



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

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Judgment No. 2017-UNAT-759

**Hassanin  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Sabine Knierim, Presiding Judge Rosalyn Chapman Judge Dimitrios Raikos
Case No.:	2016-1036
Date:	14 July 2017
Registrar:	Weicheng Lin

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Counsel for Mr. Hassanin: Lennox S. Hinds

Counsel for Secretary-General: Rupa Mitra

**JUDGE SABINE KNIERIM, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/181, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 7 October 2016, in the case of *Hassanin v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 6 December 2016, and Mr. Emad Hassanin filed his answer on 6 February 2017.

**Facts and Procedure**

2. Mr. Hassanin, born on 8 January 1959, commenced employment with the United Nations in 1989 and received a permanent appointment in 1995. Until 2014, he was a G-4 level staff member as a Documents Clerk in the Publishing Section, Meeting and Publishing Division of the Department for General Assembly and Conference Management (DGACM).

3. Since 1994 and throughout his career with the Organization, Mr. Hassanin was actively involved in the work of the Staff Association. In 2013, he was elected First Vice President of the 45<sup>th</sup> Staff Council.

4. On 23 December 1999, the General Assembly adopted resolution 54/249 which stipulates as follows, with regard to the introduction of new technology:<sup>1</sup>

... *Requests* the Secretary-General to undertake a comprehensive review of the post structure of the Secretariat, taking into account, *inter alia*, the introduction of new technology, and to make proposals in the proposed programme budget for the biennium 2002-2003 to address the top-heavy post structure of the Organization;

... *Welcomes* the use of information technology as one of the tools for improving the implementation of mandated programmes and activities;

...

.... *Emphasizes* that the introduction of new technology should lead neither to the involuntary separation of staff nor necessarily to a reduction in staff;

5. In 2013, the Secretary-General proposed the budget for the biennium 2014-2015. In subprogramme 4, he proposed the abolishment of 39 Trades and Crafts and 34 General Service (Other level) posts, remarking: “Conversion to a fully digital printing operation at

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<sup>1</sup> General Assembly resolution 54/249, paras. 59-60 and 62 (emphases in original).

Headquarters: the conversion to digital technology in the printing facilities would result in the net reduction of 59 posts ... .”

6. On 15 August 2013, the Advisory Committee on Administrative and Budgetary Questions (ACABQ) issued its first report (A/68/7) on the proposed programme budget for the biennium 2014-2015, stating:<sup>2</sup>

*General Assembly and Economic and Social Council affairs and conference management*

...

*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 ([Proposed programme budget for the biennium 2014-2015], table 2.6, item 4, and para. 2.65 (a));

...

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. The Committee provides comments on post abolishment and vacancy management in chapter I above.

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

7. On 27 December 2013, the General Assembly issued resolution 68/246, which states:<sup>3</sup>

... *Also endorses*, subject to the provisions of the present resolution and without establishing a precedent, the recommendations of the Advisory Committee concerning posts and non-post resources as contained in chapter II of its first report on the proposed programme budget for the biennium 2014–2015;

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<sup>2</sup> Emphases in original.

<sup>3</sup> General Assembly resolution 68/246, para. 18 (emphasis in original).

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

**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 consultations 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.

9. 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.

10. By letter dated 31 December 2013, signed by the Executive Officer, DGACM, Mr. Hassanin 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.

11. On 31 January 2014, Mr. Hassanin filed a request for management evaluation, contesting the decision of 31 December 2013, notified to him on 6 January 2014, "to abolish [his] post effective 1 January 2014 and as a result to terminate [his] permanent appointment".

12. On 7 February 2014, temporary job openings for Publishing Production Assistant positions at the G-4, G-5 and G-6 level were issued. The vacancies were only open to DGACM staff in order to prioritize them, particularly those, whose posts had been abolished. On 10 February 2014, the Executive Officer, DGACM, sent an e-mail to those staff members, including Mr. Hassanin, to emphasize that the deadline to apply was 15 February 2014. Subsequently, the deadline was extended to 28 February 2014, and then extended again to

7 March 2014. The DGACM staff, including Mr. Hassanin, were notified each time there was an extension.

13. On 24 February 2014, the Executive Officer of DGACM sent an e-mail to the affected staff members, including Mr. Hassanin, stating:<sup>4</sup>

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.

