and the fact that she had not been receiving the salary that she should have been, for the permanent post she occupied, if the unlawful separation had not occurred.

38. Furthermore, “the very purpose of compensation is to place the staff member in the same position he or she would have been in, had the Organization complied with its contractual obligations”.<sup>12</sup> There is also no evidence that Ms. El-Kholy found another position inside UNDP or the Organization as a whole or elsewhere (her answer to the appeal claims that she has not been successful so far).

39. As for the Secretary-General’s submission that the UNDT erred by not discounting from its award Ms. El-Kholy’s termination indemnity, the Tribunal dismisses it as being without merit. Compensation in lieu and the termination indemnity have two different legal natures and one cannot be deducted from the other.<sup>13</sup> While the purpose of the compensation is an alternative to rescission, so that the person would receive the same amount had the unlawful decision not occurred, the objective of the termination indemnity is to provide sufficient means of survival for the staff member to identify a regular placement in the labour market. Whilst length of service is taken into account for its calculation, the very purpose of termination indemnity is to warrant the professional future of the staff member, not to restore the *status quo ante*.

40. Furthermore, there is no doubt that it is incumbent upon the staff member to establish the basis for the in-lieu compensation. However, it is the Administration’s onus to establish a modifying fact for that compensation, such as to provide evidence of gainful employment after her separation from service in order to reduce the amount of the compensation.

41. The Secretary-General does not contest the moral damages awarded at the sum of USD 2,000, and the Appeals Tribunal will not interfere with it.

42. Finally, Ms. El Kholy’s request that the Secretary-General be awarded costs is rejected. Although the appeal fails in part, it does not amount to a manifest abuse of process.

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<sup>12</sup> *Warren v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-059, para. 10.

<sup>13</sup> *Eissa v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-469, para. 27.

**Judgment**

43. The appeal is partially granted, insofar as the amount of in-lieu compensation is reduced to 18 months' net base salary, interest having being stated in the UNDT's Judgment. All the other determinations in Judgment No. UNDT/2016/102 are affirmed, including its award of USD 2,000 as moral damages. Ms. El-Kholy's request for an award of costs is rejected.

Original and Authoritative Version: English

Dated this 31<sup>st</sup> day of March 2017 in Nairobi, Kenya.

*(Signed)*

Judge Halfeld, Presiding

*(Signed)*

Judge Chapman

*(Signed)*

Judge Murphy

Entered in the Register on this 26<sup>th</sup> day of May 2017 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar