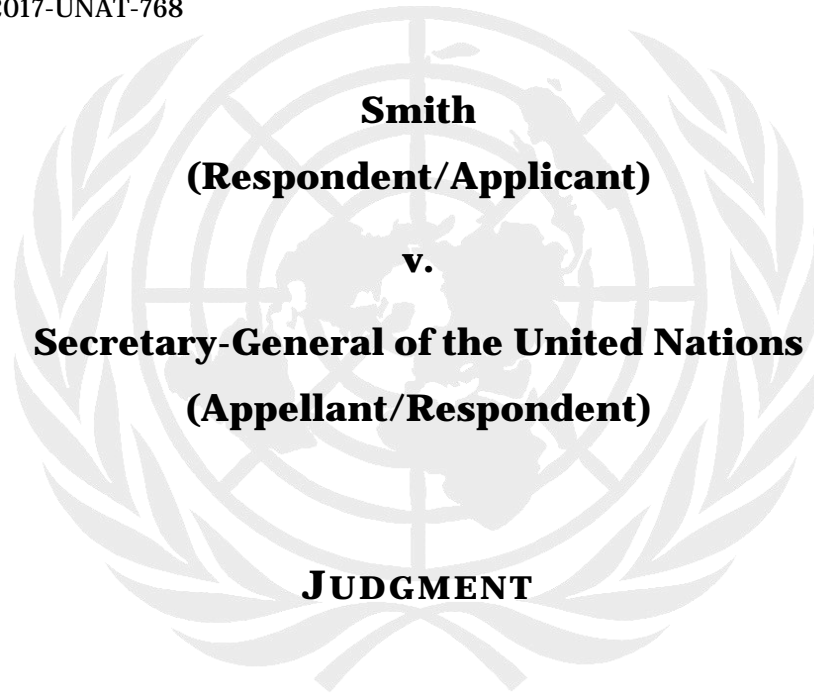




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2017-UNAT-768



**Smith  
(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.:	2016-1046
Date:	14 July 2017
Registrar:	Weicheng Lin

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Counsel for Mr. Smith: Lennox S. Hinds

Counsel for Secretary-General: Amy Wood/Nathalie Defrasne

**JUDGE SABINE KNIERIM, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/194, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 19 October 2016, in the case of *Smith v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 19 December 2016, and Mr. Alex Smith filed his answer on 13 March 2017.

**Facts and Procedure**

2. The following facts are taken from the UNDT Judgment:<sup>1</sup>

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

... The Applicant was one of fourteen former and current staff members who, in March 2014, filed applications [before the UNDT] relating to the decision to terminate their permanent appointments following the abolition of a number of posts in DGACM. 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 commenced employment with the United Nations in or around 1976. He received a permanent appointment effective 1 April 1981.

... Until 20 April 2014, the Applicant had the functional title of Supervisor at the Publishing Section at the G-6 level, step 11. After 38 years and 8 months of service at the United Nations, and the reception of several long service recognition awards, the Applicant’s permanent appointment was terminated on 20 April 2014, when he took earlier 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.

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<sup>1</sup> Impugned Judgment, paras. 1-2 and 10-24 (emphases in original).

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

*Abolishments*

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

...

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

...

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

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

*General Assembly resolution 68/246*

... On 27 December 2013, the General Assembly approved the Secretary-General's proposed programme budget for the biennium 2014–2016,<sup>[2]</sup> 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:

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<sup>2</sup> This should read "biennium 2014-2015".

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

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

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

*Secretary-General's approval of termination of appointments*

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

*Termination letter of 31 December 2013*

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

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

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

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

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

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

*Request for management evaluation*

... On 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 those staff, including Mr. Smith, 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. Smith, 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 applied for four available posts—Editorial and Desktop Publishing Assistant (Chinese), G-7 level; Administrative Assistant, G-7 level; Staff Assistant, G-6 level; Meetings Services Assistant, G-6 level. He was not retained for any of these posts. With respect to the Editorial and Desktop Publishing Assistant (Chinese) post, the Applicant did not speak Chinese, which was required for the position. With respect to the other three posts, he was not selected because he did not answer “yes” to the required number of pre-screening questions.

... Mr. Nandoe[, the Chief, Meeting Support Section] testified that, on several occasions, he asked the Applicant to apply for available posts, which the Applicant refused to do because, being a staff representative, he did not want to take away job opportunities from his colleagues.

*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. Smith’s application was receivable *ratione materiae* as the notification of the decision to abolish Mr. Smith’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. Smith’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).”<sup>3</sup> The UNDT concluded, in particular, that the Administration had failed to “meet the requirements of staff rule 13.1 to reassign [Mr. Smith] 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”.<sup>4</sup> Mr. Smith 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

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<sup>3</sup> *Ibid.*, para. 92.

<sup>4</sup> *Ibid.*, para. 91.

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. Smith'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 indemnity paid to him upon his separation. In addition, the UNDT awarded USD 7,000 as "compensation for emotional distress".<sup>5</sup>

### **Submissions**

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

4. The Secretary-General submits that the UNDT erred in law in finding Mr. Smith's application receivable on the basis that the 31 December 2013 DGACM notice to Mr. Smith 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. Smith's rights. As the decision to terminate Mr. Smith'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. Smith'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. Smith's job applications after February 2014 and thus took into account administrative decisions and actions that post-dated Mr. Smith'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.