14. By letter dated 28 February 2014, Mr. Hassanin was notified by the Management Evaluation Unit (MEU) that two days earlier they had been advised by the Administration of the extension of Mr. Hassanin'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.

15. On 24 March 2014, Mr. Hassanin filed his application before the Dispute Tribunal against "the decision to abolish Applicant's post, effective January 2014, and as a result to terminate Applicant's permanent appointment". As relief, he requested "rescission of the 31 December 2013 decision to terminate his appointment" and "enforcement of the Administration's duties to search and find an alternative suitable post to Applicant within the Generals Service in its duty station (New York Headquarters) and to retain Applicant in preference on all other types of appointments". With regard to the question of receivability,

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<sup>4</sup> Emphases in original.

he pointed out that his termination date had only been extended by a few weeks and, consequently, the MEU decision could only be understood as a rejection of his request for management evaluation because the MEU had actually confirmed that his post was abolished and his appointment terminated - but only at a later date. As to the merits of the case, he was of the view that the abolition of 59 posts was contrary to General Assembly resolution A/54/249, paragraph 62. Further, he stated that the Secretary-General lacked the authority to terminate Mr. Hassanin's permanent appointment due to Staff Rule 13.1(a). Finally, he submitted that the Secretary-General had failed to comply with his obligations under Staff Rule 13.1(d) and (e). Mr. Hassanin was one of 14 former and current staff members who filed applications relating to the decision to terminate their permanent appointments in DGACM. Several of the applicants subsequently withdrew their applications. With the exception of the present case, the remaining cases were thereafter set down for a hearing before the UNDT. The present case — Case No. UNDT/NY/2014/020 — was heard separately from these other cases on 4 April 2016.

16. On 21 March 2014, Mr. Hassanin submitted applications for two job openings of Publishing Production Assistant at the G-4 and G-5 level in the Meetings & Publishing Division, DGACM. By e-mails dated 21 and 24 March 2014, Mr. Hassanin was informed by the Executive Officer that his applications would not be considered as they were submitted after the deadline, despite two time extensions. Each e-mail further stated that “[a]s the job openings have closed and the interview process is underway, I regret to inform you that your application is not receivable”.

17. In March or early April 2014, Mr. Hassanin submitted an application for a G-6 level position of Publishing Assistant, Meetings & Publishing Division, DGACM. However, his application was rejected on the basis of the determination by the Office of Human Resources Management (OHRM) that Mr. Hassanin could only apply for temporary positions no more than one level above his grade. OHRM stated in an e-mail dated 3 April 2016 to the Chief, Meeting Support Section, DGACM, Mr. Nandoe: “If this candidate is currently serving at the G-4 level under one of the above mentioned appointments, he will unfortunately not be eligible to apply for the G-6 level.”

18. In March or early April 2014, Mr. Hassanin also applied for a position of a G-5 level Meeting Services Assistant, General Assembly Affairs Branch, DGACM. He omitted information on his work experience and work history in his application. On 4 April 2016, the Chief of the

General Assembly Branch, DGACM, e-mailed Mr. Hassanin to inform him that, “based on the overall review of the applications received ... [his] application for this position [would] not be considered further”. The Dispute Tribunal noted that Mr. Hassanin was notified in less than 48 hours that his application for the position would not be considered further, and no other explanations or reasons were given.

19. On 9 April 2014, Mr. Hassanin filed another request for management evaluation, challenging the decision to terminate his appointment with effect from 20 April 2014. He then filed a motion before the UNDT for suspension of action of the decision pending the outcome of his request. By Order No. 69 (NY/2014), the UNDT rejected his motion, finding that there was no new contested decision on the basis of which he was raising a new cause of action. The UNDT noted that “[t]he Administration merely postponed the termination date of [Mr. Hassanin’s] appointment; it did not rescind it”.<sup>5</sup>

20. On 20 April 2014, the termination of Mr. Hassanin’s permanent appointment took effect, following which he went on early retirement.

