



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

Judgment No. 2017-UNAT-765

**Fasanella
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Rosalyn Chapman Judge Sabine Knierim
Case No.:	2016-1043
Date:	14 July 2017
Registrar:	Weicheng Lin

Counsel for Mr. Fasanella: Lennox S. Hinds

Counsel for Secretary-General: Amy Wood/Nathalie Defrasne

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/193, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 19 October 2016, in the case of *Fasanella v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 19 December 2016, and Mr. Raymond Fasanella filed his answer on 13 March 2017.

Facts and Procedure

2. The following facts are taken from the UNDT Judgment:¹

... The Applicant, a former staff member [and pressman at the Trades and Crafts (TC)-5 level] 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. Several of the applicants subsequently withdrew their applications. This case was set down for a hearing [before the UNDT] along with five other cases on 29 and 30 March 2016.

...

Employment with the Organization

... The Applicant was a long-serving employee of the United Nations, having worked with the Organization for approximately 31 years. He received a permanent appointment effective 1 August 1986. The Applicant worked as a Supervisor in the Publishing Section until 20 April 2014, when his permanent appointment was terminated and he took early retirement.

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 10-22 (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 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:

**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

² This should read "biennium 2014-2015".

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

[On 7 February 2014, temporary job openings for Publishing Production Assistant positions (digital scanning) 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 these staff members, including Mr. Fasanella, 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. Fasanella, were notified each time there was an extension.]

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. [In addition, the letter stated that this was without prejudice to future requests for management evaluation.]

Filing of an application before the Tribunal

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

Subsequent job search

... The Applicant testified that he had applied to at least one job opening, without success. Mr. Nandoe[, the Chief, Meeting Support Section,] confirmed in his oral evidence that the Applicant was considered for G-5 and G-6 positions in the distribution operations but was not selected because he did not have the required experience. Mr. Nandoe testified that the Applicant could have applied to the digital scanning posts, as those would have matched his experience, but he did not do so.

Termination of permanent appointment

... The Applicant's permanent appointment was terminated on 20 April 2014 and, consequently, he elected to accept early retirement.

3. The UNDT rendered its Judgment on 19 October 2016. The Dispute Tribunal found that Mr. Fasanella's application was receivable *ratione materiae* as the notification of the decision to abolish Mr. Fasanella's post and, as a result, to terminate his appointment was a final administrative decision subject to review in accordance with Article 2(1) of the UNDT Statute. On the merits, the UNDT held that the termination of Mr. Fasanella's permanent contract was unlawful since "the Organization committed material irregularities and failed to act fully in compliance with the framework set out in staff rules 13.1(d)-(e) and 9.6(e)".³ It found, in particular, that the Administration had failed to "meet the requirements of staff rule 13.1 to reassign [Mr. Fasanella] as a matter of priority to another post matching his abilities and grade, and if this proved fruitless, to at least offer him duties at a lower grade and widen its search accordingly".⁴ Mr. Fasanella was not offered any positions prior to the abolishment of his post or subsequent thereto. Instead, he was unlawfully required to apply competitively for vacant positions and, in the course of the selection process, no actual preference was accorded to permanent staff members. By way of remedy, the Dispute Tribunal ordered rescission of the decision to terminate Mr. Fasanella's permanent contract or, as an alternative to the rescission, an award of compensation in the amount of two years' net base salary minus any termination

³ *Ibid.*, para. 90.

⁴ *Ibid.*, para. 89.

indemnity paid to him upon his separation. In addition, the UNDT awarded USD 7,000 as “compensation for emotional distress”.⁵

Submissions

The Secretary-General’s Appeal

4. The Secretary-General submits that the UNDT erred in law in finding Mr. Fasanella’s application receivable on the basis that the 31 December 2013 DGACM notice to Mr. Fasanella 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. Fasanella’s rights. As the decision to terminate Mr. Fasanella’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.

5. The Secretary-General further maintains that the UNDT erred in law and exceeded its jurisdiction by considering matters beyond the scope of Mr. Fasanella’s January 2014 request for management evaluation and the MEU’s 28 February 2014 answer. In particular, the UNDT considered evidence of the Administration’s handling of Mr. Fasanella’s job applications after February 2014 and thus took into account administrative decisions and actions that post-dated Mr. Fasanella’s request for management evaluation and that he had not challenged before the MEU. The Appeals Tribunal’s jurisprudence, 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.

6. 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. 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 right to such placement. In addition, the Administration is not precluded by the established regulatory framework from assessing a permanent staff member’s candidacy for a particular position in the context of a competitive selection exercise. On the contrary, the

⁵ *Ibid.*, para. 97.

established jurisprudence supports the conclusion that an open, transparent process provides an appropriate means by which the Administration may evaluate a staff member's suitability, as expressly required by Staff Rules 9.6 and 13.1. Moreover, contrary to the UNDT's holding, the Administration cannot be faulted for not considering Mr. Fasanella for a position for which he did not even apply. 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. Fasanella 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. Fasanella did not make even minimal efforts to cooperate with the Administration, namely to apply, within the application deadline, to positions for which he was eligible and that were accessible in view of his grade level, skills and competencies.

