



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

Judgment No. 2021-UNAT-1077

**Domitilla Bianca Icha
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Jean-François Neven, Presiding Judge Graeme Colgan Judge Kanwaldeep Sandhu
Case No.:	2020-1372
Date:	30 October 2020
Registrar:	Weicheng Lin

Counsel for Appellant:	George G. Irving
Counsel for Respondent:	Jiyoung Kwon

JUDGE JEAN-FRANÇOIS NEVEN, PRESIDING.

1. On 16 February 2018, Ms. Icha filed an application with the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) contesting the decision to terminate her fixed-term appointment with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). On 7 February 2020, the UNDT in Nairobi issued Judgment No. UNDT/2020/024 dismissing the application. The UNDT found that the Secretary-General met the minimal standard of proof that the abolition of Ms. Icha's post and her non-placement on another suitable post had been done in accordance with the Regulations and Rules. The UNDT found that, therefore, the burden of proof had shifted to Ms. Icha to show by clear and convincing evidence a violation of her employment rights. The UNDT addressed, in turn, the anomalies in the post reduction exercise alleged by Ms. Icha.

2. Ms. Icha appealed to the United Nations Appeals Tribunal (Appeals Tribunal). For the reasons set out below, the appeal is partially granted.

Facts and Procedure

3. On 2 August 2001, Ms. Icha joined MONUSCO (then United Nations Organization Mission in the Democratic Republic of the Congo (MONUCO)) on a fixed-term appointment, serving as an Administrative Assistant at the FS-5 level, at the Kisangani duty station. On 8 May 2008, Ms. Icha moved to Goma.

4. In May 2016, Ms. Icha's profile was comparatively reviewed with six other staff members with the same level and functions. On 2 June 2016, she was informed that based on the recommendation of the Comparative Review Panel, she would not be retained beyond 30 June 2016. However, as part of the MONUSCO Placement Exercise, she was laterally transferred to a vacant Air Operations Post, at the FS-5 level, for administrative purposes. Accordingly, she continued to perform the functions of Administrative Assistant. Effective 1 July 2017, her fixed-term appointment was extended for another year through 30 June 2018.

5. On 4 August 2017, the Special Representative of the Secretary-General (SRSG) sent a broadcast informing MONUSCO staff members that the review by the General Assembly of the report of the Secretary-General on the budget of MONUSCO for the 2017/2018 period had resulted in a major reduction to the budget proposal of the Mission and indicating that

managers would be asked to make proposals for targeted post reductions in line with the operational priorities set forth in Security Council resolution 2348 (2017).

6. In August 2017, MONUSCO promulgated Guidelines for the implementation of the reduction of the staffing component at MONUSCO (CRP Guidelines). The Comparative Review Process (CRP) was conducted by a Comparative Review Panel (CRP Panel) which was guided by MONUSCO's CRP Guidelines and the CRP Panel's terms of reference (TORs). The TORs were subsequently amended to include a review by the CRP Panel of the process for "dry cuts". "Dry cut" was defined as a situation where a post or function proposed for reduction did not have a comparative post or function in the same category and level within the same section as a result of which the incumbent of the post would not be subject to comparative review.

7. On 22 August 2017, the Chief of Staff provided the Mission leadership with an approved list of staff reductions. On the same day, Ms. Icha was notified that a number of posts in her section would be reduced, and consequently, MONUSCO would undertake a comparative review of staff in her section with similar functional titles and levels.

8. On 23 August 2017, the SRSG sent another broadcast to all MONUSCO staff members advising that the MONUSCO leadership had concluded a review of the Mission's most critical functions and determined which posts were to be reduced based on the relative priority of the tasks performed. The SRSG also announced a comparative review process, which would determine which staff would be retained.

9. On 25 August 2017, Ms. Icha was informed that MONUSCO would be seeking the approval of the Department of Management to terminate her appointment effective 30 September 2017 on grounds that there were no other posts in her section with the same functional title in the same category, at the same grade encumbered by another staff member with a contractual modality that could take precedence over hers under the Staff Rules.

10. On 5 September 2017, the CRP Panel submitted its report to the Compliance Review Committee (CRC). In its report of 14 September 2017, the CRC was satisfied that there was no flaw in the CRP Panel's implementation of the process.

11. On 20 October 2017, the Department for Management approved the termination of the appointments of 146 MONUSCO staff members including Ms. Icha's. On 26 October 2017, Ms. Icha was notified that her separation from service effective 31 October 2017 had been approved.

12. On 27 October 2017, Ms. Icha requested management evaluation of the decision to terminate her fixed-term appointment.

13. On the same date, the President of the MONUSCO Field Service Union (FSU) wrote an e-mail to the MONUSCO SRSG requesting his approval for Ms. Icha to be absorbed elsewhere. The pertinent parts of the e-mail read: "[I]t was agreed that on humanitarian grounds, [Ms. Icha] could be allowed to retire next year as she is due having served the UN for very long. ... I would be grateful for your kind approval so that she can be absorbed elsewhere."

14. On 10 January 2018, the contested decision was upheld following the management evaluation.

15. Ms. Icha separated from service, effective 27 January 2018, her initial date of separation having been postponed pending management evaluation.

16. On 16 February 2018, Ms. Icha filed an application with the Dispute Tribunal contesting the decision to terminate her fixed-term appointment.

17. On 7 February 2020, the UNDT in Nairobi issued Judgment No UNDT/2020/024 dismissing the application. The UNDT found that the Secretary-General as Respondent met the minimal standard of proof that the abolition of Ms. Icha's post and her non-placement on another suitable post had been done in accordance with the Regulations and Rules. The UNDT found therefore that the burden of proof had shifted to Ms. Icha to show by clear and convincing evidence a violation of her employment rights.

18. The UNDT addressed, in turn, the anomalies in the post reduction exercise alleged by Ms. Icha. The UNDT found that Ms. Icha's assertion that she was close to retirement and that therefore she should have been allowed to remain in service until reaching her mandatory retirement age in August 2018 had no valid foundation in law. Regarding Ms. Icha's assertion that her fixed-term contract was about to be converted to a continuing appointment and that therefore she could have had priority of retention over fixed-term

appointees, the UNDT found that Ms. Icha had not shown how she met the requirements for conversion to a continuing appointment. The UNDT found that Ms. Icha failed to adduce any evidence to connect the decision to abolish her post to her active membership in the staff union. The UNDT found that Ms. Icha's contention that it was the second time in two years that she had been faced with termination due to abolition of post did not address any issue of irregularity in this instance. Furthermore, the UNDT found that Ms. Icha's statement that she qualified for priority selection to be retained in service as stipulated in Staff Rule 9.6 was a misinterpretation of the provision in light of the fact that four staff members in Ms. Icha's position had continuing appointments and therefore had priority over her. She has not demonstrated how she had priority over Mr. D R-B's selection who, like her, had been identified for a "dry cut". The UNDT accepted the Secretary-General's explanation that that colleague had been placed in a post after taking into account the objective selection criteria that included gender, bearing in mind that the post was located in a security risk area and it was preferable to assign a man rather than a woman.

19. The UNDT concluded that Ms. Icha had "failed to discharge her legal duty to prove with clear and convincing evidence that the abolition of her post and non-placement on a suitable position were marred by irregularities entitling her to a remedy".¹

20. On 28 February 2020, Ms. Icha filed an appeal and on 4 May 2020, the Secretary-General filed his answer.

21. During its 2020 Fall Session held from 19 to 30 October 2020, the Appeals Tribunal considered Ms. Icha's appeal and issued the following order:²

... With respect to Ms. Icha's ground of appeal that the UNDT erred in fact in requiring Ms. Icha to rebut the presumption of regularity of the Administration's acts without giving her an opportunity to contest the Secretary-General's arguments, the Appeals Tribunal noted that in her application to the UNDT, Ms. Icha had stated that "several similarly situated colleagues who were also in need of placement [had been] found posts and remain[ed] in service, including the colleagues, who [had] initially [been] identified along with her for separation". In his response to the application, the Secretary-General conceded that another FS-5 staff member also due to be separated (Mr. D R-B) had been reassigned to a newly created position in Kananga, funded by the Department of Political Affairs. There was no vacancy announcement for this position.