21. The UNDT rendered its Judgment on 7 October 2016. The Dispute Tribunal found that Mr. Hassanin’s application was receivable *ratione materiae* as the notification of the decision to abolish Mr. Hassanin’s post and, as a result, to terminate his appointment was a final administrative decision subject to review in accordance with Article 2(1)(a) of the UNDT Statute. On the merits, the UNDT held that Mr. Hassanin’s termination was unlawful “because he did not receive proper consideration as a permanent appointee and as an elected high-level official of the Staff Union”.<sup>6</sup> The UNDT concluded, in particular, that the Organization had failed to accord Mr. Hassanin priority consideration for vacant positions as a permanent appointment holder and did not fully comply with the requirements set out in Staff Rules 9.6(e) and 13.1(d) and (e). The UNDT further found that the Administration “failed to give proper consideration to [Mr. Hassanin’s] status as a newly elected Vice President of the Staff Union”.<sup>7</sup> By way of remedy, the Dispute Tribunal ordered rescission of the decision to terminate Mr. Hassanin’s permanent contract or, as an alternative to rescission, an award of compensation in the amount of

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<sup>5</sup> *Hassanin v. Secretary-General of the United Nations*, Order No. 69 (NY/2014), para. 11.

<sup>6</sup> Impugned Judgment, para. 142.

<sup>7</sup> *Ibid.*, para. 141.



three years' net base salary minus any termination indemnity paid to him upon his separation. In addition, the UNDT awarded USD 20,000 as "compensation for emotional distress".<sup>8</sup>

### **Submissions**

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

22. The Secretary-General submits that the UNDT erred in law in finding Mr. Hassanin's application receivable on the basis that the 31 December 2013 DGACM notice to Mr. Hassanin of the General Assembly's decision to abolish his post constituted an appealable administrative decision. The UNDT's power of review under Article 2(1)(a) of its Statute is restricted to administrative decisions that have a direct and negative impact on the staff member's rights. The challenged DGACM notice was a mere notification deprived of any such direct impact on Mr. Hassanin's rights. As the decision to terminate Mr. Hassanin's appointment was contingent upon him not finding an alternative position, it was preparatory in nature and "hypothetical" in that it depended on future events to be realized. In the absence of an appealable administrative decision, the UNDT did not have jurisdiction to entertain the application.

23. The Secretary-General further maintains that the UNDT erred in law and exceeded its jurisdiction by considering matters beyond the scope of Mr. Hassanin's January 2014 request for management evaluation and the MEU's February 2014 answer. In particular, the UNDT considered evidence of the Administration's handling of Mr. Hassanin's job applications in March and April 2014 and thus took into account administrative decisions and actions that post-dated Mr. Hassanin's request for management evaluation and that he had not challenged before the MEU. The Appeals Tribunal, however, has consistently held that the scope of the application before the UNDT and therefore the UNDT's jurisdiction *ratione materiae* is limited to matters previously presented to management evaluation.

24. Most importantly, the UNDT erred in law in finding that the Secretary-General failed to fully comply with Staff Rules 9.6 and 13.1. The 31 December 2013 DGACM notice fulfilled these requirements when it invited Mr. Hassanin to apply for vacant positions and to inform the Executive Office of DGACM of such applications so that he could be afforded priority consideration. Nothing in Staff Rule 13.1 prevents a permanent staff member whose post is abolished from being required to apply for vacant positions and to undergo a competitive

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<sup>8</sup> *Ibid.*, para. 154.

selection process. Had it been the intention to prohibit competitive consideration of staff members with permanent appointments, this would have been explicitly stated in the Staff Rules. In the selection process, preferential treatment is only given to permanent staff members if they are equally qualified as other applicants. Moreover, the burden is on the staff member to prove that the Administration had discretion to simply place him or her in a specific position. The UNDT, however, erroneously placed the onus on the Administration to prove that it could not make an exception to place Mr. Hassanin on a significantly higher level post for which he was normally not eligible to apply. The Staff Rules “do not provide for an absolute right for any staff member to be retained” and the Administration is thus not required to “create and tailor positions solely in order to retain” a staff member. In the present case, the Administration offered career training, extended Mr. Hassanin’s appointment and notified him of exclusive, suitable positions to which he could apply. In contrast, he did not make even minimal efforts to cooperate with the Administration. Instead, he only submitted applications after the (even extended) deadlines had passed, applied for positions for which he was not eligible and submitted incomplete applications.

