UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2014/034 UNDT/GVA/2014/035 UNDT/GVA/2014/036 UNDT/GVA/2014/037 UNDT/GVA/2014/038
Judgment No.:	UNDT/2014/132
Date:	11 November 2014
Original:	English

Before: Judge Coral Shaw

Registry: Geneva

Registrar: René M. Vargas M.

MATADI

JOHNSON

GAYE

DOE J.

DOE P.

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Miles Hastie, OSLA

Counsel for Respondent:
Steven Dietrich, ALS/OHRM, UN Secretariat
Nicole Wynn, ALS/OHRM, UN Secretariat

Introduction

1. The five Applicants, who served in various capacities at the GS-3 and GS-4 level in the United Nations Mission in Liberia ("UNMIL"), have each filed an application contesting the decisions not to renew their fixed-term appointments beyond 30 June 2013. These decisions were made following a restructuring exercise resulting in the abolition of over 100 posts at UNMIL.

The Issues

2. The Tribunal is to consider the following:

a. Whether the restructuring exercise was genuine;

b. Whether the restructuring exercise was implemented through a fair process; and

c. Whether the restructuring exercise methodology and criteria were correctly and fairly applied.

Procedural Matters

3. The five applications were filed separately on 14 November 2013 at the Nairobi Registry. The Respondent filed a reply to each of the applications on 16 December 2013, raising, *inter alia*, their receivability.

4. The cases were transferred to the Geneva Registry of the Tribunal on 4 June 2014 and, with the agreement of the parties, were joined.

5. On 1 July 2014, the Applicants submitted comments on the receivability issue raised in the Respondent's replies, and requested an oral hearing of their cases. The parties filed a joint statement of agreed facts on 19 September 2014.

6. At the oral hearing held from 24 to 26 September 2014, each of the Applicants gave evidence. In addition, evidence was given by:

a. Mr. Momolu Johnson Sr., an UNMIL staff member appointed by the National Staff Association ("NASA") as one of its representatives in the restructuring process;

b. Ms. Rochell Woodson, President of NASA;

c. Mr. Hubert Price, Director of Mission Support ("DMS"), UNMIL; and

d. Mr. Anthony P. Duncker, Chief, Quality Assurance & Information Management Section, Field Personnel Division ("FPD"), at the United Nations Headquarters ("UNHQ").

7. The following facts are based on the statement of agreed facts, the documentary evidence provided by the parties and the evidence given at the hearing.

Facts

8. The Applicants were national staff who held fixed-term appointments with UNMIL until 30 June 2013. Mr. Matadi was a Warehouse Assistant (GS-3); Mr. Johnson was an Engineering Technician (GS-4); Ms. Gaye, Mr. Doe. J. and Mr. Doe P. were Materials and Asset Management Assistants (GS-3).

9. On 21 June 2012, the General Assembly adopted resolution 66/264, requesting the Secretary-General to comprehensively review the civilian staffing requirements in each peacekeeping mission, especially when there was a change to peacekeeping force levels, to ensure that it was appropriate to implement the current mission mandate.

10. UNMIL, which had higher levels of support staff than other peacekeeping missions of similar size, approved a budgeting framework in August 2012 with the aim of realigning staffing numbers and levels in accordance with General Assembly resolution 66/264. It directed all UNMIL sections to "review their staffing[,]provide information on their staffing requirements, [on] any vacant posts and how long the posts have been vacant".

11. In September 2012, by resolution 2066 (2012), the Security Council authorized the Secretary-General to reduce the military component of UNMIL personnel by 1,900 between October 2012 and September 2013. It called on UNMIL to make the appropriate internal adjustments.

12. After a period of negotiation, UNMIL, the Department of Peacekeeping Operations ("DPKO") and DFS agreed on the posts identified by UNMIL Section Chiefs to be recommended for abolition to the General Assembly. Mr. Price, DMS, UNMIL, said in evidence that the managers made the decision about how many staff members were to be retrenched. This was not discussed with the staff unions.

13. On 16 October 2012, the Special Representative of the Secretary-General, UNMIL ("SRSG"), issued a memorandum to all civilian UNMIL staff, announcing a comprehensive civilian staff review in line with Security Council resolution 2066 (2012) and General Assembly resolution 66/264.

14. The memorandum stated that the review would take into account the ratio and composition of UNMIL posts in line with UNHQ guidance on appropriate staffing levels, and overall UNMIL staffing numbers compared to other medium—sized peacekeeping missions. It further advised that UNMIL would be restructured to better reflect the mission's main areas of concentration and that revised staffing levels would be reflected in the 2013-2014 budget.

15. The memorandum concluded that as the revised staffing levels, expected to come into effect on 1 July 2013, would affect some staff members, UNMIL would put in place a fair and objective process.

16. Mr. Price told the Tribunal that by the end of October 2012, UNMIL had decided on the posts to be abolished in each section. These posts included all those of Warehouse Assistants (GS-3), encumbered by Ms. Gaye, Mr. Doe J. and Mr. Doe P. Since this entire occupational group was slated for abolition, their positions were treated like "unique posts". As no comparators existed within the same unit/section, no comparative review was deemed needed.

17. In December 2012, the SRSG and the DMS, UNMIL, held two Town Hall meetings at which they announced a reduction of approximately 100 national posts in UNMIL. Ms. Woodson told the Tribunal that NASA was not consulted about the number of posts to be abolished or on staffing matters during 2012.

18. In early 2013, three *ad hoc* bodies were created to conduct the UNMIL retrenchment exercise:

a. a Steering Committee ("SC"), chaired by the Deputy SRSG, Recovery and Governance ("D/SRSG"), to give overall oversight and high level review of the entire staff retrenchment process;

b. a Working Group ("WG"), chaired by the DMS, to ensure that the individual work stream activities related to the implementation of the staff retrenchment process were implemented within deadlines; and

c. a Comparative Review Panel ("CRP"), chaired by the Chief of Administrative Services, to review the master lists of posts to be abolished based on agreed modalities, criteria and a point scoring mechanism, and to compile score sheets for each of the staff members who were to be comparatively reviewed. The continuing employment of these staff members with UNMIL was to be determined on the basis of their ranking under this scoring system.

19. In January 2013, NASA and the Field Staff Union ("FSU"), which represented international staff, were requested to appoint representatives to participate in each of the three *ad hoc* bodies. NASA appointed Mr. Momolu Johnson and Ms. Woodson.

20. Draft guidelines to be used by the CRP were issued on 20 January 2013. The criteria to be taken into account in the scoring exercise included "relevant experience in a given field".

21. At the first meeting of the SC, on 29 January 2013, all SC members were requested to sign a confidentiality agreement requiring them to refrain from any unauthorized use of information to which they had access in the course of their assignment with the SC, or any related groups. The NASA representatives objected to signing this undertaking because they believed that it would compromise their ability to meet their responsibility to represent their constituents and other staff members.

22. In spite of this objection, all members, including NASA representatives, participated in the first meeting of the SC. Among other items, a score sheet template for the comparative review of staff members to be retrenched was distributed and agreed on by the participants. This score sheet included a column to rate the relevant experience of the staff members under review.