¹ Impugned Judgment, para. 78.

² *Icha* Order No. 390 (2020) dated 16 November 2020, paras. 6-13 (internal footnotes omitted).

... Ms. Icha did not ask the Administration to provide further explanations regarding this reassignment. However, by Order No. 022 (NBI/2020) of 27 January 2020, the UNDT requested that the Secretary-General provide further and more precise details on the process used to select Mr. D R-B, and not the other two similarly situated colleagues, for the reassignment to the newly created position.

... On 3 February 2020, the Secretary-General presented evidence and explained that due to gender considerations, Ms. Icha and Ms. A Z had been considered not suitable for reassignment and “[a]fter considering all of the criteria, MONUSCO recommended the reassignment of Mr. D R-B”.

... In its Judgment, the UNDT stated that:

[t]he Respondent concedes that one similarly situated staff member was placed in a post after taking into account an objective selection criteria that included, gender, bearing in mind that the post was in a security risk area and it was preferable to assign a man rather than a woman. This explanation meets the standard of proof that the selection was regular. [Ms. Icha] has not rebutted this presumption by adducing any evidence to show that the selection of Mr. D R-B instead of her was irregular.

... The Appeals Tribunal finds that the evidence and the explanation provided by the Secretary-General in response to Order No. 022 (NBI/2020) of 27 January 2020 raise serious legal issues. The recruitment limited to male staff members and the decision that [Ms. Icha] and Ms. A Z were considered not suitable for this reassignment could be inconsistent with the Organization’s gender policy. Furthermore, this recruitment appears to have been carried out without any vacancy announcement and with a lack of transparency.

... Prior to the UNDT Judgment, Ms. Icha had no indication that she had been excluded from selection based on her gender. We find that there is a due process violation where a party is not given the opportunity to be heard on a specific argument at trial and that this failure could have had an impact on the outcome of the judgment. In the present case, the time period between the Secretary-General’s response to Order No. 022 (NBI/2020) and the UNDT Judgment was so short (three days) that we find that Ms. Icha was not given the opportunity to effectively challenge the specific legal issue raised by that response, which had an impact on the outcome. Accordingly, we find that the UNDT erred in procedure resulting in a due process violation which may be remedied by hearing the arguments and/or reviewing the evidence the UNDT failed to hear/review at trial.

... According to Article 2(5) of the Appeals Tribunal Statute, the Appeals Tribunal shall not remand the case to the Dispute Tribunal, if a decision can be taken without oral testimony or other forms of non-written evidence. In the present case, the legal issue in question does not appear to require such evidence.

Therefore, we order the parties to provide any documentary evidence and submissions that we may need in order to reach an informed and reasoned decision regarding the compliance of Mr. D R-B's reassignment with the Organization's gender policy and the impact that any non-compliance could have in this case.

... The Appeals Tribunal will resume its consideration of the present case upon receipt of the aforementioned evidence and submissions.

21. On 10 December 2020, Ms. Icha filed a motion for admission of documentary evidence and comments. On 18 January 2021, the Secretary-General filed his response.

Submissions

Appellant's Appeal

22. The UNDT failed to properly exercise its jurisdiction by rejecting the parties' request to reconvene the case management discussion (CMD) for the purpose of identifying the relevant issues and considering any information needed for a full understanding of the case, or assessing the utility of a hearing on the merits with witnesses. Ms. Icha had filed her application almost two years earlier and had been anticipating an opportunity to present oral evidence or request leave to adduce additional documentary evidence regarding the rationale for the abolition of her post, her efforts to prevent separation from service and the negative consequences of termination.

23. The rationale for abolishing Ms. Icha's post with immediate effect was never scrutinized. There had been no actual review by the CRP or the CRC of the justification for selecting certain posts for abolition; Ms. Icha had been deemed eligible for a permanent appointment; her position was exceptional in that she had been placed on a borrowed post and given the title "Air Operations Assistant" and it was not clear that her post had ever been abolished; and some of her similarly situated colleagues were placed without a comparative review. None of the issues were thoroughly addressed by the UNDT and Ms. Icha was never given an opportunity to contest the Secretary-General's arguments in this regard. A case in point is the UNDT's solicitation of information from the Secretary-General justifying his decision to place a male FS5 staff who was dry cut, and the UNDT's acceptance of the explanation, which lacked any programmatic basis and appeared to be in violation of the Organization's gender policy, without affording Ms. Icha an opportunity to comment.

24. The UNDT also erred in rejecting Ms. Icha's allegations of ill-motivation as unproven. Although the UNDT had decided to admit evidence of an attempt to terminate her appointment just two years before by abolishing her post following her election to the Staff Committee, there was little analysis of this prior episode or its bearing on the UNDT's conclusion that this was an unsubstantiated statement and that she enjoyed no special privileges as a staff representative. Similarly, the MONUSCO FSU Committee citing its belief that this was a factor in her second termination proceeding was dismissed as speculation. Yet, discrimination often is not openly manifested and has to be inferred from the surrounding facts.

25. In its analysis of Staff Rule 9.6(e), the UNDT appeared to conflate the rules governing abolition of post with the contractual consequences on staff. In *Timothy*,³ the Appeals Tribunal held that the purpose of Staff Rule 9.6(e) is to mitigate the effects of retrenchment on staff holding non-temporary appointments, insofar as suitable posts are available in which their services can be utilized, provided due regard should be given in all cases to relative competence, integrity and length of service. The UNDT failed to apply the legal principle to the particular facts of the case. Ms. Icha had been continuously applying from 2016 for available and suitable vacancies, including nine from August 2017 to January 2018 as reflected in the INSPIRA and COSMOS records, which were in the Secretary-General's possession. This information having never been requested by the UNDT, Ms. Icha included a specific reference to it in her closing statement. She also included a specific reference to posts available around that critical time for which she had never been contacted and for which there was no evidence that she had even been considered though some remained unfilled at the time of her separation and she was already rostered. The Secretary-General's contentions that Ms. Icha had failed to take proactive steps to ensure her continued employment and that no posts had been available to place her were therefore demonstrably wrong. Ms. Icha requests that the Appeals Tribunal admit the documentation regarding her INSPIRA and COSMOS records and take judicial notice of this information in the Secretary-General's possession.

26. Before the UNDT, Ms. Icha requested rescission of the contested decision with reinstatement and corresponding adjustment of her pension entitlements. Although generally given a two-year fixed-term appointment, considering that Ms. Icha could have

³ *Timothy v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-847.

qualified for an extension to age 65 had she remained in service, any alternative compensation should take this factor into account. The unforeseen economic dislocation had a tangible effect on her well-being which she documented. She also requested one year's net base pay for moral damages for the abrupt manner which caused harm to her dignity and professional reputation as well as serious emotional stress for which she received treatment. Ms. Icha requests that the Appeals Tribunal find in her favour based on the evidence; order compensation for material and moral damages or, in the alternative, remand the case to a different Judge of the UNDT; and award her USD 10,000 in legal costs for abuse of process.

The Respondent's Answer

27. The UNDT correctly found that the abolition of her post was proper. The UNDT correctly applied the legal framework on termination of appointment to determine that the Administration had properly terminated Ms. Icha's fixed-term appointment. The abolition of posts was necessitated by General Assembly resolution 71/301, which substantially reduced MONUSCO's budget for the 2017-2018 budget-year. To accommodate the reduction in its budget and strategic priorities, MONUSCO decided to reduce the Mission's civilian staffing component, including the number of Administrative Assistants at the FS-5 level, in the Field Administrative Offices, Mission Support Division, from seven to four posts. The UNDT concluded that the Administration had outlined in detail the reasons for abolishing the posts and correctly concluded that the Administration had properly carried out the abolition exercise.