7. With respect to the UNDT's award of in-lieu compensation, the Secretary-General claims that the UNDT erred in finding that Mr. Fasanella's rights had been violated and in awarding compensation to Mr. Fasanella on this basis. In addition, the UNDT erred in setting the amount of the in-lieu compensation at two years' net base salary without requiring Mr. Fasanella to provide evidence of his post-separation employment, which had to be taken into account in accordance with the Appeals Tribunal jurisprudence.

8. Based on the foregoing, 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. Fasanella's appointment. In the alternative, the Secretary-General requests the Appeals Tribunal to vacate or reduce the award of compensation ordered by the UNDT.

Mr. Fasanella's Answer

9. Mr. Fasanella 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. Fasanella 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 to give notice under Staff Rule 9.7 and no evidence was presented that there was another “final” notice forthcoming.

10. Mr. Fasanella further maintains that the UNDT did not exceed its jurisdiction when it considered evidence of the Administration’s handling of Mr. Fasanella 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. Fasanella 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. Fasanella’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.

11. 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 and apply for suitable posts onto Mr. Fasanella’s shoulders without making a good faith effort to identify alternative posts for him. The Secretary-General has the primary obligation to find alternative posts for permanent staff members facing abolition of their posts. The UNDT correctly found that the evidence indicated that there were available posts against which Mr. Fasanella could have been considered without having to apply and compete for them but that he was in fact not considered. In particular, there were digital scanning posts which matched his experience but the Administration did not consider Mr. Fasanella for them, competitively or otherwise. The evidence supports the UNDT’s finding that the Administration failed to make good faith efforts to place Mr. Fasanella. It placed other staff members on posts during the restructuring of DGACM through lateral transfer, but it would not consider lateral transfer for Mr. Fasanella without explanation although it knew of positions for which he was qualified. Even assuming the Administration could require Mr. Fasanella to participate in competitive selection exercises, it violated the requirement of priority retention under Staff Rules 9.6(e) and 13.1(d) as there was no evidence of any distinction having been made between permanent staff and other categories of

staff in these selection exercises. Rather, the evidence supported the opposite conclusion that the Administration disregarded length of service and contract status. The efforts mentioned by the Secretary-General are not “minimally sufficient” to show that the Administration fulfilled its obligation of priority retention of permanent staff members. Mr. Fasanella complied with the requirement of “reasonable cooperation” by (unsuccessfully) applying for posts.

12. Finally, the UNDT did not err in awarding compensation to Mr. Fasanella. The UNDT enjoys discretion to determine damages in each particular case. The Secretary-General failed to discharge his burden to show that the UNDT erred in its determination of the appropriate remedy. 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. Fasanella testified at his oral hearing as to his financial situation and gave specific information with respect to his economic loss. The Secretary-General did not present evidence to rebut this testimony. The UNDT also correctly awarded compensation for emotional distress as it was best placed to assess and weigh the evidence before it. The Secretary-General has not presented any argument in opposition to this award.

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

Considerations

Receivability

14. The Secretary-General contends that Mr. Fasanella’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:⁶

... The letter of termination stated in no uncertain terms that the post against which the Applicant 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 [the Applicant’s] permanent appointment” and that, “[i]n the event [the Applicant 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,

⁶ Impugned Judgment, para. 35.

without any doubt, affected the Applicant'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.

15. 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*:⁷

... 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.

16. 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 terms of appointment or contract of employment of the individual staff member.⁸ 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".⁹

17. At the time Mr. Fasanella'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. Fasanella's contract was charged. The termination letter of 31 December 2013, resulting from the abolishment of Mr. Fasanella's post, was a final decision of the Administration to terminate his permanent appointment with the Organization, as demonstrated by the language

⁷ Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para. V.

⁸ *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.

⁹ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 50, citing *Bauzá Mercère v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-404, para. 18 and citations therein.

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. Fasanella’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.¹⁰

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

Merits

(i) Evidence Post-Management Evaluation

19. 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:¹¹

... 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. ...

20. The Secretary-General submits that the UNDT erred in law and exceeded its jurisdiction by considering matters beyond the scope of Mr. Fasanella’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

¹⁰ See *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481.

¹¹ *Massabni v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-238, paras. 2-3.

submitted by the moving party, whatever name the party attaches to the document,¹² 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.¹³ The evidence of which the Secretary-General complains is relevant to the UNDT's interpretation of Mr. Fasanella's application.

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

22. Third, due to the unusual circumstances of the case, wherein the notice of termination was given months in advance of Mr. Fasanella'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. Fasanella'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. Fasanella of events subsequent to the Management's response to his request for management evaluation.

(ii) *Termination*

23. The Administration has broad discretion to reorganize its operations and departments to meet changing needs and economic realities.¹⁴ According to the Appeals Tribunal's well-settled jurisprudence, "an international organization necessarily has power to restructure some or all of

¹² *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 cites therein.

¹³ *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.