23. The second meeting of the SC was convened on 31 January 2013. The NASA representatives were presented with a re-drafted confidentiality undertaking. They felt this wording did not tackle their concerns and stated that they were not ready to sign it. They were asked to leave the meeting and, after that, NASA did not participate in any further meetings of the *ad hoc* bodies.

24. On 6 February 2013, following advice from FPD, DFS, in UNHQ, the final version of the Guidelines for the comparative review was issued. It included "relevant experience" as one of the criteria to be considered.

25. In Information Circular No. 2013/005 dated 11 February 2013, the DMS advised all UNMIL personnel that UNMIL would undergo a staff retrenchment (or reduction) during the budget cycle effective 1 July 2013 through 30 June 2014. It set forth the reduction of 31 international posts and 110 locally recruited posts. It stated: "[t]his information circular is to inform staff how we have come to this point and the process to be followed as we move ahead".

26. The Information Circular said that based on requirements of UNHQ there was a need to reduce the cost of peacekeeping operations, that troop military strength in UNMIL was being reduced, and that compared to other medium-sized missions there was a disproportionate number of mission support staff in UNMIL.

27. The Circular set out a two-phase process for the restructuring:

a. from January to mid-March 2013: identification and final approval from UNHQ of staff members directly affected by the staff retrenchment process; and

b. from mid-March to 30 June 2013: concerned staff members were to be given priority in seeking new employment opportunities, to receive additional training and/or to prepare themselves for final departure from UNMIL on 30 June 2013.

28. The Circular also described the planned process to conduct the retrenchment exercise and listed the *ad hoc* bodies which, according to the Circular, comprised the appropriate level of representation from across sections of UNMIL civilian leadership and management as well as self-nominated representation from the UNMIL NASA and FSU.

29. The Circular further stated that, once the CRP completed the technical scoring exercise according to modalities that had been advised by UNHQ, it would pass the scoring sheets to the DMS for review. The DMS would brief the WG and SC, and forward the results to FPD and the Office of Human Resources Management ("OHRM") for final approval and referral back to UNMIL.

30. At para. 7, the Circular referred to further circulars which were to be issued as and when required "in order to inform staff on a more formal basis of updates or announcements pertaining to the process". It stated that this might include an announcement of the principles of the staff retrenchment process, the membership and terms of reference of constituted UNMIL committees and when they would meet.

31. On 22 February 2013, the Secretary-General submitted a proposal to the General Assembly for UNMIL budget for the period 1 July 2013 to 30 June 2014, which reflected the reduction of 30 international staff and 111 national posts and positions.

32. A Frequently Asked Questions ("FAQ") brochure regarding the UNMIL retrenchment exercise was posted on the UNMIL intranet in March 2013. It was also printed and made available at the office of Human Resources Management Section ("HRMS"), UNMIL, but was not published through the Bulletin, a paper publication distributed at the workplace regularly used by UNMIL Administration to disseminate information to staff at large, as not all staff had regular access to computers.

33. From the evidence of the Applicants at the hearing, it appears that they saw the FAQ only when they went to HRMS to sort out their exit formalities.

34. Ms. Woodson gave evidence that in March 2013, the staff union wrote to the D/SRSG with their concerns about the process. He replied that the process would continue but would be improved at the next retrenchment exercise.

35. In a memorandum dated 21 March 2013 addressed to the President of NASA, the D/SRSG referred to their previous exchanges about NASA representation on the *ad hoc* committees. He reiterated, "personnel sitting on any of the three UNMIL retrenchment committees are not representatives of the Section or part of the organization they happen to work in". He regretted "NASA's unwillingness to cooperate", and observed that the timeframe for the

retrenchment process was tight. He said that the requirement to sign a confidentiality letter was not an UNMIL management decision, but a global best practice, recommended and approved by UNHQ, as well as discussed and agreed to by the SC and the WG during meetings on 29 and 31 January 2013 respectively. He noted that the NASA representatives' refusal to sign the confidentiality letter at the outset of the CRP meeting for locally recruited staff caused delay in the process. Lastly, he invited the President to discuss the NASA contribution to the retrenchment.

36. Mr. Price told the Tribunal that because of the unwillingness of the staff representatives to serve on the CRP, UNMIL senior management, in consultation with UNHQ, decided to replace the members of the CRP for the purpose of the comparative review of national UNMIL staff. After considering various options, including calling upon well-respected national staff members, such as Mr. Momolu Johnson, the decision was made to convene a new CRP whose members were completely external to UNMIL. Three international staff members, not employed by UNMIL, were identified to conduct the comparative review.

37. The D/SRSG addressed a memorandum dated 5 April 2013 to the NASA President, communicated by email, to inform the latter about the new CRP. He referred to his proposal to NASA of 13 February 2013 to move the process forward, and to his 21 March 2013 reply to a NASA proposal, agreeing to meet to discuss and resolve the outstanding issues related to the CRP and retrenchment exercise for locally recruited staff, to which he did not receive a reply. The correspondence concluded "I continue to be available should you wish to meet to discuss any issues arising from the retrenchment process".

38. The Respondent produced evidence following the hearing that the above email communication transmitting the memorandum was sent to Ms. Woodson's email address. Ms. Woodson, however, told the Tribunal, orally and in a written statement, that she had never seen the memorandum. She said that NASA was not informed about the new CRP panel until she was contacted to arrange a meeting with them when they arrived in Monrovia to conduct the review.

39. The Chair of the new CRP, Mr. Duncker, told the Tribunal that when he and the other two members of the new CRP arrived in Monrovia, they first met with the President of NASA and other staff representatives. They explained their mandate to them, confirmed that a list of posts to be cut had already been approved, and highlighted that they would perform their task in all fairness. They discussed why NASA was unwilling to participate in the process, and asked them to reconsider and participate fully or at least as an observer. He said that the NASA representatives responded that they would not be comfortable participating in any way in the downsizing exercise for fear of how that would appear to the union members.

40. Mr. Duncker said that the NASA representatives told him that they believed that the list of those staff members who were to be retrenched had been completed, and that the role of the new CRP was limited to sign that list off. He explained to them that the new CRP role was to establish a ranked order of staff members to be compared with the budgetary requirements of UNMIL. He said he explained in detail how points would be allocated and reviewed, and that all UN service would be counted as relevant work experience.

41. Mr. Duncker stated that the NASA representatives were looking for a neutral process and gave a positive response to the information given by the panel members. Ms. Woodson confirmed to the Tribunal that the new CRP members had met with her and other NASA representatives both before and after the comparative review, at which time the panel explained the process they had followed.

42. The new CRP met from 11 to 13 April 2013. Before undertaking the review, the panel members sought guidance as to tie-break criteria. They were told to use relevant experience as tie-breaker and to treat all UN service as relevant experience to eliminate subjective evaluations of what constituted relevant work experience.

43. Mr. Duncker described the comparative review process for locally recruited posts as a sterile and mathematical process. The panel members knew none of the staff members being considered. Out of the 110 posts identified for abolition as of 30 June 2013, 23 were vacant and 21 were assessed to be unique posts for which no comparative review was to be conducted. The 66 staff members on the remaining posts were assessed by the CRP against the score sheets to identify those who were to be retrenched.

44. Mr. Duncker explained to the Tribunal that the panel relied on two operative documents: the staff members' Personnel Action Forms ("PA"), taken from the Integrated Management Information System, to obtain the years of service based on the staff members' entry on duty ("EOD"), and their two latest performance evaluations ("e-PASes"). The panel was also provided with the Official Status Files of the concerned staff members and the relevant post descriptions.

45. To evaluate each staff member, the panel used a master list staffing worksheet, where the raw information from the two operative documents was entered against the names of staff members being reviewed. It contained the information listed in para. 4 of the Guidelines: the up-to-date staffing table, the official list of posts to be abolished, with indication of the sections to which each staff member belonged, the incumbents of the posts to be abolished, as well as details of the posts in the same section, occupational group and level. Corrections were made directly on the master lists. As the verifications were finished, officials from HRMS, UNMIL, who assisted the panel administratively throughout the review, transcribed the scoring on the comparative evaluation sheet.

46. The panel then checked the scoring sheet. All three panel members initialled the score sheets as proof that each of them had reviewed them. The panel took three days to review 66 staff members, including Applicants Mr. Matadi and Mr. Johnson.

47. The staff members were ranked according to their scores from highest to lowest. The same standard methodology was applied to everyone. The resulting ranked list was compared with the number of posts available under the budget which constituted the "cut-off" point. The contracts of staff members ranked below the cut-off point were not to be renewed.

48. Mr. Matadi's and Mr. Johnson's scores were below the cut-off point in their respective occupational groups. The DMS sent the record of the comparative review of the 110 national posts scheduled for abolition to the Officer-in-Charge, FPD, on 29 April 2013. The contracts of those staff members who were directly affected, including the five Applicants, were recommended for non-extension beyond 30 June 2013.

49. On 30 April 2013, the Advisory Committee on Administrative and Budgetary Questions recommended approval of the Secretary-General's proposal to decrease 111 national staff posts and positions (110 posts and one position funded under general temporary assistance) at UNMIL, and FPD approved UNMIL recommendation to abolish the proposed 110 posts, resulting in the retrenchment of 87 national staff members.

50. The DMS notified each of the Applicants by memorandum dated 6 May 2013 that, as UNMIL was downsizing and the mission's budget was being cut, their respective posts were being abolished after 30 June 2013 and their contracts, which expired on that same date, would not be renewed.

51. During the months of May and June 2013, UNMIL organised a number of work fairs and seminars intended to assist the staff whose appointments were not going to be renewed to find alternative employment outside the Organization. Once separated, former staff members were still able to take part in subsequent work fairs. The Applicants all attended at least one of these events but none found employment after their separation.

52. On 18 June 2013, the Applicants requested management evaluation of the decision to abolish their posts, which resulted in the non-renewal of their appointments.

53. As mentioned in para. 6 above, each of the Applicants gave evidence to the Tribunal.

54. Ms. Gaye, Mr. Doe J. and Mr. Doe P. maintain that they were hired and always worked within the Engineering Section, whereas they ended up appearing as employees of the Supply Section for the purposes of the retrenchment exercise.

55. To support this contention, the Applicants submitted printouts of Galileo, UNMIL electronic system for logistic operations, where they appeared under the Engineering Section. On the other hand, there is compelling documentary evidence that effective 1 July 2011, Ms. Gaye was transferred from the Engineering to the Supply Section, as recorded by a PA issued on that date, and that Mr. Doe J. was recruited, upon competitive selection, for a post with the Supply Section in June 2010. Further, the Tribunal was presented with three memoranda dating back to May 2009, indicating that the Chief of Section, to which each of these three Applicants reported, was the Officer-in-Charge of the Supply Section.

56. The Applicants also pointed out that 14 posts were loaned from the Engineering to a different section shortly before the retrenchment.

57. The Applicants are critical of the choice of April 2013 as cut-off date for calculating their years of work experience. They claim that this date affected them more than most of their comparators, as they were not credited any point for large portions of a year worked. Mr. Price explained that April 2013 was chosen in order to facilitate calculations, as that was the time of the year when the comparative review took place.

58. Mr. Johnson asserted that a high-ranking official from HRMS, UNMIL, told him that he had been blacklisted by UNMIL Administration and, therefore, it would be difficult for him to use UNMIL as a reference in looking for a job, as UNMIL was unlikely to give positive references about him in case it was contacted by a potential employer for background checking. He accepted that the official in question told him this some months after the decision not to renew his appointment.

59. Each Applicant also gave evidence of their unsuccessful attempts, since separation, to find new employment not only with the Organization, but also with non-governmental organizations, the Liberian government, foreign embassies and private companies. The Tribunal accepts that each of them has made and continues to make concerted efforts to find alternative employment. As at the date of the hearing, none has been employed and all have serious difficulties as a result.

60. Mr. Johnson had to borrow money to pay medical bills for his ill son; however, he was unable to pay for his daughter's treatment and she has since passed away.

61. Mr. Doe J. has a large family and could not pay school fees or medical bills.

62. Mr. Matadi spoke of the breakup of his family because he lost his job. He suffers stress headaches every day.

63. Ms. Gaye is a single mother with three children and an extended family to support. Her children cannot attend school because she cannot pay school fees and she is selling belongings to pay rent.

64. Mr. Doe P. has six children. As he cannot afford to provide for them as expected, including paying school fees, his wife has left him.

65. The Applicants say that not enough effort has been made by UNMIL to assist them. They are of the view that as people who have lost their employment as a consequence of the retrenchment exercise, they are at a disadvantage in obtaining new employment.

Receivability

Parties' submissions

66. The Respondent's principal contentions on receivability are:

a. The applications are not receivable *ratione materiae*, to the extent that they challenge the Secretary-General's proposal to the General Assembly to abolish the posts encumbered by the Applicants, or the General Assembly's decision to abolish such posts. These do not constitute final administrative decisions within the meaning of art. 2.1 of the Tribunal's Statute. The Secretary-General's proposal to the General Assembly is a preparatory decision, which is not by itself appealable;

b. The Applicants lack standing to claim a violation of the Secretary-General's bulletins setting forth the framework for negotiations of general terms and conditions of work. The right to consultation set out in Chapter VIII of the Staff Regulations and Rules and Secretary-General's bulletins ST/SGB/172 (Staff Management Relations: Decentralization of Consultation Procedure) and ST/SGB/274 (Procedures and Terms of Reference of the Staff Management consultation Machinery at the Departmental or Office Level) does not belong to an individual staff

member. There is no requirement to consult individually with each staff member who may be affected by a restructuring, nor would it be reasonable or practicable to do so.