25. The Secretary-General further argues that the UNDT erred in law by holding that the termination of Mr. Hassanin’s appointment was unlawful because he did not receive particular consideration as an elected high-level official of the Staff Union. None of the documents cited by the UNDT support the finding that the Administration may not terminate a staff member’s appointment if he or she is a staff representative or that such representatives are entitled to higher priority for retention than other staff members. Staff Regulation 9.3 and Staff Rules 9.6 and 13.1 do not require the Administration to give special consideration for retention purposes to a staff member’s capacity as staff representative.

26. With respect to the UNDT’s award of in-lieu compensation, the Secretary-General claims that the UNDT erred in finding a basis for rescission, let alone “aggravating, egregious or exceptional circumstances” justifying an award of more than two years’ net base salary as compensation. The UNDT also erred in awarding compensation for emotional distress because the UNDT may not solely rely on the staff member’s testimony without any corroborating evidence.

27. Based on the foregoing, the Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment, except with respect to its findings that (i) there was no breach of General Assembly resolution 54/249; (ii) the Secretary-General had the legal authority to

terminate Mr. Hassanin's appointment; and, (iii) Mr. Hassanin had failed to establish that his appointment was terminated because of his involvement in Staff Union activities.

**Mr. Hassanin's Answer**

28. Mr. Hassanin submits that the UNDT was correct in finding his application receivable. The Secretary-General was unable to point to any instance in which the Appeals Tribunal or the UNDT had found that a notice of termination was interlocutory and thus not a final administrative decision. The fact that Mr. Hassanin was given ninety-day notice prior to the termination did not detract from the finality of the decision as contained in the 31 December 2013 notice because the Administration was merely fulfilling its obligation under Staff Rule 9.7 and no evidence was presented that there was another "final" notice forthcoming.

29. Mr. Hassanin further maintains that the UNDT did not exceed its jurisdiction when it considered evidence of the Administration's handling of Mr. Hassanin's applications following his request for management evaluation. It was the Secretary-General who initially introduced the evidence in his submissions before the UNDT in support of his claim that the Organization took measures to retain Mr. Hassanin in preference to staff members who did not serve on permanent appointments and that he was merely unsuccessful in his applications. The Secretary-General may not, on the one hand, introduce evidence before the UNDT and, on the other hand, claim that Mr. Hassanin's rebuttal to that evidence was inadmissible. The Secretary-General has failed to demonstrate that the UNDT erred in the valid exercise of its broad discretion under Article 18(1) of the UNDT Rules of Procedure. Consequently, the UNDT did not commit a reversible error when it considered and weighed that evidence in its Judgment.

30. Furthermore, the UNDT was correct in its material findings of law and it made no error of fact in finding that the Secretary-General failed to fully comply with Staff Rules 9.6 and 13.1. Contrary to the Secretary-General's assertion, it was unlawful under Staff Rules 9.6(e) and 13.1(d) for the Administration to shift the burden to identify suitable posts onto Mr. Hassanin's shoulders. The Administration failed to present evidence that Mr. Hassanin's permanent status and seniority were taken into account in the competitive selection process for posts he applied for and that distinctions were made between permanent and non-permanent staff. Even if the Appeals Tribunal concludes that the UNDT erred in law in finding that Mr. Hassanin could not lawfully be required to participate in a competitive process in the same pool as staff members with less priority, this error was not dispositive to the outcome of the UNDT's decision since, in

the absence of evidence of any distinctions being drawn between permanent staff and other staff members in these selection exercises, the Administration in any case violated the priority retention requirement in Staff Rules 9.6(e) and 13.1(d). Mr. Hassanin cooperated with the Administration to find an alternative position by applying to four job openings but the Administration failed to engage in good faith efforts to assist him in applying for these and other positions. The Organization also failed to exercise its discretion to place him into specific (temporary) posts or to tailor such posts to his qualifications.