¹⁴ *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.

its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff”.¹⁵ This Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff.¹⁶ 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.¹⁷ In the present case, however, as the General Assembly abolished a number of DCACM posts before the notice of termination was sent to Mr. Fasanella, there can be little doubt that the retrenchment exercise was genuine and not improperly directed at him or any other specific staff member. Mr. Fasanella does not suggest otherwise.

24. 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:¹⁸

... 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.

25. 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

¹⁵ *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).

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

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

¹⁸ Emphasis added.

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.¹⁹

26. At the hearing before the Dispute Tribunal, the Administration presented evidence that “[t]he Applicant [Mr. Fasanella] applied for vacant posts at the G-5 and/or G-6 level but his job applications were rejected”. As he did not obtain another position, Mr. Fasanella was terminated, taking early retirement.

27. The Dispute Tribunal correctly concluded that Mr. Fasanella’s status as a permanent staff member provided him “with additional legal protections and guarantees”,²⁰ as recognized historically within the Organization:²¹

... 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).

¹⁹ Staff Rule 9.6(e) and (f) provides (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.

²⁰ Impugned Judgment, para. 59.

²¹ *Ibid.*, para. 61.

28. The Dispute Tribunal also properly concluded that the Administration had authority to terminate Mr. Fasanella as a permanent appointee under Staff Regulation 9.3(a)(i)²² and Staff Rules 13.1(a)²³ and 13.1(d), “provided that it is lawfully done, i.e., that relevant conditions concerning preferential retention are satisfied”²⁴ but that the Administration did not comply with Staff Rule 13.1(d) in terminating Mr. Fasanella.²⁵ The UNDT aptly concluded:²⁶

... 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 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.

29. 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.

30. The Dispute Tribunal found that, as to Mr. Fasanella:²⁷

... the Applicant in this case was not offered any positions prior to the abolishment of his post, or subsequent thereto. The Respondent in this case placed not an iota of evidence before the [Dispute] Tribunal to show that the required criteria were applied or considered, such as the Applicant’s contract status, suitability for vacant posts, special skills, length of service, competence and integrity, nationality, etc., with a view to positioning him or offering him a position. ...[T]he main method of retention of staff was through a competitive process, without consideration of priority criteria such as contract type or seniority.

31. The Appeals Tribunal agrees that Mr. Fasanella’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

²² 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...”.

²³ 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”.

²⁴ Impugned Judgment, para. 76.

²⁵ *Ibid.*, paras. 81 and 87.

²⁶ *Ibid.*, para. 87.

²⁷ *Ibid.*, para. 85.

terminating Mr. Fasanella. As the UNDT found, the Administration did not meet its burden. Mr. Fasanella – 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. Fasanella did apply for two positions, and the Administration does not claim that he was not qualified for these posts.

32. 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 applied for the post. As this was not done for Mr. Fasanella, the UNDT properly concluded that the decision to terminate Mr. Fasanella was unlawful.²⁸

(iii) Remedies

33. In light of the conclusion that Mr. Fasanella's termination was unlawful, the Dispute Tribunal, under Article 10(5)(a) of the UNDT Statute, rescinded the termination and in lieu of reinstatement ordered two years' net base salary, less any amount of termination indemnity.²⁹

34. The Secretary-General challenges the in-lieu compensation, arguing that Mr. Fasanella must show mitigation. That is not so. As we stated in *Eissa*,³⁰ "[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. Fasanella's in-lieu compensation by the amount of his termination indemnity, to which he has a right under the Staff Regulations and

²⁸ *Ibid.*, para. 90.

²⁹ *Ibid.*, paras. 96-97; See, e.g., *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092.

³⁰ *Eissa v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-469, para. 27.

Staff Rules. The award of in-lieu compensation should be modified to strike the deduction for termination indemnity.

35. Mr. Fasanella testified that he was frustrated, inconvenienced, and disoriented by the sudden loss of his employment. Based on Mr. Fasanella's testimony, the UNDT awarded him USD 7,000 as damages for emotional stress.³¹ 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.³² Thus, the award of compensatory damages for emotional distress in the amount of USD 7,000 should be reversed.

³¹ Impugned Judgment, paras. 94 and 97. 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.

³¹ Impugned Judgment, paras. 95 and 98.

³² *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742.

Judgment

36. The appeal is granted in part. Judgment No. UNDT/2016/193 is affirmed as to the rescission of the termination of Mr. Fasanella'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 Raikos, Presiding

(Signed)

Judge Chapman

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 qualified for the position in question. A permanent staff member could even force the Administration into

¹ See para. 32 of the majority opinion.

promoting him or her to a higher grade level. In a case where a permanent staff member applied only for one position and at a higher grade level, the Administration would be obliged to choose (and consequently promote) him or her even if the staff member 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. Fasanella'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. Fasanella'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. 27 of the majority opinion, referring to paras. 59 and 61 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. Fasanella 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. Fasanella 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 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 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. Fasanella 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. Fasanella 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. Fasanella, on the other hand, applied only for one or two positions.

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