67. The Applicants' principal contentions on receivability are:

a. The contested decisions are not the recommendations to abolish certain posts, but the decisions not to renew the Applicants' contracts. Non-renewal decisions are open to appeal;

b. The contested decisions were neither preparatory nor conditional. The notifications were unequivocal in that it had been decided that they would be separated;

c. The Applicants' separation letters are clear in that the Administration, not the General Assembly, made the contested decisions;

d. The unlawful separation decisions are not cured by *post hoc* General Assembly abolition decisions. The view of the Respondent relies to a large extent upon confusion between abolition of post and separation decisions. Restructuring processes are not just about how many posts to cut, but about where to cut and who gets to stay. In any event, staff contractual rights are not dependent on funding arrangements at the General Assembly level;

e. The Respondent's argument that staff do not have standing to invoke rights to staff consultation is misplaced. Staff regulation 1.1(c) prescribes that the Secretary-General shall ensure that the rights and duties of staff members, as set out in the Charter, the Staff Regulations and Rules and in the relevant resolutions and decisions of the General Assembly, are respected. The rights claimed are either in Chapter VIII of the Staff Rules or in administrative issuances of the Secretary-General derived therefrom;

f. The Tribunal has repeatedly recognized both the duties of staff consultation and the reviewability of their failings. In the case at hand, the Administration has failed to consult either the staff members or their representatives.

Considerations on receivability

68. The impugned decisions are the non-renewal of the Applicants' appointments. Applications concerning non-renewal of appointments are receivable *ratione materiae*, as repeatedly recognized by the Tribunal (*Guzman* Order No. 264 (NBI/2013)).

69. The memoranda of 6 May 2013, which notified the Applicants of their non-renewal, show that such decisions were made by the Administration, not by the General Assembly. The General Assembly gave the instruction to UNMIL to review its staffing requirements by resolution 66/264, and approved the UNMIL 2013-2014 budget, thus, endorsing the abolition of numerous posts. These decisions by the General Assembly are not subject to review by the Tribunal. Appropriately, the Applicants have not challenged them.

70. In relation to the Respondent's claim that the Applicants lack standing to challenge the alleged failure to consult the staff representatives, the Tribunal observes that the Applicants allege failure of consultation only to the extent that it may constitute a flaw in the procedure that led to the decisions not to renew their contracts. The Applicants challenge administrative decisions that are alleged to be in non-compliance with the terms of their appointment. Said terms included all pertinent regulations and rules and all administrative issuances, such as Chapter VIII of the Staff Regulations and Rules, which deal with the requirements for staff consultation, and the Secretary-General's bulletins issued to implement those Regulations. The obligations of the Administration under these issuances are not limited to the staff associations but are part of the terms and conditions of the individual staff members. Non-compliance with the duty to maintain consultations with staff representatives is reviewable in the context of assessing the legality of

an administrative decision affecting the rights of an individual staff member (*Allen* UNDT/2010/009; *Villamoran* UNDT/2011/126).

71. The Tribunal holds that the Applicants have standing pursuant to art. 2.1 of its Statute.

Merits

Parties' submissions

72. The Applicants' principal contentions on the merits are:

a. As a result of staff movements, only some sections got a larger number of posts available to retain individuals. A post movement by loan was effected after the official reporting of the new section composition, but before the comparative review was completed. There were 14 posts moved from Engineering to another section to regularize national translators who worked with military observers in the field and were individual contactors. The Applicants holding posts in Engineering were not assigned to, or selected for, such translation posts;

b. The abolition of the posts of Ms. Gaye, Mr. Doe J. and Mr. Doe P. was a function of the vagaries of institutional lines drawn at the mission that resulted in carving some staff out of the retrenchment, but not others. These three Applicants were not comparatively reviewed because their occupational group within their section was entirely downsized. They were considered as working in the Supply Section for the purposes of the retrenchment, while they continued discharging functions of the Engineering Section. Immediately after their separation, their functions were taken over by Engineering staff, whilst they were never compared against their successors;

c. Comparisons occurred across units, apparently ignoring unit divisions. Mr. Matadi was compared, with one exception, with personnel from another unit and with a staff member of a different grade. Also, Mr. Johnson was compared with two staff who were junior to him in "relevant experience", as they had been recently promoted;

d. Since retrenchment is clearly a systemic issue that affects staff welfare, as well as the directly affected staff, the Administration was under the obligation to consult with the relevant staff representatives, by staff regulation 8.1(a) and staff rule 8.1(f), as well as Secretary-General's bulletins ST/SGB/172 and ST/SGB/274. These rules are enforceable by individual staff members;

e. The required standard of consultation is "effective consultation" or a "full and meaningful consultation process". Mere announcement of a decision once it is final does not amount to effective consultation. Consultations are rendered meaningless if a final decision had already been taken upfront;

f. The staff associations were denied all the foregoing because notice to staff associations was given after the Administration had decided how many posts were to be abolished, how many in each section, and after the Administration had decided to comparatively review posts within a section, not across occupational groups. Staff unions were not consulted;

g. The non-reviewed Applicants were made aware of the cut of posts as a *fait accompli*. They were not given prior information and their views were not sought;

h. Individual staff members were not permitted a right of consultation on the comparative review, and for staff associations, such right was made contingent upon the signing of a confidentiality undertaking, which effectively precluded them from acting as representatives;

i. There were errors in the comparative reviews of Mr. Matadi and Mr. Johnson. This suggests that a greater number of not immediately apparent errors was made:

i. Choice of EOD cut-off date for computing years of service: when counting the years of service only complete years were taken into account, excluding fractions of years. Moreover, the cut-off date chosen was the exact EOD date of Mr. Johnson's three competitors;

ii. Choice of e-PAS cycles: the Administration has not followed its own guidance in considering the last two e-PASes, as the 2012-2013 e-PASes were omitted from consideration;

iii. Failure to score length of relevant experience: the criterion of "relevant experience in a given field" was not scored. The Administration's explanation that this was intended to be only a tie-break criterion is not borne out by para. 6 of the Guidelines. Management changed, unilaterally and without consultation, the way this criterion was weighted;

iv. Errors in scoring EOD date: four competitors of Mr. Matadi received 18 points for length of service, while another with the same EOD date was credited only with 16 points;

v. Errors in scoring e-PAS values and overall ratings: discrepancies exist in the allocation of scores and some ratings in the competitors' e-PASes; the Respondent did not produce all documents necessary for an exhaustive check of this point. Besides, Mr. Johnson's comparative review took into account his e-PAS 2011-2012 while it was under rebuttal and even though the rebuttal panel concluded that his performance had not been adequately assessed. Consideration of his e-PAS 2011-2012 resulted in downgrading him with regard to "Core Values", although, as the

"Manager's Comments" reflect, his low rating related to a case being investigated for allegations of theft which were never established;

j. All five Applicants have suffered devastating consequences as a result of their separation, despite their efforts to find a job. They sustained a loss of income exceeding 12 months' net base salary and moral injury for which six months' net base salary is claimed.