28. The Administration properly applied Staff Rule 9.6. The UNDT correctly found that the Administration met its burden of proof in showing that it had properly carried out the termination exercise. The affected staff members, including Ms. Icha, were consistently notified and updated on the downsizing process. The Administration undertook a comprehensive and transparent CRP, with clear Guidelines and TORs, conducted by an independent CRP Panel. The CRP Panel reviewed the list of dry cuts and unanimously agreed that the process for identifying the posts deemed as dry cuts had been fair and transparent. At the conclusion of the CRP, the Administration received management approval to terminate the appointments of those affected. Furthermore, the Administration encouraged the affected staff members to actively apply for positions for suitable placement and paid termination indemnity to affected staff who could not be placed in a suitable

position. Ms. Icha failed to show that she had applied for any job openings following the Mission's announcement of the budget cut on 4 August 2017.

29. Contrary to Ms. Icha's contention, the UNDT properly exercised its jurisdiction by rejecting the parties' request to reconvene a second CMD. Ms. Icha had been afforded all opportunities to present her views and evidence during the first CMD and throughout the proceedings and the denial of a second CMD did not negatively affect her due process rights.

30. Ms. Icha has not identified any error of fact. She merely repeats the arguments submitted before the UNDT. She also seeks to introduce new information without providing supporting evidence that another staff member on a fixed-term appointment whose post was dry-cut was retained against a MOVCON/Aviation Assistant post. Ms. Icha had previously raised the selection of Mr. D R-B, but on appeal seeks to introduce a new argument, namely that his selection was not proper because it limited the recruitment to male staff only in violation of the Organization's gender policy.

31. Ms. Icha has not identified any error of law. There is no merit in Ms. Icha's contentions that the UNDT failed to apply the legal principles of *Timothy*, and that the Secretary-General's assertion about no suitable posts in which to place Ms. Icha was "patently false". The facts of the *Timothy* case are distinguished from Ms. Icha's case. The affected staff member in *Timothy* was holding a continuing appointment and applied to 18 positions after being informed that her post was being abolished, thereby exercising her due diligence in good faith. In contrast, Ms. Icha did not apply to any posts after being informed that MONUSCO was going through a budget cut in its civilian component, and being encouraged to take proactive efforts to ensure her future career prospects although she had two and a half months to do so. She failed to demonstrate that she had fully cooperated in order to succeed in being placed in a suitable position.

32. As to Ms. Icha's contention that the UNDT should have taken into consideration that she could have qualified for retirement at age 65, the UNDT already found that this argument did not have any valid foundation in law. Similarly, her assertion that she could have benefited from an extension of retirement at 65 is without legal basis, as she had no expectancy of renewal or conversion, under her fixed-term appointment. Finally, in his response to Order No. 16 (NBI/2020), the Secretary-General pointed out that Ms. Icha did

not prove, through the correspondence with UNJSPF which she had submitted, that her pension benefits had been harmed.

33. The Secretary-General requests that the Appeals Tribunal dismiss the appeal and affirm the UNDT Judgment.

Appellant’s submission pursuant to Order No. 390

34. Ms. Icha had no opportunity to challenge the information provided by the Respondent about the reassignment of Mr. D R-B. For this position, there was no special requirement concerning gender. Kananga has female staff members assigned there and no gender preference has been articulated with regard to any other position. The selected candidate, a male candidate recommended by the Deputy Director of Mission Support, had 15 years less seniority in service (entry of duty (EOD) of 2005 as opposed to Ms. Icha’s EOD of 1990) and in grade (FS-5 Step 9 as opposed to her FS-5 Step 13). Ms. Icha’s Personal History Form has demonstrated her ability to work in challenging environments. She worked in numerous field locations in the DRC, including Goma, Kisangani, Bunia (“one of the most insecure regions of DRC”) as well for MINUSRO in Algeria to register voters in areas controlled by the POLISARIO. She had a good working knowledge of French having spent two years in Western Sahara and 17 years in the DRC.

35. Ms. Icha requests that this Tribunal admit the new material in Annexes 16 and 17 into evidence and find that the Respondent failed to undertake placement efforts in good faith rendering the decision to terminate her fixed-term appointment illegal.

The Respondent’s submission pursuant to Order No. 390

36. The Respondent recognizes that the reassignment of Mr. D R-B does not appear to have been carried out in compliance with the Organization’s legal framework.