31. Moreover, the UNDT was correct in holding that the termination of Mr. Hassanin's appointment was unlawful because he did not receive proper consideration as an elected high-level official of the Staff Association. The UNDT did not incorrectly "frame" the issue as a freedom of association question. The relevance of considering whether a staff member is a workers' representative when making termination decisions has been codified in multiple international labour standards cited by the UNDT which are applicable in the present case. In addition, the Administration has not provided evidence for "gross misconduct or other violations of the staff rules that would justify the decision to remove him from his official representative duties".

32. Finally, the UNDT did not err in awarding compensation to Mr. Hassanin. The UNDT enjoys discretion to determine damages in each particular case. The UNDT correctly found that the present case involved aggravating circumstances, namely Mr. Hassanin's length of service, his status as an elected official and the breach of the rules on retention of permanent staff and elected staff representatives. The UNDT also correctly awarded compensation for emotional distress and was best placed to assess that Mr. Hassanin's testimony demonstrated that the contested decision and its aftermath deeply affected him.

33. Mr. Hassanin requests that the Appeals Tribunal reject the appeal in its entirety and uphold the UNDT Judgment.

### **Considerations**

34. The issues to be determined in this appeal are, as contended by the parties, (i) whether the UNDT erred in finding the case receivable *ratione materiae*; and, (ii) whether the UNDT erred in ruling that the termination of Mr. Hassanin's permanent appointment, effective 20 April 2014, was unlawful.

*Receivability*

35. The Secretary-General contends that Mr. Hassanin'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:<sup>9</sup>

... The letter of termination stated in no uncertain terms that the post against which [Mr. Hassanin] 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. Hassanin's] permanent appointment" and that, "[i]n the event [Mr. Hassanin] [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. Hassanin'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.

36. 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*.<sup>10</sup>

... 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. ...

37. 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

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<sup>9</sup> *Ibid.*, para. 69.

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

terms of appointment or contract of employment of the individual staff member.<sup>11</sup> 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”.<sup>12</sup>

38. At the time Mr. Hassanin’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. Hassanin’s appointment was charged. The termination letter of 31 December 2013, resulting from the abolishment of Mr. Hassanin’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 “[t]he present letter ... constitutes the formal notice of termination of your permanent appointment under staff rule 9.7”. The mere fact that Mr. Hassanin’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.<sup>13</sup>

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

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<sup>11</sup> *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.

<sup>12</sup> *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.

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

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

40. 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:<sup>14</sup>

... 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.

41. The Secretary-General submits that the UNDT erred in law and exceeded its jurisdiction by considering matters beyond the scope of Mr. Hassanin'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, 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. The evidence of which the Secretary-General complains is relevant to the UNDT's interpretation of Mr. Hassanin's application.

42. Second, the Secretary-General presented evidence of actions taken after the issuance of the notice to support his defense against Mr. Hassanin's application. As Mr. Hassanin 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. Hassanin's offering rebuttal evidence, on the other hand.

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

43. Third, due to the unusual circumstances of the case, wherein the notice of termination was given months in advance of Mr. Hassanin's actual termination from service, it would have been inappropriate 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. Hassanin'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. Hassanin of events subsequent to the Management's response to his request for management evaluation.

(ii) *Termination*

44. The Dispute Tribunal committed an error of law in finding that the decision to terminate Mr. Hassanin's permanent appointment was unlawful because he did not receive proper consideration as a permanent appointee and staff representative, and that the Organization committed material irregularities and failed to act fully in compliance with the relevant legal provisions.

45. The Administration has broad discretion to reorganize its operations and departments to meet changing needs and economic realities.<sup>15</sup> According to the Appeals Tribunal's well-settled jurisprudence, "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".<sup>16</sup> This Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff.<sup>17</sup> Even in a restructuring exercise, like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members.<sup>18</sup> In the present case, however, as the General Assembly abolished a number of DGACM posts before the notice of termination was sent to Mr. Hassanin, there can be no doubt that the retrenchment exercise was genuine and not improperly directed at

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<sup>15</sup> *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.

<sup>16</sup> *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).

<sup>17</sup> *Matadi et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-592, para. 16.

<sup>18</sup> *Ibid.*, citing *Hersh v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-433/Corr.1, para. 17.



him as a staff representative. Consequently, there was no administrative decision to remove Mr. Hassanin from his duties as a staff representative but merely to terminate his appointment due to the abolition of his post.