73. The Respondent's principal contentions on the merits are:

a. A fixed-term appointment does not carry any expectancy of renewal. A non-renewal decision may be challenged on the grounds that the staff member had a legitimate expectancy of renewal, procedural irregularity, where the decision was arbitrary or ill-motivated. The Applicant bears the burden of proving that the decision was not a valid exercise of discretion. A proposal to restructure a mission that results in loss of employment for staff members falls within the Secretary-General's discretionary authority. The Administration has also wide discretion in implementing *bona fide* retrenchment exercises;

b. UNMIL undertook a mandated restructuring exercise leading to the abolition of over 100 national posts. The reasons for the non-renewal of the Applicants' appointments were clearly stated in their respective notifications dated 6 May 2013. The proposed abolition of the Applicants' posts was a legitimate reason for not renewing their appointments. It was the result of the downsizing mandated by the Security Council and a concomitant General Assembly resolution requiring staffing tables to reflect UNMIL new structure. In this regard, the Applicants do not contest that the restructuring exercise as such was genuine;

c. The issue of post management/allocation of resources, and whether to recruit among staff or to replace separated staff are within the managerial discretion to structure the mission;

d. The Applicants have adduced no evidence as to when the movement of 14 posts from Engineering occurred or that it was improper. There is no support for their contention that this occurred after the proposed staffing structure had been approved, that it was irregular or arbitrary or how it adversely affected the Applicants;

e. The posts slated for abolition generally were not loaned unless to limit impact of retrenchment. UNMIL took steps to maximize the number of vacant posts. The submission of 29 October 2012 to FPD was not a final proposal for the restructuring; even afterwards, the mission continued to make attempts to minimise job loss. The posts from Engineering were moved to a different section because significant downsizing was to occur in Engineering. This decision was made to give a more secure status to national translators and the decision was fully disclosed;

f. On the issue of consultation, there was no obligation to consult until the posts to be proposed for abolition had been identified;

g. The staff participated effectively in the restructuring process. UNMIL maintained continuous contact with individual staff members as well as their representative bodies through written communications and Town Hall meetings. Staff were given advance notice of the staffing review process and an adequate opportunity to express their views from the beginning and throughout;

h. Both FSU and NASA were invited to participate in the retrenchment process, including in the SC, WG and CRP. FSU fully participated in the consultative process. NASA participated in the SC meeting of 29 January 2013;

i. The confidentiality agreement was required for all members of the different bodies involved in the retrenchment process. As a result of NASA representatives' refusal to sign, and after some weeks of delay, DFS nominated an external panel which conducted the exercise following UNMIL established procedures. It also met with NASA on two separate occasions, but NASA still refused to take part in the process;

j. After additional attempts to have NASA participate at least as observers in the comparative review, the exercise was conducted without them. NASA was invited and urged to participate in the panel's work, as it did in other committees and working groups. It was the choice of NASA not to participate in the review panel. The confidentiality requirement was reasonable under the circumstances to protect staff members' rights and the integrity of the process;

k. All three posts of Material and Asset Management Assistant in the Supply Section were slated for abolition, which explains that none of the three Applicants who held such positions was included in the comparative review;

l. The decision regarding Mr. Matadi and Mr. Johnson was made after a fair and transparent comparative review process. The CRP had all the necessary documents needed to conduct the review and calculate the scores, and could have requested any additional information they might have needed;

m. NASA was aware of the criteria to be applied and already possessed information about the process. Prior to the review, the panel discussed the methodology with NASA, which did not raise concerns about the e-PASes to be used or the scoring of relevant work experience;

n. Mr. Matadi was among the 11 lowest scoring staff members in his category, who were all retrenched. Similarly, Mr. Johnson received the lowest score in his comparative group using the criteria set out in the Guidelines;

o. The discrepancies between scores of staff members having the same EOD date is an error; however, they had no impact on the outcome, nor on Mr. Matadi's score. The use of Mr. Johnson's unrebutted 2011-2012 e-PAS was an error but did not change the outcome of the review. The cut-off date used to calculate the years of service, i.e., April 2013, and the method of counting complete years only was applied consistently;

p. The comparative exercise implied the review of hundreds of pages of documents about 66 posts. The errors that the Applicants identified do not vitiate the entire retrenchment exercise. These mistakes, or even their cumulative effect, do not change the outcome. They did not cause any actual harm to the Applicants;

q. Compensation may be awarded only if the staff member suffered actual harm. The Applicants must adduce evidence of their alleged loss and injury to support a claim for moral damages. The mathematical errors spotted did not vitiate the process and did not adversely affect the Applicants.

Considerations on the merits

74. The legal principles against which to assess retrenchment decisions may be summarised as follows:

a. A proposal to restructure a mission that results in loss of employment for staff members falls within the Secretary-General's wide, but not unfettered, discretionary authority (*Rosenberg* UNDT/2011/045; *Gehr* 2012-UNAT-236 confirming *Gehr* UNDT/2011/142);

b. It is not for the Tribunal to substitute its own views for those of the Secretary-General on matters such as how to organize work and meet operational needs, determining the review criteria, the methodology for applying the criteria or the evaluation of staff based on these criteria (*Pacheco* UNDT/2012/008);

c. Decisions may be set aside only on limited grounds, such as breach of procedural rules, or if discretion was exercised in an arbitrary, capricious or illegal manner. The procedure must be fair and transparent (*Chen* 2011-UNAT-107, *Adundo et al.* UNDT/2012/118). Consultation and communication with staff and staff unions is an essential element of a fair process (staff regulation 8.1(a));

d. Where a retrenchment process involves a comparative review of staff, the review must be based on fair and objective criteria, and be carried out by means of an impartial and transparent process (see *Rawat* UNDT/2011/146). The decisions must be supported by the established facts and not be based on erroneous, fallacious or improper motivation.

75. It is for the Tribunal to verify whether the retrenchment exercise that resulted in the non-renewal of the appointments of the five Applicants was based on genuine reasons, whether its implementation was done through a fair and lawful process, including consultation with staff and staff representatives, and whether the methodology and criteria for selection of the Applicants for non-renewal was correctly and fairly applied.

Was the restructuring genuine?

76. The UNMIL restructuring was undertaken to implement General Assembly resolution 66/264. The resolution did not specifically direct the Secretary-General to downsize UNMIL, but it clearly warranted a retrenchment, especially as UNMIL had high levels of support staff as compared to other missions of similar

size. Shortly after, Security Council resolution 2066 (2012) reinforced the need for a retrenchment, by reducing the military component of the mission.

77. The downsizing was not prompted or influenced by any motive other than following the General Assembly's instructions. It was a large-scale exercise undertaken at the direction of the General Assembly, and there is no evidence that it was in any way designed to remove specific staff members.

78. The Tribunal finds that, although the retrenchment resulted in the non-renewal of the Applicants' appointments, the motivation for it was genuine.

Was the restructuring implemented through a fair and lawful process?

Consultations

79. Chapter VIII of the Staff Regulations and Rules sets broad parameters for the Administration's obligations to consult with staff members through their staff representatives.

80. Staff regulation 8.1(a) requires the Secretary-General to establish and maintain continuous contact and communication with the staff to ensure its effective participation in examining and resolving issues relating to staff welfare. This provision concerns consultations on human resources policies.