37. Nonetheless, the reassignment of Mr. D R-B did not have an impact on the challenged decision. Whether or not Mr. D R-B’s selection for a completely different position was consistent with the Organization’s gender policy is a matter that falls outside the present case. In accordance with the order of preference set out in Staff Rule 9.6(e), Ms. Icha was not retained in service because she did not hold a permanent or continuing appointment but rather a fixed-term appointment that had no expectancy of renewal. Furthermore, there was

no obligation on the part of the Administration to find her, or any of other staff members on fixed-term appointment whose posts were slated for abolition, a suitable position. While the Appeals Tribunal has found in *Timothy* that the Administration should make reasonable efforts to find displaced candidates a post, those considerations were made in respect to staff on continuing appointments, and not staff on fixed-term appointments.

Considerations

Legal framework in case of termination for abolition of post

38. Staff Regulation 9.3 states:⁴

(a) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment or for any of the following reasons:

(i) If the necessities of service require abolition of the post or reduction of the staff;

...

(c) If the Secretary-General terminates an appointment, the staff member shall be given such notice and such indemnity payment as may be applicable under the Staff Regulations and Rules. Payments of termination indemnity shall be made by the Secretary-General in accordance with the rates and conditions specified in annex III to the present Regulations;

39. Staff Rule 9.6 states:

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;

⁴ Staff Regulations and Rules quoted here are taken from the Secretary-General's Bulletin ST/SGB/2017/1/Corr.1 issued on 18 January 2017.

(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.

40. In case of abolition of post, two issues are subject to judicial review: firstly, whether the decision of abolition of posts was procedurally correct and fair, and secondly, whether the affected staff members were given the opportunity, subject to the availability of suitable posts in which their services can be effectively utilized, to be reassigned in the order of preference established by the staff rules.

Did the UNDT fail to properly exercise its jurisdiction by rejecting the parties' request to reconvene a second CMD?

41. On 11 December 2019, by Order No. 214 (NBI/2019), the UNDT rejected the parties' request to hold a second CMD and ordered the parties to file closing submissions restricted solely to the legal issues for consideration. Ms. Icha alleges that she had filed her application almost two years earlier and had been anticipating an opportunity to present oral evidence or request leave to adduce additional documentary evidence regarding the rationale for the abolition of her post, her efforts to prevent separation from service and the negative consequences of termination.

42. Pursuant to Article 19 of the UNDT Rules of procedure, the UNDT "may at any time, either on application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties". This Tribunal has consistently held that:⁵

Under the new system of administration of justice, the UNDT has broad discretion with respect to case management. (...) As the court of first instance, the UNDT is in the best position to decide what is appropriate for the fair and expeditious disposal of a case and do justice to the parties. The Appeals Tribunal will not interfere lightly with the broad discretion of the UNDT in the management of cases.

⁵ *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062, paras. 22-23; see also *Monarawila v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-694, para. 28.

43. The procedural history of the case indicates that the UNDT convened a CMD, outlined the agenda for the CMD in advance, which offered the parties the opportunity to discuss all factual and legal issues and allowed the parties to explore the avenues of alternative dispute resolution. In addition, even without the second CMD, the Appellant had the opportunity to file a motion to introduce evidence into the record, which she did on 16 December 2019. She requested leave to submit three documents relating solely to the issue of damages, which the UNDT authorized by Order No. 016 (NBI/2020). The Appellant was given a sufficient opportunity to discuss the rationale for the abolition of her post, her efforts to prevent separation from service and the negative consequences of termination.

44. The UNDT did not fail to properly exercise its jurisdiction by refusing to convene a second CMD.

Did the UNDT err in failing to address Ms. Icha's factual arguments challenging the legality of the abolition of her post?

45. An International organization has power to restructure its departments or units, including abolition of post. The Appeals Tribunal has recently decided:⁶

It is well settled jurisprudence that an international organization necessarily has the 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. The Appeals Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However, even in a restructuring exercise, like any other administrative decision, the Administration has the duty to act fairly, justly, and transparently in dealing with staff members.