46. The Administration may terminate the appointment of a staff member on a number of grounds, including abolition of posts or reduction of staff (Staff Rule 9.6(c)(i)). In such cases, the Organization must follow the requirements set out in the Staff Rules and Regulations.<sup>19</sup>

47. Staff Rules 9.6(e) and (f) read as follows:

**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.

48. Staff Rule 13.1 provides, in relevant part, as follows:

**Permanent appointment**

...

(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

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<sup>19</sup> Applicable in this case is the 2013 version of the Staff Rules and Regulations, Secretary General's Bulletin ST/SGB/2013/3 (Staff Regulations and Staff Rules of the United Nations).

effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments, provided that due regard shall be given in all cases to relative competence, integrity and length of service. 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.

(e) The provisions of paragraph (d) 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 station.

49. During the restructuring process at DGACM, the Administration engaged in a variety of activities to assist permanent staff and thus managed to secure alternative positions for the majority of the affected staff members. It is lawful and reasonable of the Administration to expect affected permanent staff members, including Mr. Hassanin, to cooperate fully in the process. If the Administration informs the staff members that they are expected to apply for suitable available positions, they are obliged to fully cooperate and make a good faith effort in order for their applications to succeed. This includes a duty to apply within the deadlines and to respect the formal requirements.<sup>20</sup>

50. The evidence before us shows that Mr. Hassanin did not make a good faith effort to secure another position.

51. His applications for two positions of Publishing Production Assistant at the G-4 and G-5 level were rejected as they had been submitted after the deadline despite two time extensions, and the interview process was already underway. The Administration did not have the duty to consider Mr. Hassanin for any of these positions under Staff Rules 9.6 and 13.1 as he had not fully cooperated in the process by failing to hand in his applications on time.

52. Another application for a position of Publishing Assistant at the G-6 level was rejected because the position was two levels higher than Mr. Hassanin's grade. We find that the UNDT erred in law when stating that positions more than one level higher than the concerned staff member's grade are suitable positions and trigger the obligations of the

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<sup>20</sup> See also *Haimour and Al Mohammad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-688.

Administration under the aforementioned provisions. The UNDT's finding is not in accord with our jurisprudence<sup>21</sup> and Section 6.1 of Administrative Instruction ST/AI/2010/3 (Staff selection system) and Section 5.1 of Administrative Instruction ST/AI/2010/4 (Administration of temporary appointments). Those provisions indicate that a position more than one level higher than the staff member's current grade level cannot be considered "suitable", let alone for purposes of Staff Rules 9.6 and 13.1. Consequently, the Administration had no duty to consider Mr. Hassanin for this position.

53. Finally, his application for a position as Meeting Services Assistant at the G-5 level was rejected because Mr. Hassanin had left the "work experience" section of his application blank. As we stated above, a good faith effort of the staff member requires him or her to respect the formal requirements of an application.

54. The UNDT also erred in holding that the termination of Mr. Hassanin's appointment was unlawful on the grounds that he did not receive particular consideration as an elected high-level official (First Vice President) of the Staff Union. Elected high-level staff representatives do not enjoy special protection from termination or enjoy higher priority for retention than other staff members. Neither in Staff Rules 9.6 and 13.1 nor in other legal provisions can we find such a requirement. This being so, it would cast doubt on the legality of the Administration's actions had they favoured Mr. Hassanin in comparison to other permanent staff members.

55. As the termination of Mr. Hassanin's permanent appointment was lawful, the UNDT erred in law when rescinding it and setting in-lieu compensation. For the same reason, the UNDT also erred in law when it awarded USD 20,000 for emotional distress.

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<sup>21</sup> *Terragnolo v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-447.

**Judgment**

56. The appeal is granted and Judgment No. UNDT/2016/181 is vacated.

Original and Authoritative Version: English

Dated this 14<sup>th</sup> day of July 2017 in Vienna, Austria.

*(Signed)*

Judge Knierim, Presiding

*(Signed)*

Judge Chapman

*(Signed)*

Judge Raikos

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

*(Signed)*

Weicheng Lin, Registrar