81. Staff rule 8.1(f) entitles staff representative bodies to effective participation in relation to the policy matters referred to in staff regulation 8.1(a).

82. Secretary-General's bulletin ST/SGB/172 was promulgated to decentralise the staff management consultation procedure so that staff issues in an organizational unit could be resolved at the departmental level. To this end, the heads of departments and others are to hold consultations with the appropriate unit representative(s) on questions such as administrative arrangements for the implementation of decisions involving major organizational changes.

83. Secretary-General's bulletin ST/SGB/274 prescribes procedures and terms of reference of the staff management consultation machinery at the departmental level. In accordance with sec. 5, the consultation should occur about issues or policies that affect the entire department or office or at least a significant number of staff in a particular unit or service of the department or office. In such cases, sec. 5(c) provides that the staff affected should be informed of any such changes in advance and be provided with an opportunity for consultation on such matters at the departmental or office level.

84. The following constituents of fair consultation have been established in a number of judgments of the former United Nations Administrative Tribunal ("UNAdT") and of this Tribunal:

a. "[S]taff-management consultations are not only a preferable form of communication but ... an indispensable element of due process" (*Allen* UNDT/2010/009);

b. "[E]ach party to the consultation must have the opportunity to make the other party aware of its views" (UNAdT Judgment No. 518, *Brewster* (1991));

c. Consultation is not the same as negotiation and "it is not necessary for the Administration to secure consent or agreement of the consulted parties" (*Rees* UNDT/2011/156; *Gehr* UNDT/2011/142; *Gatti et al.* Order No. 126 (NY/2013); *Adundo et al.* UNDT/2012/118);

d. Consultation must be full, effective and meaningful. Staff members are to be given proper notice, a say in the process and their interests have to be taken into consideration (*Adundo et al.* UNDT/2012/118; *Gatti et al.* Order No. 126 (NY/2013));

e. Consultations must be carried out in good faith and should generally occur before a final decision is made (*Rees* UNDT/2011/156; *Chattopadhyay* UNDT/2011/198; *Gatti et al.* Order No. 126 (NY/2013)).

85. In the present case, following the General Assembly resolution, UNMIL Section Chiefs were requested to identify posts to be recommended for abolition. Discussions between UNMIL, DPKO and DFS resulted in a decision by the end of October 2012 on the overall number of posts and on which of them were to be abolished.

86. This decision involved major organizational changes and decisions on matters that affected the entire department or office or at least a significant number of UNMIL staff. As such, staff regulation 8.1(a), staff rule 8.1(f) and sec. 5 of ST/SGB/274 entitled the staff representative bodies to effective participation, information and the opportunity for consultation, and ST/SGB/172 required the departmental heads to consult with staff representatives.

87. Neither the staff members, nor NASA at UNMIL were consulted during those discussions. The notice of the impending retrenchment exercise given to staff members on 16 October 2012 met the requirements provided for in ST/SGB/274 of advance notice of the further implementation of the retrenchment process consequent upon the policy decisions made earlier. However, it did not refer to the decisions that had already been made or were about to be made concerning which posts were to be abolished.

88. The Tribunal finds that the Administration did not consult the staff or staff representatives about the posts to be abolished before the decision was made and this constitutes a breach of the Staff Rules and the relevant Secretary—General's bulletins.

89. These decisions directly affected Ms. Gaye, Mr. Doe J. and Mr. Doe P. who held posts deemed "unique". The decision to abolish their individual posts, and therefore not to renew their contracts, was effectively made by the end of October 2012 without any consultation whatsoever.

90. Mr. Matadi and Mr. Johnson held posts that were potentially affected by the abolition of posts but their continuing employment was dependent on selection decisions yet to be made following the CRP process.

91. In early 2013, phase 1 of the retrenchment exercise had started and had been promulgated through Information Circular No. 2013/005, which included the composition of the CRP comprising NASA representatives.

92. The Administration planned and expected to conduct the comparative review of staff members through this representative panel. Faced with NASA refusal to sign the confidentiality agreement, the Administration made concerted efforts to resolve the issue with proposals and discussions with the union but, by early April, the time frame for the retrenchment exercise had been exceeded and action was needed. The Administration made an attempt to constitute another panel that would have some staff representation in it, but eventually decided to have an entirely independent panel from outside UNMIL. However, in so doing, it failed to act in compliance with its own Information Circular No. 2013/005.

93. In *Sannoh* 2014-UNAT-451, the Appeals Tribunal held that Information Circulars issued by the United Nations Mission in South Sudan during a restructuring exercise were not merely issued for information purposes but also provided a legal framework—in addition to the Organization's Rules and Regulations—to govern, *inter alia*, the comparative review process.

94. In the present case, the Administration changed the constitution of the *ad hoc* CRP, foreseen in the Guidelines and subsequently prescribed and notified to the staff members in Information Circular No. 2013/005. The CRP, which was to comprise appropriate level representation from across sections of UNMIL civilian leadership and management, as well as self-nominated representation from NASA, was replaced by a non-representative independent panel. The new CRP was also a change to administrative arrangements about the retrenchment process that required consultation with staff representatives under ST/SGB/172.

95. According to Information Circular No. 2013/005, staff members were to be informed on a formal basis by further circulars as and when required. It was incumbent on the Administration to issue a new information circular to reflect the proposed new legal framework before the fundamental change to the composition of the CRP was made. Apart from providing a proper legal basis for the change, it would also have provided formal and unequivocal notice to NASA and staff members of the changes.

96. The 5 April 2013 memorandum sent to NASA may or may not have been received by Ms. Woodson but, in any event, it was merely a notification of a decision that had already been made and does not amount to meaningful consultation. This was another breach of due process, although the Tribunal notes that the decision was made only after unsuccessful efforts to engage positively with NASA about the CRP.

97. The requirement of full and effective consultation can only be met if both parties are prepared to engage. The initial refusal of NASA to sign the confidentiality agreement was a stumbling block to the process. It is arguable whether the refusal was justified, but the Tribunal finds that the Administration made attempts in good faith to find solutions to the impasse. These attempts were not successful because NASA would not fully engage even on informal observer basis offered at the last minute by the new CRP.

98. However, it is apparent from the evidence of the Applicants and their witnesses that they strongly believed that the outcome of the retrenchment exercise had been predetermined by the Administration, and that staff representatives did not want to be seen to be associated with it. This belief is hardly surprising in light of the breaches of the relevant rules, the Secretary-General's bulletins and the Information Circular, which were all designed to ensure an inclusive process in which staff members or their representatives were constructively involved at least by proper consultation before critical decisions were made.

99. In *Allen* UNDT/2010/009, a case in which the Administration was found to have failed to comply with ST/SGB/172 and ST/SGB/274, the Tribunal held that staff-management consultations are "not only a preferable form of communication" but, in relation to the situations specified in ST/SGB/172 and ST/SGB/274, "an indispensable element of due process". The Tribunal further held that "the failure of the Respondent to adhere to its own rules, the adherence of which is strictly and solely within the power of the Respondent, represents an irregularity which amounts to a violation of the Applicant's right to due process".

100. The procedural flaws in this case, as described above, are of such nature as to warrant the rescission of the contested decision.

Methodology

100. As part of the general requirement of a fair process, the methodology put in place must be reasonable non-arbitrary, and include objective and just criteria.

Relevant experience in a given field

101. The criteria applied by the CRP in ranking staff members for the retrenchment were discussed and agreed upon at the first meeting of the SC. These included "relevant experience in a given field". It was stipulated in the Guidelines, but did not appear as a separate category on the evaluation sheet used by the new CRP.

102. Technically, this is a departure by the Administration from the Guidelines that it had promulgated, which normally entails the unlawfulness of ensuing decisions. Mr. Duncker's evidence established that such relevant experience was considered by the panel as essentially the same as length of service with the United Nations.

103. The Tribunal considers that if the Administration establishes Guidelines with two separate criteria, namely length of service in the United Nations and relevant experience in a given field, it cannot, for practical reasons, subsequently apply only one of these criteria on the grounds that the second criteria was a "duplication" of the first. However, while the Tribunal finds that the score sheets used by the new CRP omitted the criterion of relevant experience, in view of the fact that none of the Applicants claimed or showed evidence of any potential "relevant experience in a given field", which could potentially have impacted on their ranking, this omission did not have an impact on the Applicants.

Section by section approach

104. The Applicants question the method of constituting pools of staff members and reviewing them comparatively on a section by section basis, instead of mission-wide. It is submitted that this methodology carves some staff, but not others, out of the competition, and that the outcome for each employee is dependent to a large extent on which administrative section they belonged to.

105. This course of action, nevertheless, is nothing but an application of para. 3 of the Guidelines, which reads:

> The comparative review is, in principle, conducted between or among staff in the same section, at the same grade level and occupational group where the number of serving staff members exceed the number of proposed posts in the revised mission structure. The determination of which staff fall into the same occupational group within each section and unit shall primarily be guided by functional title. In acknowledgement of the fact that the functional title does not, in all cases, properly reflect the occupational group (e.g. a driver may be performing clerical duties, or an administrative assistant may be performing some programme assistant functions), the [Chief Civilian Personnel Officer] must, in cases of doubt, determine which individual fall into which occupational group <u>within the same grade</u> (emphasis in the original).

106. The Tribunal finds that this is an acceptable and fair methodology. It mirrors the operational functioning of the mission and is consistent with the Guidelines. It is therefore lawful.

Full years of service

107. Para. 6 of the Guidelines list as one of the criteria to be considered:

> a. Length of service in the United Nations as per the EOD date: two (2) points are to be given for each *completed* year of service from 1 to 10 years. Staff members with 10 years of service and above are to be granted the maximum 20 points. *No point is to be given for less than 1 year of service*. (emphasis added)

108. By defining the "length of service" criterion in this way, it was decided to discount fractions of years. This may have disadvantaged some staff members more than others, but this adverse impact is nonetheless very limited and its negative effects are outweighed by the simplicity and clarity that it brings to the scoring. It is a rational justifiable method and, therefore, lawful.

Were the methodology and criteria correctly and fairly applied?

Constitution of staff pools for comparison

109. The Tribunal has examined the evidence concerning the Applicants' allegation that their chances to remain employed were reduced because UNMIL arbitrarily moved some of its staff across sections before the retrenchment took place, placing them artificially into inappropriate comparative pools.

110. Although somewhat contradictory, the human resources documents submitted by the Respondent show that as early as May 2009, the Chief of Section to which Ms. Gaye, Mr. Doe J. and Mr. Doe P. reported was the Officer-in-Charge of the Supply Section. For the purpose of ascertaining the institutional position of the Applicants within UNMIL, the Tribunal gives more weight to the official human resources documents, i.e., PAs and official memoranda (cf. para.

55 above) than to printouts from the Galileo system that merely make a general reference to the Engineering Section.

111. Therefore, the Tribunal finds that it is more likely than not that Ms. Gaye, Mr. Doe J. and Mr. Doe P. were administratively under the Supply Section for at least two years before their separation. Moreover, there is nothing to support their contention that they would have had better chances to keep their employment had they been reviewed as staff members belonging to the Engineering Section.

112. Mr. Matadi avers that he was placed in a pool that had comparators from a different section and of a different grade. This could suggest that a certain degree of flexibility was used in applying para. 3 of the Guidelines, but this was not clearly established. In any case, Mr. Matadi has not shown how this had negative consequences for him, since he was placed in a pool where, given the available posts, more than half of the staff members retained their employment.

113. It was further alleged that Mr. Johnson was compared to two persons apparently having less relevant experience than him, as they had been recently promoted. This argument has no merit. The seniority in the current post or grade was not meant to be taken into account as a factor in the comparison. This element was not even mentioned in the Guidelines.

Staff movements

114. The Applicants contend that 14 posts were taken from Engineering to regularise translators who used to be consultants before the retrenchment was completed, thereby reducing the posts available for Engineering staff. Even if these staff movements took place in anticipation of the retrenchment, since the Tribunal has found that Ms. Gaye, Mr. Doe J. and Mr. Doe P. served at the Supply Section, the fact that the Engineering Section was left with less posts before the exercise did not have any impact on their chances to continue as UNMIL employees.

115. The related allegation that, in addition, these three Applicants and Mr. Johnson were not reassigned to, or selected for, the translation functions, is misplaced, as this was a matter of post management/allocation of resources falling within managerial discretion.

116. The staff movements pointed out were not designed to single out one or more of the Applicants in view of the retrenchment, nor were they manifestly detrimental for them.

Comparative review exercise

117. The review was carried out by a panel of three international staff members, who, given their responsibilities and experience, demonstrably possessed the necessary competencies and expertise. They were provided with a clear mandate and a pre-established methodology, as well as with all necessary information to complete the review.

118. The new CPR acted in an open and transparent manner by meeting with the NASA representatives before the review was conducted. As the panel members were external to UNMIL, they did not know any of the staff they were tasked with reviewing. They had no interest in a certain outcome, nor any prejudice for or against any of the concerned persons. It therefore had a good prospect of completing its functions objectively.

119. Mr. Drucker's description of a sterile, mathematical process indicates that personalities were not considered in the evaluation, and that the criteria applied were the sole determinants of the ranking of the staff members.

120. The Tribunal concludes that the new CRP conducted its review in accordance with the Guidelines and in a fair and objectively verifiable manner.

Errors in the comparative review

121. In spite of the efforts of the CRP, the records of the comparative review reveal some inaccuracies. Although Mr. Johnson had successfully rebutted his 2011-2012 e-PAS, the unrebutted ratings were taken into account; a staff member was given a different ranking for length of service than others who had joined the mission on the same date; and the points to be granted to Mr. Johnson were miscalculated in the comparative evaluation sheet.

122. It is unfortunate that several errors occurred in the comparative review. It is legitimate to expect the Administration to exhibit particular care and diligence in an exercise meant to have such dramatic impact on the affected staff. That said, having examined each of the errors detected, and in light of the voluminous documentation eventually produced by the Respondent, the Tribunal concludes that none of these mistakes had material repercussions on the final outcome.

123. The evidence shows that had the above-mentioned errors not been made, the Applicants would still have been ranked among those to be retrenched within their respective comparative groups. Mr. Johnson was in a comparative group of four people, out of which one post was to be cut, and he was the lowest ranked in the group with a gap of at least 14 points between him and his comparators. Had all the inputs and scores been correct, he would still have remained last in his group.

124. Similarly, Mr. Matadi was in a large pool of staff where 11 out of 24 posts were slated for downsizing, and he was fourth from the bottom, five points from the last non-retrenched comparator. The rectification of errors would not have altered his position with respect to his comparators, and certainly not brought him eight positions upwards in the ranking.

125. In addition, Mr. Matadi and Mr. Johnson allege discrepancies between the ratings in the e-PASes of several of their comparators. Having assessed the ratings used by the new CRP, the Tribunal is not convinced that any errors carrying any significant impact on the review process were made.

126. In addition to the material errors, the Applicants also question a number of methodological choices, such as the choice of EOD cut-off date and the inconsistent choice of e-PAS cycles to be taken into account.

127. The Guidelines plainly stipulated that only complete years would count in calculating the length of service of each staff member; therefore, it was a practical necessity to set a date up to which entire years could be computed. Unavoidably, any date chosen would have been more convenient for some staff than for others. The Tribunal finds that the use of April 2013, the date of the comparative review, enabled the length of service of all staff members to be objectively and consistently assessed. Its use was not arbitrary or capricious.

128. The Guidelines provided for the two last e-PASes to be used and para. 6(d) explicitly refers to the 2010-11 and 2011-12 cycles. As the e-PAS cycle ends on 31 March, by April 2013, theoretically, 2012-2013 e-PASes should have been completed. However, as the Guidelines were issued before the end of this cycle, and the review was conducted just 11 days after the end of the cycle, it is highly likely that the vast majority of staff would not have had their last e-PAS finalized by the time of the review.

129. The Tribunal finds that the Administration made a rational choice to use the two e-PAS cycles referred to in the Guidelines. This methodology was applied equally across all the staff under review and was not unreasonable or arbitrary.

130. In sum, the mistakes brought to the Tribunal's attention, and even their cumulative effect, did not have an impact on the contested decision. There is nothing to suggest that any of the inaccuracies identified were introduced intentionally, or with the purpose to favour or disadvantage any of the reviewed staff members. For these reasons, the mistakes found in the comparative review, while regrettable, are not of such nature as to invalidate the impugned decisions.

131. Although the Applicants, and Mr. Johnson in particular, suspected that the methodology criteria applied might have been tailored to favour some of his comparators (e.g., the choice of the cut-off date), the evidence is that the raw data of all staff members was assessed against the same objective criteria.

Blacklisting of Mr. Johnson

132. It is trite law that any Applicant alleging improper motives bears the burden of proving such claim. Apart from his testimony, Mr. Johnson has not adduced any evidence of such motives.

133. Mr Johnson's allegation that an UNMIL official told him that UNMIL had blacklisted him is hearsay and, therefore, of limited probative value. It is not sufficient to demonstrate that the decision not to renew Mr. Johnson's appointment was based on prejudice against him. This contention must fail.

Remedies

134. In their applications the Applicants requested that, if found to be unlawful, the decisions not to renew their contracts should be rescinded and material damages awarded. They also seek moral damages.

135. This is a case that concerns appointment; therefore, if the decisions are rescinded, the Tribunal must also set an amount of compensation that the Respondent may elect to pay in lieu of damages. Such an amount would reflect the material losses to the Applicants caused by the violations identified in this Judgment.

136. In assessing these losses the starting point is to determine if, but for the violations, any of the Applicants were likely to have had their fixed-term contracts renewed.

137. The Applicants were all on fixed-term contracts, which normally do not carry an expectancy of renewal. In these cases, the usual lack of expectancy was compounded by the radical restructuring that UNMIL was required to undertake. The Applicants' separation was triggered by the retrenchment. Nevertheless, the inherent lack of expectancy of renewal of their contracts was not diminished by the fact that the Administration put in place a methodology to identify the staff members to be retained in the context of the downsize.

138. There were undoubtedly violations of the relevant Secretary-General's bulletins at the initial stage of the decision-making process when the posts for abolition were identified without consultation. That decision, directly and immediately affected the Applicants who were on posts deemed as "unique" posts. In spite of that decision, the Applicants who were not on "unique" posts continued to have a prospect of being renewed if they were ranked high enough in the comparative review.

139. It is impossible at this stage to reconstruct the process and determine with any reliability the probability of non-abolition of the posts encumbered by Ms. Gaye, Mr. Doe J. and Mr. Doe P. had there been consultations as required. At best, in the case of these three Applicants the chances were not high, but they were denied the chance to influence or change the outcome through consultation.

140. The other two Applicants went through a comparative review process that was tainted by the failure of the Administration to follow the process promulgated in its Information Circular. The change in composition of the new CRP eliminated the consultation and participation rights of NASA.

141. Again, it is not possible to retroactively accurately determine the outcome of the review had the procedure been lawful, especially when the alternative process was objective and, overall, reliable. The Tribunal assesses the chances of these two Applicants to be somewhat less than the other three Applicants.

142. The Tribunal is satisfied that each of the Applicants benefited from the facilities offered by the Administration to assist them in obtaining alternative employment, and each made a number of unsuccessful job applications.

143. In light of all the foregoing, and in view of the violations of process, the Tribunal sets as alternative compensation in lieu of rescission:

a. two months' net base salary for the three Applicants who held posts deemed "unique"; and

b. one month's net base salary for those Applicants who underwent a comparative review.

144. As regards moral damages, the Applicants' evidence about the impact of losing their employment with UNMIL on their personal lives is accepted. They were all breadwinners for their families and the loss of their income and benefits has seriously impacted them.

145. However, moral damages may only be awarded for the harm caused by proven violations. In these cases, this is the harm caused to the Applicants by the uncertainty about what was happening to their employment. The lack of consultation and information at critical stages of the retrenchment process caused them anxiety and stress. For this, each is entitled to one month's net base salary.

Conclusion

146. In view of the foregoing, the Tribunal DECIDES:

a. The decisions not the renew the Applicants' fixed-term appointments were in breach of the applicable rules and, as such, should be rescinded;

b. If the Respondent elects to pay compensation as an alternative to rescinding the decisions, he is ordered to pay two months' net base salary for the three Applicants who held "unique" posts and one month's net base salary for those Applicants who underwent a comparative review;

c. In any event, the Respondent is hereby ordered to pay one month's net base salary to each Applicant for moral damage;

d. The above amounts shall be paid within 60 days from the date this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional 5% shall be added to the US Prime Rate until the date of payment.

(*Signed*)

Judge Coral Shaw

Dated this11th day of November 2014

Entered in the Register on this 11th day of November 2014

(*Signed*)

René M. Vargas M., Registrar, Geneva