46. In this case, the various arguments made before the UNDT regarding the abolition of post are simply repeated on appeal, without indicating that the Tribunal erred on a question of fact or law. These include allegations that the rationale for abolishing Ms. Icha's post with immediate effect was never scrutinized, that there had been no actual review by the CRP or the CRC of the justification for selecting certain posts for abolition, that Ms. Icha had been deemed eligible for a permanent appointment, that her position was exceptional in that she had been placed on a borrowed post and given the title "Air Operations Assistant", and that it was not clear that her post had ever been abolished.

⁶ *Nouinou v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-902, para. 34 (internal citations omitted).

47. The Appeals Tribunal has consistently held:⁷

The Appeals Tribunal emphasizes that the appeals procedure is of a corrective nature and, thus, is not an opportunity for a dissatisfied party to reargue his or her case. A party cannot merely repeat on appeal arguments that did not succeed before the lower court. The function of the Appeals Tribunal is to determine if the Dispute Tribunal made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Appeals Tribunal's Statute. An appellant has the burden of satisfying the Appeals Tribunal that the judgment he or she seeks to challenge is defective. It follows that an appellant must identify the alleged defects in the impugned judgment and state the grounds relied upon in asserting that the judgment is defective.

48. With regard to the decision to abolish Ms. Icha's post, the appeal is without merit; she only reargues her case and does not establish that UNDT erred in fact or in law about this issue.

Did the UNDT err in deciding that Ms. Icha had failed to rebut the presumption that the selection of Mr. D R-B was regular and in dismissing her claim that the termination was unlawful?

49. In her application to the UNDT, the Appellant stated that "several of [her] similarly situated colleagues who were also in need of placement were found posts and remain in service, including the colleagues, who were initially identified along with her for separation". In his response to the application filed on 23 March 2018, the Secretary-General conceded that another FS5 staff who was due to be separated (Mr. D R-B) was reassigned to a newly created position in Kananga, funded by the Department of Political Affairs. There was no vacancy announcement for this post.

50. It is undisputed that the reassignment of Mr. D R-B was not carried out in compliance with the Organization's legal framework, in particular, its gender policy. The issue is whether this non-compliance had an impact on the challenged decision.

⁷ *Abu Salah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-974, para. 33; see also *Harris v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-896, para. 51, citing *Cherneva v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-870, para. 30, which in turn cited *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 19; *El Saleh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-594, para. 30; *Achkar v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-579, para. 15; and *Ruyooka v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-487, para. 24.

51. In *Timothy*, the Appeals Tribunal decided:⁸

... The purpose of Staff Rule 9.6(e) is to mitigate the effects of retrenchment on staff members holding non-temporary appointments, insofar as suitable posts are available “in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service”.

... Staff Rule 9.6(e) specifically sets forth a policy of preference for retaining a staff member with a continuing appointment who is faced with the abolition of a post or reduction of staff, and creates an obligation on the Administration to make reasonable efforts to find suitable placements for the redundant staff members whose posts have been abolished. As such, a decision to abolish a post triggers the mechanism and procedures intended to protect the rights of a staff member holding a continuing post, under the Staff Rules and the Comparative Review Policy, to proper, reasonable and good faith efforts to find an alternative post for him or her who would otherwise be without a job. Failure to accord to the displaced staff members the rights conferred under the said provisions will constitute a material irregularity.

... Therefore, the Administration is bound to demonstrate that all reasonable efforts have been made to consider the staff member concerned for available suitable posts. Where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given.

52. As the reassignment of Mr. D R-B was not compliant with the gender policy and Ms. Icha was not given the opportunity to apply for the newly created position in Kananga, the presumption that the selection of Mr. D R-B was regular was rebutted and the Administration did not demonstrate that all reasonable efforts had been made to consider Ms. Icha for available suitable posts. With regard to the impact of this unlawfulness, we find that, given that the selected candidate was a similarly situated colleague, with less seniority and experience, the order of preference set out in Staff Rule 9.6(e) cannot justify Ms. Icha’s exclusion from the selection process. Therefore, the decision to terminate her fixed-term appointment was unlawful.

⁸ *Timothy v. Secretary-General of the United Nations*, Judgment No 2018-UNAT-847, paras. 30-32, with reference to *Fasanella v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-765, para. 24; *El-Kholy v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-730, paras. 25 and 31; *Haimour and Al Mohammad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-688, paras. 23 and 24.