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<sup>5</sup> *Ibid.*, para. 99.



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 of staff affected by abolition of post outside the normal selection process 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 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. Smith 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. Smith of vacancies some of which were restricted to the affected DGACM staff members and repeatedly extended the deadlines to apply for such positions. It also extended Mr. Smith's appointment beyond the three-month notice period to afford him additional opportunities to apply for vacant positions. By contrast, Mr. Smith 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. Mr. Smith applied to only four positions, none of which were suitable for him.

7. With respect to the UNDT's award of in-lieu compensation, the Secretary-General claims that the UNDT erred in finding that Mr. Smith's rights had been violated and in awarding compensation to Mr. Smith on this basis. In addition, the UNDT erred in setting the amount of in-lieu compensation at two years' net base salary without requiring Mr. Smith 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. Smith'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. Smith's Answer**

9. Mr. Smith 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. Smith 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. Smith further maintains that the UNDT did not exceed its jurisdiction when it considered evidence of the Administration's handling of Mr. Smith'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. Smith 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. Smith'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. Smith'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. Smith 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. Smith for them, competitively or otherwise. The evidence supports the UNDT's finding that the Administration failed to make good faith efforts to place Mr. Smith. It placed other staff members on posts during the restructuring of DGACM through lateral transfer, but it would not consider lateral transfer for Mr. Smith without explanation although it knew of positions for which he was qualified. Even assuming the Administration could require Mr. Smith 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. Smith complied with the requirement of "reasonable cooperation" by (unsuccessfully) applying for posts.

12. Finally, the UNDT did not err in awarding compensation to Mr. Smith. 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. Smith testified at his oral hearing as to his financial situation since his early retirement 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. Smith requests that the Appeals Tribunal reject the appeal in its entirety and uphold the UNDT Judgment.

**Considerations**

14. 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. Smith's permanent appointment, effective 20 April 2014, was unlawful.

*Receivability*

15. The Secretary-General contends that Mr. Smith'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.

16. The Dispute Tribunal rejected this contention, stating:<sup>6</sup>

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

17. 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>7</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

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<sup>6</sup> *Ibid.*, para. 37.

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

the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. ...

18. 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.<sup>8</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>9</sup>

19. At the time Mr. Smith’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. Smith’s appointment was charged. The termination letter of 31 December 2013, resulting from the abolishment of Mr. Smith’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. Smith’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>10</sup>

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

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<sup>8</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>9</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>10</sup> See *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481.

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

21. 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>11</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.

22. The Secretary-General submits that the UNDT erred in law and exceeded its jurisdiction by considering matters beyond the scope of Mr. Smith'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. Smith's application.

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

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

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

*(ii) Termination*

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

26. The Administration has broad discretion to reorganize its operations and departments to meet changing needs and economic realities.<sup>12</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>13</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>14</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>15</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. Smith, there can be no doubt that the retrenchment exercise was genuine and not improperly directed at him or any other specific staff member. Mr. Smith does not suggest otherwise.

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<sup>12</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>13</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>14</sup> *Matadi et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-592, para. 16.

<sup>15</sup> *Ibid.*, citing *Hersh v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-433/Corr.1, para. 17.

27. The Administration may terminate the appointment of a 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>16</sup>

28. 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.

29. Staff Rule 13.1 provides, in relevant parts, 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 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

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<sup>16</sup> Applicable in this case is the 2013 version of the Staff Rules and Regulations, Secretary-General's Bulletin ST/SGB/2013/3 (Staff Rules and Staff Regulations of the United Nations).



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.

30. During the restructuring process at DGACM, the Administration had 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. Smith 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>17</sup>

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

32. Mr. Nandoe testified that, on several occasions, he asked Mr. Smith to apply for available posts, which he refused to do because, being a staff representative, he did not want to take away positions from his colleagues. If a permanent staff member refuses to apply to positions despite a direct call from his superior, there is no sufficient cooperation and the Administration has no duties under Staff Rules 9.6 and 13.1 to consider that staff member for the available positions.

33. Mr. Smith's application for a position as Editorial and Desktop Publishing Assistant (Chinese) at the G-7 level was rejected because he does not speak Chinese. The Administration did not have the duty to consider Mr. Smith for this position under Staff Rules 9.6 and 13.1 as he did not have the necessary qualifications.

34. His applications for three positions as Administrative Assistant at the G-7 level, Staff Assistant at the G-6 level and Meetings Services Assistant at the G-6 level, were rejected because Mr. Smith did not answer "yes" to the required number of pre-screening questions.

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<sup>17</sup> See also *Haimour & Mohammad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-688.

The Administration had no duty to consider Mr. Smith for these positions under Staff Rules 9.6 and 13.1 as he was not qualified.

35. As the termination of Mr. Smith'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 compensation for emotional distress.

**Judgment**

36. The appeal is granted and Judgment No. UNDT/2016/194 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