53. In terms of Article 9 of the Appeals Tribunal Statute, the decision must be rescinded, the Appellant must be reinstated and an amount of in-lieu compensation must be set.

54. The Appellant claims compensation for moral and material damages. An entitlement to moral damages may arise where there is evidence produced to the Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee, which can be directly linked, or reasonably attributed, to a breach of his or her substantive or procedural rights and where the Tribunal is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.⁹ In the present case, the Appellant has provided various medical reports issued in 2016 but also in 2019 (from the Nairobi Hospital). They establish the stress, harm and anxiety that she suffered over an extended period of time, which can reasonably be attributed to the conditions of termination, the gender policy violation and the due process rights breaches. An amount of 5,000 US Dollars is granted for moral damage.

⁹ *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309, para. 36.

Judgment

55. The appeal is partially granted. The decision to terminate Ms. Icha's fixed-term appointment is rescinded, and the Secretary-General is ordered to reinstate Ms. Icha on similar terms and conditions of employment. As an alternative to the order of reinstatement, the Secretary-General may elect to pay an amount of compensation equal to eight months' net base salary in effect at the time of the Appellant's separation from service.

56. The Appellant is awarded the sum of USD 5,000 as compensation for moral damage.

57. The sums above shall bear interest at the U.S. Prime Rate with effect from the date this Judgment becomes executable until the payment of said award. An additional five per cent shall be applied to the U.S. Prime Rate 60 days from the date this Judgment becomes executable.

Original and Authoritative Version: English

Dated this 30th day of October 2020.

(Signed)

Judge Neven, Presiding
Brussels, Belgium

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Sandhu
Vancouver, Canada

Entered in the Register on this 12th day of February 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar

Concurring Opinion of Judge Graeme Colgan

1. I agree with the foregoing judgement but wish to add some observations, what are known to lawyers as non-binding *obiter dicta*. My concerns are about the manner in which what I will call “redundancy cases” are decided in this jurisdiction. These are cases in which a staff member’s employment is terminated, not renewed, extended or converted to permanence when, in normal circumstances, this might have been expected. As this case illustrates, this is occurring to long-standing, loyal and well-performing staff members. Nor is the Organisation at fault for these situations. It is occurring increasingly because of extreme financial pressures on the United Nations including in some cases because of Member States non-payment of their monetary contributions that are essential for the Organisation to do its important work. I foresee an increasing number of these cases coming before the UNDT and the UNAT over the next few years so it is timely in my view for this Tribunal to review, in an appropriate case or cases, its relevant jurisprudence.

2. This case provides a good example of where this jurisprudence has proven problematic and has delayed the expeditious and just disposition of the case. The principles at issue include the “presumption of regularity” of administrative decisions; the imposition of an onus of proof resting on an affected staff member of establishing irregularity or other unlawfulness once the Organisation has met a very low threshold of regularity; and then that the burden of that proof carried by the staff member is to the high standard of a “clear and convincing” case, the same standard of evidential proof as the Organisation is expected to show in its investigation of allegations of serious misconduct against staff members that may result in their summary dismissal from service.

3. In such situations, the Organisation almost always holds most, if not all, of the information and therefore the evidence relevant to the grounds for its decision. At best, the staff member holds relatively little. The information power imbalance is pronounced. Yet the jurisprudence expects the staff member to make out a case to a high standard against the Organisation that holds unilaterally the relevant information and may naturally be reluctant to divulge it all. It is little wonder that such cases fail for want of proof. It is difficult, if not impossible, to prove what one may be unaware of.

4. As this case well illustrates, informed and detailed consideration needs to be given to whether a more just regime may be one in which adversarialism and strict rules of proof yield to one in which the UNDT's task is to ensure that all relevant information is gathered and assessed in a balanced way so that just outcomes can be achieved in cases and the current marked imbalance of power becomes less determinative of the outcome.

Original and Authoritative Version: English

Dated this 30th day of October 2020.

(Signed)

Judge Colgan
Auckland, New Zealand

Entered in the Register on this 12th day of February 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar