



Before: Judge Goolam Meeran

Registry: Geneva

Registrar: René M. Vargas M.

EL-KHOLY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George Irving

Counsel for Respondent:

Fabrizio Mastrogirolamo, UNDP

Introduction

1. By application filed on 22 July 2015, the Applicant contests the decision of 12 February 2015 to terminate her permanent appointment and to separate her from service on 30 June 2015.
2. The Respondent filed his reply on 24 August 2015.

Facts

3. The Applicant joined the United Nations Development Programme (“UNDP”) in 1998, as a Policy Advisor (P-4) in the Regional Bureau for Arab States, at the UNDP Headquarters in New York. After various assignments in several duty stations, she was promoted to the P-5 level on 1 July 2002 and to the D-1 level on 1 July 2005. She was granted a permanent appointment on 30 June 2009.
4. The Applicant was appointed to the post of Director, Oslo Governance Centre (“OGC”) (D-1), Democratic Governance Group (“DGG”), Bureau for Development Policy (“BDP”), in Oslo, Norway, with effect from 10 March 2012. The majority of her performance evaluations during the 16 years of her career rated the Applicant as exceeding expectations and outstanding. For the cycle 2013/14, in her function as Director, OGC, signed on 16 and 17 March 2014, respectively, the Applicant received an overall rating of “very good”.
5. OGC was funded through the UNDP’s Governance Thematic Trust Fund (“DGTTF”). In November 2012, the Norwegian Government, the donor of the project, indicated that it planned to cut its funding to the DGTTF for 2013 by USD3.5 million.
6. In July 2013, Mr. Martinez-Soliman, Deputy Assistant Administrator and Deputy Director, BDP, visited Norway to discuss the future of OGC with the Norwegian Government. The Applicant was not involved in these and subsequent discussions on OGC with the host government. Mr. Martinez-Soliman also acted as Director, BDP, since September 2013.

7. By email of 22 August 2013, Mr. Martinez-Soliman informed the Applicant that structural changes within OGC were needed due to the risk of a continued dearth of funding for 2014, and that those changes would also affect the profile of the Director, OGC, i.e., the post encumbered by the Applicant. The Applicant was concerned at the impending structural changes and the likely impact on her post, particularly given the fact that she was excluded from the high level discussions regarding these changes.

8. The senior management of BDP which included Mr. Martinez-Soliman, decided that it would not be appropriate to involve staff, including the Applicant, in discussions on the future of OGC, since their presence and/or participation may not be conducive to a dispassionate review. The Applicant took a different view and considered that excluding her as Director, OGC was high handed, unjustified and had a potentially negative impact on her position and that of her team.

9. Given her concerns about what she regarded as the lack of transparency and secrecy surrounding the restructuring discussions, the Applicant contacted the Director of the UNDP Ethics Office in October 2013, and again in January 2014. She was given advice on the procedures available for filing complaints relating to retaliation, abuse of authority, and harassment. The Tribunal has no further information or knowledge on this issue and will refrain from making any comment. It is mentioned herein as an indication of the view taken by the Applicant at the time and the anxiety she was experiencing regarding her future.

10. In January 2014, the Applicant verbally raised concerns with Mr. Jens Wandel, Director, Bureau of Management (“BOM”), in her meeting with him in New York, and in writing with Mr. Michael Liley, Director, Office of Human Resources (“OHR”), on 28 January 2014, with respect to what she considered to be improper treatment towards her by Mr. Martinez-Soliman.

11. By email of 13 February 2014, Mr. Martinez-Soliman informed the Applicant that a decision was taken to abolish the position of Director because of the need to move forward into a year of transition leading to the phasing out of OGC. He reminded the Applicant that the decision was based on the urgent need

to revitalize the partnership with Norway and to develop a different programme for the Centre.

12. By letter dated 20 February 2014, Ms. Liz Huckerby, Officer-in-Charge, OHR, formally notified the Applicant that her post as Director, DGG/BDP, would be abolished with effect from 31 March 2014. She was also informed that she would be placed on the status of “between assignment”, and was encouraged to apply for vacancies at UNDP and other sister agencies. The letter further informed the Applicant that the three months job search period would start on the date of the letter, and run through to 31 May 2014. She was also told that as of 1 April 2014, she would become part of the Business Solutions Exchange (“BSE”). She was told that she was not expected to report to work beyond 31 March 2014. Finally, the Applicant was advised of the options she would have should she not find a new assignment by the end of the three months search period, namely to undertake a fully funded temporary assignment; to avail herself of accrued annual leave; to serve the one-time three-month separation notice period which would allow her to remain on the payroll while continuing to search; to take Special Leave without Pay (“SLWOP”) and continue applying for vacancies as an internal candidate. She could also request Early Retirement if she was 55 years of age or older.

13. By email of 22 February 2014, the Applicant was provided with a note explaining the significance of the BSE status. The note clarified that the BSE consisted of a talent pool composed of long-serving international staff members, who were between assignments, like herself, and whose posts were abolished. In accordance with the terms of that note, any staff member in the BSE pool, even if on a formal temporary assignment through the BSE mechanism would remain on BSE status throughout any temporary assignment.

14. By email of 7 March 2014, the Applicant indicated that the terms of reference for the post of Senior Advisor, Gender, offered to her by the BDP Gender team, to be based in Brussels, Belgium, were not suitable. By email of 18 March 2014, the Applicant further declined a post of Senior Gender Advisor, with

the BDP Gender team, in Bruges, Belgium. These posts were temporary assignments.

15. On 31 March 2014, the Applicant left her post.

16. By letter dated 31 March 2014, the State Secretary, Ministry of Foreign Affairs, Norway, thanked the Applicant for her close cooperation and relentless commitment to strengthen the relevance of OGC. He also stressed that “thanks to [the Applicant’s] efforts, [they] now have solid results and experiences to build on as UNDP and the Ministry of Foreign Affairs have renewed [their] commitment to continuing the partnership on the UNDP Oslo Governance Centre” .

17. By letter of 31 March 2014, OHR/BOM informed the Applicant that a fully funded temporary assignment had been identified for her as Senior Advisor to the Executive Coordinator and Deputy Executive Coordinator of the United Nations Volunteers (“UNV”) programme in Bonn. The Applicant accepted that post, and took up the one-year temporary assignment on 3 April 2014. The letter noted that the assignment was for a defined period of one year, that it will start on 1 April 2014 and will expire on 31 March 2015 and there will be no possibility of extension. It further stated that “[i]n the event that [the Applicant] [did] not find a regular assignment by the conclusion of the temporary assignment, i.e.. by 31 March 2015, the options available to [her] as articulated in the letter from [OHR/BOM] of 20 February 2014, remain in effect”.

18. By email of 10 April 2014, the Applicant wrote to Ms. Helen Clark, the UNDP Administrator, summarizing her positive achievements as Director, OGC. In her concluding paragraph, she expressed her deep concerns about the manner in which the restructuring was carried out and the way in which she was treated, in the following terms:

At the same time, I would also like to register my concerns, which I have already expressed to BDP management and OHR several months ago, regarding the process through which OGC has been handled in the past eight months. My concerns relate to what appears to be arbitrary decision making processes and the systematic exclusion of the OGC Director, and OGC's management team for that matter, from internal and external discussions and

consultations regarding the OGC, and its future directions. I will be writing separately in this regards, but for now as I exit the Oslo Governance Center, I wanted to bring to your attention these results by the OGC team and their recognition by the government of Norway as the building blocks for its renewed financial and political commitment to the Center. (emphasis added)

19. It would appear that the Applicant did not receive a response from the UNDP Administrator, or anyone acting on her behalf. The Tribunal has not been provided with any evidence that the Applicant had written separately, as indicated in the final paragraph of her letter.

20. At the time, significant structural changes were taking place within UNDP. The Executive Board had approved a new Strategic Plan for 2013, requiring the Organization to improve its institutional effectiveness. UNDP conducted a structural review, so as to align the organizational structure of UNDP with the strategic direction set out in that Plan. This resulted in a reduction of the overall number of UNDP staff, and those affected by the structural change were put on notice of the possible consequences of these changes and informed that to safeguard their interests they should participate in the forthcoming competitive Job Fairs in order to obtain suitable alternative posts.

21. Staff members who were in the BSE were also affected by the structural change which is governed by the UNDP People Realignment Policy and Processes (“the Realignment Policy”). Section V of the Realignment Policy states that “[u]pon commencement of the realignment process, all staff within scope of the structural change will, in principle, be affected unless otherwise notified by their manager and should begin seeking alternative placement. This includes staff members who are currently in the Business Solution Exchange”.

22. On 21 May 2014, Mr. Wandel sent an email entitled “Structural Change: Notification to affected staff”, advising relevant staff, including the Applicant that the posts they encumbered were within the scope of the change exercise and that they were therefore in principle affected by the structural change. Mr. Wandel encouraged staff to talk to their managers and HR Business Partner to make sure they have all the information to fully apprehend the implications of the process on

their positions. The email further stressed that “[s]taff who are unable to secure a position by the conclusion of the relevant structural change exercise will be separated in accordance with the provisions of the UN Staff Regulations and Rules and the UNDP People Realignment Policy and Processes which are applicable during this exercise”.

23. On 8 June 2014, the Applicant filed a complaint with the UNDP Office of Audit and Investigations (“OAI”) alleging harassment and abuse of authority on the part of Mr. Martinez-Soliman.

24. By letter of 8 July 2014, Mr. O’Donnell, Deputy Director (Investigations), OAI, informed the Applicant that OAI had determined that her complaint did not amount to abuse of authority or harassment that would constitute misconduct, hence an investigation was not warranted, and the case had been closed.

25. On 16 July 2014, the Applicant sent a request for management evaluation of the decision to reinstate the post of Director, OGC (D-1), and to reinstate recruitment for it.

26. By email of 21 July 2014 to staff members affected by the structural Change, including the Applicant, the Assistant Administrator announced the launching of the Job Fairs, indicating the sequence of application dates, with a round of applications for D, P-6 and P-5 team leader positions for the period 28 July to 4 August 2014.

27. By email of 25 July 2014 from the OHR, BOM, UNDP, the Applicant was informed that pursuant to the Realignment Policy, as a person affected by the structural change, she was eligible to apply for positions in the first round of the structural change Job Fairs, and given instructions on how to apply.

28. On 27 July 2014, the Applicant responded to the email, indicating that she had seen it only then, since she had been on leave and out of the country until 25 July 2014. She stated that she was unable to access the site, and requested a telephone conversation with the Officer, OHR, BOM, UNDP, who had sent her

the email of 25 July 2014. That conversation took place on 28 July 2014. The Applicant was offered a one-day extension of the deadline for application.

29. By email of 31 July 2014, the Applicant informed Mr. Wandel that although there were a number of positions in the Job Fair that suited her profile, she had decided not to participate in it, since she could not be expected, if selected, to start in a new post so soon after her recent relocation. In that email, the Applicant also sought clarification as to whether her current status was related to the on-going structural changes.

30. By email of 6 August 2014, entitled “RE: Participation on the structural change job fairs”, the Officer-in-Charge (“OIC”), Chief Integrated Talent Management, OHR, BOM, UNDP, informed the Applicant that although she had decided not to take part in the first round of the D-1 job fair, “any positions not filled in the first round of the job fairs [would] be re-advertised in a second round and that [she would] remain eligible to apply at that time as well, should [she] so choose”.

31. Mr. Wandel responded to the Applicant’s request for management evaluation on 27 August 2014, stressing that further to the restructuring exercise of OGC, her post had been abolished and it was anticipated that it would be replaced by a different function of Head of Research (D-1), and that the job description for that post was yet to be determined, pending approval of the OGC project document and funding commitments from Norway and other donors, and the classification process. Hence, no recruitment process had been initiated. He further noted that any management evaluation request with regard to the abolition of the post of Director, OGC, was time barred.

32. On 20 October 2014, the Applicant was informed by OHR/BOM that it had been decided to give all permanent appointment holders an additional opportunity to apply for the remaining vacant positions following the structural change job fair exercise. By email of 26 October 2014, the Applicant responded that she had carefully reviewed the vacant posts, but had not found any position matching her profile.

33. On 7 November 2014 a vacancy announcement for a D-1 Director, OGC was issued. It seems that the new position had been approved by OHR on 6 November 2014. The Applicant did not apply for this post.

34. On 13 November 2014 the Applicant applied for the D-2 post of “Special Representative of the Administrator, Programme of Assistance to the Palestinian People”. She was shortlisted and interviewed for that post, but not recommended. This is the subject of a separate application to the Tribunal.

35. On 7 December 2014, the Applicant sent a further request for management evaluation of what she regarded as a decision to reinstate her previous post of Director, OGC, further to its alleged abolition earlier that year.

36. Mr. Wandel, the Assistant Administrator and Director, BOM, UNDP, responded to the Applicant’s second request for management evaluation on 28 January 2015, stating that the new post of Director, OGC, was substantially different from the post of Director, OGC, previously encumbered by the Applicant. He reiterated that her claim that that post had been reinstated was unfounded, and pointed out that she had elected not to apply for the new position. She filed an application against the decision to reinstate the post of Director, OGC. This was dealt with in Judgment *El-Kholy* UNDT/2016/028, issued on 13 April 2016.

37. By letter dated 12 February 2015, the Applicant was informed that since she remained without a regular placement following the closure of the structural change Job Fairs, during which she had not applied for a position, her appointment would be terminated on 30 June 2015. The letter stated that the decision was made in accordance with staff rule 9.6(c)(i). The Applicant was informed that she could apply for agreed separation, and of the possibility of receiving compensation in lieu of notice.

38. On 9 April 2015, the Applicant sent a request for management evaluation of the decision to terminate her appointment.

39. By letter of 9 April 2015, the Applicant informed the Assistant Administrator and Director, BOM, that she had opted to serve two out of the three months of termination notice and receive compensation in lieu of the remaining month of notice period.

40. On 19 May 2015, the Associate Administrator, UNDP, responded to the Applicant's request for management evaluation.

41. In light of the Applicant's decision concerning her notice period, her appointment ended on 31 May 2015 and she was separated on that date.

42. She filed this application on 22 July 2015, and the Respondent filed his reply on 24 August 2015. After a case management discussion and several case management orders, by which the Tribunal sought to obtain clarification as to the efforts made to retain the services of the Applicant, it asked the parties whether they would agree to a decision being rendered on the papers. Both parties agreed.

Parties' submissions

43. The Applicant's principal contentions are:

a. In cases of restructuring or abolishment of posts, the Organization is obliged to act conscientiously and fairly towards the staff affected;

b. Although the Tribunal cannot generally intervene in the exercise of discretion when it comes to the reorganization of offices, it can interfere in cases where the Administration has manipulated the job description and posting and failed to apply the relevant Regulations and Rules in a fair and transparent manner (*Hersh* 2014-UNAT-433);

c. The hasty removal and replacement of the Applicant as Director, OGC, by an OIC was unfair and not in accordance with the duty to act fairly. In fact, the post of Director, OGC, was never abolished but simply modified, slightly, with the aim of getting rid of the Applicant and to recruit someone else. The Applicant was excluded from all consultations leading up to the abolishment of her post. She was never informed of the reasons for

the said abolishment and her abrupt and forced removal from that post ultimately led to the termination of her permanent appointment;

d. The evidence, including the full support received by the Applicant from the Norwegian Government, defeats the argument that the change was done at the latter's behest;

e. In light of her abrupt removal, the Applicant was prevented from the D-1 and D-2 job matching exercise at BPPS, a desk review exercise in June which preceded the Job Fairs. Had she been given a proper search period and remained on the post for a few more months, she would have been eligible to participate;

f. A change in duties requires the issuance of a new job description. The job is reclassified and advertised, as such allowing the incumbent to remain in post and to apply for the newly advertised post;

g. Since she presumed that the decision was based on valid budgetary or programmatic reasons, she did not initially contest the decision to abolish her post. The real motive behind the decision was to remove her from the post, not to abolish it. This only became apparent much later;

h. The hasty process and the continuing of abolished functions, which were taken over by an OIC and then by the person selected for the new post, support a conclusion of manipulation for extraneous reasons;

i. The Applicant had been the initiator of the change process which was also praised by the Norwegian Government;

j. The decision to abolish a post requires a number of procedural steps. It cannot be an *ad hoc* decision that is implemented with immediate effect. Her hasty removal did not lead to a saving but rather to an increase in costs. It was not clear why she could not perform the transitional role instead of recruiting a Director *ad interim*;

k. The post was advertised as an external vacancy without first considering her suitability. Given the almost identical job descriptions, the Bureau was obliged under the restructuring as well as the recruitment and selection framework to justify external outside recruitment instead of using the non-competitive alternatives set out in sec. 9.0 of the UNDP Recruitment and Selection Framework such as lateral movement, placement of unassigned staff and strategic placement;

l. After the abolition of her post, the Applicant was not given adequate notice to apply for another regular post as is normal practice for permanent staff members. Accordingly, she had to find her own assignment with UNV and was never part of the BSE. No effort was made by BDP or OHR to identify or facilitate properly a regular assignment;

m. After she completed the temporary assignment with UNV, she was not provided with any search period or reassigned to the BSE for proper placement;

n. As a permanent member of staff, she had a right to special consideration under staff rule 9.6(e). She was not afforded the opportunity to remain in her post during the three-month search period and she was not considered, e.g., for a Resident Representative/Coordinator (“RR/RC”) assignment although she was in the pool of approved candidates. No proposals for further assignments were made;

o. She was told that she had the “right to apply even though she was not part of the structural change process”, but not that if she were not to apply, her appointment would be terminated;

p. Even if the restructuring had been applicable to her case, the Respondent violated staff rule 9.6(e), in that she was put in a communal group of staff who were without posts, independently of their contractual status. Accordingly she did not receive the fullest consideration for the vacancies she applied for. Further, no effort was made by management to

provide priority placement to her within or outside the structural change process;

q. She requests compensation in the amount of two years' net base pay; compensation for the violation of her contractual rights and resulting damage to her career and reputation and requests that the responsible managers be held accountable.

44. The Respondent's principal contentions are:

a. Since the Applicant failed to submit a request for management evaluation of the decision to abolish the post of Director, OGC, her arguments in this respect are not receivable *ratione materiae* and that decision is not subject to judicial review by the Tribunal;

b. The decision to terminate the Applicant's appointment does not constitute a new administrative decision to abolish the post of Director, OGC; hence, the Tribunal is requested to find, as a preliminary matter, that the application with respect to the decision to abolish the post of Director, OGC, is not receivable *ratione materiae* and *ratione temporis*;

c. Without prejudice to the foregoing arguments on receivability, the Respondent notes that the decision to abolish the post of Director, OGC, was a valid exercise of discretion; further, the newly established post of Director, OGC, is different from the abolished one;

d. The Applicant was clearly informed, before assuming her functions at UNV that that placement was temporary and that upon its completion she would have to secure a new position;

e. After the abolition of the post of Director, OGC, the Applicant became part of the BSE talent pool. She was affected by the structural change, which, in accordance with the Realignment Policy, included staff who are part of the BSE;

f. The BSE note clearly stated that staff members in the BSE pool, even if engaged in a formal temporary assignment through the BSE must continue searching for a regular assignment. Accordingly, her argument that upon completion of her assignment in Bonn she was not reassigned to the BSE for a proper placement is without merit;

g. She was repeatedly informed that she was affected by the structural change. On 21 May 2014, she was further informed that if she failed to secure a post by the conclusion of the structural change process, she would have to be separated. The fact that she was affected by the structural change was reiterated on 21 July, 25 July, 28 July and 6 August 2014. She was also informed, during the telephone conversation of 28 July 2014, that if she did not find another post at the end of the temporary assignment with UNV, she would be separated from service;

h. In her email of 31 July 2014, the Applicant reiterated that she would not apply for vacancies in the Job Fairs. This was her personal choice. At the time over 1700 staff members holding fixed-term and permanent appointments were affected by the structural change. It is surprising that the Applicant chose not to participate in the Job Fairs, although she herself noted that having reviewed the vacancies, she knew that she was suitable for a number of the posts;

i. The Applicant was given a search period when the post of Director, OGC, was abolished, and she obtained a one-year temporary appointment with UNV. At the end of a temporary assignment, no further search periods are granted;

j. In any event, the Applicant was displaced and on a temporary assignment. She knew that unless she secured a regular position, she would be separated. This was clearly indicated in the letter of 20 February 2014 from Mr. Wandel, the Assistant Administrator and Director, BOM, which stressed that the Applicant would be served with notice of separation if she failed to secure an assignment during the search period. Accordingly, it was incumbent upon the Applicant to apply for all available positions, including

those advertised in the Job Fair. If, as she claims, the Applicant was not affected by the structural change, by allowing her to participate in the job fairs, the Administration had afforded her additional opportunities to find a regular post;

k. The order of retention in cases of abolition of posts under staff rule 9.6(e), is subject to the availability of suitable posts. The Organization has to make a good faith effort to find alternative posts for permanent staff members in case of post abolishment. In this case, the Applicant was offered three posts, viz., that of Senior Gender Adviser with BDP, Brussels, Senior Gender Advisor, BDP, Bruges and Senior Advisor with UNV, Bonn. The Applicant declined the two first positions. Although the Applicant may well have established the first discussion with UNV on a possible assignment, the Applicant's temporary assignment with UNV later was formalized and entirely financed through BDP management. Thus, upon the abolition of the Applicant's posts, good faith efforts were in fact made by the Administration to find the Applicant a one-year assignment according to her preference, as such giving her additional time to identify a regular placement;

l. However, the Applicant who was eligible to participate in the Job Fair chose not to apply for any post within it. Accordingly, she could not be given priority consideration for retention by the Administration, given the fact that other permanent appointment holders had applied for posts in the Job Fair and there was a consistent pattern of according them priority over staff members on fixed-term appointments;

m. With respect to the two posts for which the Applicant applied, outside of the job fairs, she was found not suitable. In the circumstances, she could not be retained with priority over candidates who were considered to be suitable;

n. With respect to positions of Resident Representative/Resident Coordinator, those are not within the prerogative of UNDP. The Respondent has no authority to appoint a UNDP staff member whose post was abolished

against such a post. In any event, the Respondent has no record of the Applicant having applied for any of these posts;

o. There is no evidence that the decision to abolish the post of Director, OGC, and the ultimate decision to terminate the Applicant's appointment were vitiated by extraneous factors. In particular, the allegations of abuse of authority levelled by the Applicant against the Deputy Assistant Administrator and Deputy Director, BDP, were found by OAI to not warrant an investigation. The Applicant did not seek management evaluation of the OAI decision. Further, the evidence on file shows that the abolition of the post of Director, OGP, was not motivated by any personal *animus* against the Applicant;

p. The Applicant did not apply for the new post of Director, OGC, hence could not be considered for it;

q. The application should be rejected.

Consideration

45. The Respondent's primary submission is that, at all material times, they made good faith attempts to find an alternative post for the Applicant as a displaced staff member and that the arrangements made, and the effort expended, were entirely consistent with their obligation under the Staff Rules. Accordingly, the Tribunal has identified a number of staff rules applicable in determining whether the consistent tenor of the Respondent's contention, that they could not consider the Applicant for those posts for which she had not applied, is a correct interpretation of the obligation under the Staff Rules. Alternatively, were the process and procedures adopted the result of a genuine but misguided application of the substance and principles of the relevant staff rules, which were designed to protect the interests of displaced staff members holding permanent appointments?

46. In making that assessment, the Tribunal is mindful of the jurisprudence of the Appeals Tribunal which held that in case of conflict between a staff rule and an administrative issuance, the former would take precedence over the latter

(*Couquet* 2015-UNAT-574). It also recalls what the Tribunal held in *Villamorán* UNDT/2011/126 with respect to the hierarchy of norms:

29. At the top of the hierarchy of the Organization's internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General's bulletins, and administrative instructions (see *Hastings* UNDT/2009/030, affirmed in *Hastings* 2011-UNAT-109; *Amar* UNDT/2011/040). Information circulars, office guidelines, manuals, and memoranda are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

Applicable law

47. Permanent appointments may be terminated only under conditions set by the Staff Regulations and Rules. The following regulations and rules are relevant:

48. Staff regulation 1.2(c) provides:

General rights and obligations

(c) Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them;

49. Staff rule 13.1 provides with respect to permanent appointments that:

(a) A staff member holding a permanent appointment as at 30 June 2009 or who is granted a permanent appointment under staff rules 13.3 (e) or 13.4 (b) shall retain the appointment until he or she separates from the Organization. Effective 1 July 2009, all permanent appointments shall be governed by the terms and conditions applicable to continuing appointments under the Staff Regulations and the Staff Rules, except as provided under the present rule.

...

(d) If the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts for which their services can be effectively utilized, staff

members with permanent appointments shall be retained in preference to those on all other types of appointments, provided that due regard shall be given in all cases to relative competence, integrity and length of service. Due regard shall also be given to nationality in the case of staff members with no more than five years of service and in the case of staff members who have changed their nationality within the preceding five years when the suitable posts available are subject to the principle of geographical distribution. (emphasis added)

50. With respect to termination, staff rule 9.6 provides:

Rule 9.6

Termination

Definitions

(a) A termination within the meaning of the Staff Regulations and Staff Rules is a separation from service initiated by the Secretary-General.

...

Reasons for termination

(c) 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 the appointment or on any of the following grounds:

(i) Abolition of posts or reduction of staff;

...

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: (emphasis added)

(i) Staff members holding continuing appointments;

...

(g) Staff members specifically recruited for service with the United Nations Secretariat or with any programme, fund or subsidiary organ of the United Nations that enjoys a special status in matters of appointment under a resolution of the General Assembly or as a result of an agreement entered by the Secretary-General have no entitlement under this rule for consideration for posts outside the organ for which they were recruited.

51. For the purpose of its structural review process, UNDP issued its Realignment Policy, which provides for limited voluntary separation packages, staff realignment modalities, including lateral moves, relocation, position matching and competitive selection procedures. The Policy provides under sec. 1 that “for the purposes of the structural change, the People Realignment Policy and Processes temporarily suspends related UNDP guidelines, frameworks and policies concerning recruitment and separation unless specifically referred to in this document. All decisions and actions will be taken in accordance with the principles set forth in the People Realignment Policy and Processes”.

Issues

52. It is clear from staff rule 9.6(a), (c) and (e) that a termination as a result of the abolition of a post is lawful provided that the provisions of the Staff Rules are complied with in a proper manner. It is also abundantly clear from this rule, read together with staff rule 13.1(d), that there is an obligation on the Administration to give proper and priority consideration to permanent 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 under the Staff Rules to proper, reasonable and good faith efforts to find an alternative post for the staff member who will otherwise be without a job. Failure to accord to the displaced staff members the rights conferred under the Staff Rules will constitute a material irregularity.

53. In deciding if the termination of the Applicant’s permanent appointment, by reason of a restructuring of the workplace, was lawful, the Tribunal has identified the following issues to be considered:

- a. Was the decision to abolish the post arrived at following a structural review?
- b. If yes, did UNDP comply with its obligations under staff rules 9.6(e) and 13.1(d) when it terminated the Applicant's permanent appointment?
- c. If it did not, is the Applicant entitled to any remedy arising from the termination of her appointment?

Was the decision to abolish the post encumbered by the Applicant a direct consequence of a structural review?

54. This Judgment is not concerned with an examination of the lawfulness or otherwise of the structural review and the manner in which it was carried out by the Organization. This matter has been dealt with in Judgment *El-Kholy* UNDT/2016/028. The Tribunal finds that the post of Director, OGC (D-1), DGG, encumbered by the Applicant at the material time was abolished as a direct consequence of the restructuring exercise. A termination of a contract of employment by reason of restructuring of the workplace is lawful provided that the Organization discharges fully its duty and obligations towards the displaced staff member in accordance with the applicable law, in this case, staff rules 9.6(e) and 13.1(d).

Did UNDP act in accordance with its obligations pursuant to staff rules 9.6(e) and 13.1(d) when it terminated the Applicant's permanent appointment?

55. Staff rules 9.6(e) and 13.1(d) clearly set out the duty and obligation on the Administration with an unequivocal commitment to give priority consideration to retaining the services of staff members holding a permanent appointment subject to the following conditions or requirements: relative competence, integrity, length of service and the availability of a suitable post in which the staff members services can be effectively utilized.

56. With respect to staff members specifically recruited for service with a programme, fund or subsidiary organ of the United Nations, staff rule 9.6(g) clarifies that their entitlement for consideration for suitable posts is limited to

those available within the relevant organ for which they were recruited. In this case it would be within UNDP.

57. Staff rule 9.6(f) limits the Administration's duty with respect to staff members in the General Service category to consideration of available posts at their duty station and within their department. Such limitation does not, however, apply to staff members in the Professional category, like the Applicant.

58. The question for decision is whether the Respondent complied with the obligation of good faith in carrying out his responsibilities under staff rules 9.6(e), 9.6(g) and 13.1(d).

59. A review of the case law indicates that there has to date been a very limited opportunity for UNAT to rule on the proper interpretation to be given to the obligation upon the Administration to use good faith efforts to find displaced staff members alternative employment particularly, those on permanent appointments, under current staff rules 9.6(e) and 13.1(d) in case of abolition of their post. In *Dumornay* UNDT/2010/004, this Tribunal found that the Applicant was shortlisted and considered for twenty-nine posts, including a number of posts for which she did not even apply. Her permanent appointment was ultimately terminated, since, despite these efforts by the Administration, the Applicant had not been found suitable for any of those posts. The Tribunal found in that case that the Organization had met its obligation of good faith under former staff rule 109.1(c)(i)¹. The Appeals Tribunal ruled that reasonable efforts were made by the

¹ Former staff rule 109.1(c) provided: "Abolition of posts and reduction of staff

(i) Except as otherwise expressly provided in subparagraph (ii) b below, if the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments, and staff members with probationary appointments shall be retained in preference to those on fixed-term or indefinite appointments, provided that due regard shall be had in all cases to relative competence, to integrity and to length of service. Due regard shall also be had to nationality in the case of staff members with no more than five years of service and in the case of staff members who have changed their nationality within the preceding five years when the suitable posts available are subject to the principle of geographical distribution;

(ii) a. The provisions of subparagraph (i) above insofar as they relate to locally recruited staff members shall be deemed to have been satisfied if such locally recruited staff members have received consideration for suitable posts available at their duty stations; b. Staff members specifically recruited for service with any programme, fund or subsidiary organ of the United Nations which enjoys a special status in matters of appointment under a resolution of the General

Administration to find suitable alternative employment given the factual findings (*Dumornay* 2010-UNAT-097).

60. In the absence of specific authority from the United Nations Appeals Tribunal regarding the proper meaning and effect of staff rules 9.6(e) and 13.1(d), the Tribunal considers that the jurisprudence of the former former United Nations Administrative Tribunal (“UNAdT”) and of the International Labour Organization Administrative Tribunal (“ILOAT”) in relation to the same issue may be regarded as persuasive.

61. The UNAdT held that the obligation of the Administration under former staff rule 109.1(c) meant that “once a *bona fide* decision to abolish a post has been made and communicated to a staff member, the Administration is bound—again, in good faith and in a non-discriminatory, transparent manner—to demonstrate that all reasonable efforts had been made to consider the staff member concerned for available and suitable posts” (*Hussain* Judgment No. 1409 (2008)). The former UNAdT further noted in *Fagan* Judgment No. 679 (1994) that the application of former staff rule 109.1(c) was:

vital to the security of staff who, having acquired permanent status, must be presumed to meet the Organization’s requirements regarding qualifications. In this connection, while efforts to find alternative employment cannot be unduly prolonged and the person concerned is required to cooperate fully in these efforts, staff rule 109.1(c) requires that such efforts be conducted in good faith with a view to avoiding, to the greatest extent possible, a situation in which a staff member who has made a career within the Organization for a substantial period of his or her professional life is dismissed and forced to undergo belated and uncertain professional relocation.

62. According to the former UNAdT, since “the circumstances under which the staff member is being separated are not of his making at all” “it is for the Administration to prove that the incumbent was afforded that consideration”, a duty that is “not discharged by a simple *ipse dixit* but by showing what posts existed; that the staff member was considered against them and found unsuitable

Assembly or as a result of an agreement entered by the Secretary-General have no entitlement under this rule for consideration for posts outside the organ for which they were recruited.”

and why that was so (*Hussain* Judgment No. 1409 (2008); *Soares* Judgment No. 910 (1998); *Carson* Judgment No. 85 (1962)).

63. The ILOAT stated in Judgment No. 3437 (2015), para. 6, that:

The Tribunal's case law has consistently upheld the principle that an international organization may not terminate the appointment of a staff member whose post has been abolished, at least if he or she holds an appointment of indeterminate duration, without first taking suitable steps to find him or her alternative employment (see, for example, Judgment 269, under 2, 1745, under 7, 2207, under 9, or 3238, under 10). As a result, when an organisation has to abolish a post held by a staff member who, like the complainant in the instant case, holds a contract for an indefinite period of time, it has a duty to do all that it can to reassign that person as a matter of priority to another post matching his or her abilities and grade. Furthermore, if the attempt to find such a post proves fruitless, it is up to the organisation, if the staff member concerned agrees, to try to place him or her in duties at a lower grade and to widen its search accordingly (see Judgments 1782, under 11, or 2830, under 9).

64. In Judgment No. 1782 (1998), the ILOAT applied staff rule 110.02(a)² of the United Nations Industrial Development Organization, which is similar to staff rule 9.6(e) and, in para. 11, ruled as follows:

What [staff rule 110.02(a)] entitles staff members with permanent appointments to is preference to "suitable posts in which their services can be effectively utilized", and that means posts not just at the same grade but even at a lower one. In a case in which a similar provision was material (Judgment 346: *in re* Savioli) the Tribunal held that if a staff member was willing to accept a post at a lower grade the organisation must look for posts at that grade as well.

65. In relation to the Respondent's contention that vacancy lists were published and the Applicant did not apply, the ILOAT, in Judgment No. 3238 (2013), in considering whether the mere advertising of posts inviting individuals to apply

² Staff rule 110.02(a): If the necessities of service require abolition of a post or reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on fixed-term appointments, provided that due regard shall be paid in all cases to relative competence, to integrity and to length of service.

was sufficient to comply with the duty to give priority to reassigned staff members, said:

At all events, in law the publication of an invitation for applications does not equate with a formal proposal to assign the complainants to a new position, issued specifically in order to comply with the duty to give priority to reassigning staff members holding a contract for an indefinite period of time

66. The Respondent submits that he has discharged any obligation under staff rule 9.6(e) by giving the Applicant the opportunity of participating in the Job Fair and offering her three temporary assignments in March 2014. The Respondent further submits that he could not otherwise consider the Applicant for any vacancies for which she had not applied, or for lateral moves/placement. In light of the above principles and for the reasons outlined below, the Tribunal considers that the application by the Respondent of the Administration's duty of good faith under staff rules 9.6(e) and 13.1(d) was far too restrictive in the present case.

67. The fact that the Staff Rules provide that in assessing the suitability of staff members for available positions, due consideration has to be given to the relative competence, integrity and length of service, does not imply that the Organization can make such assessment only if and when a staff member has applied for a particular vacancy. Nothing in staff rules 9.6(e) and 13.1(d) indicates that the suitability for available posts of a staff member affected by the abolition can only be assessed if that staff member had applied for the post.

68. On the contrary, in case of abolition of post or reduction of staff, the Organization may be expected to review all possibly suitable available posts which are vacant or likely to be vacant in the near future. Such posts can be filled by way of lateral move/assignment, under the Secretary-General's prerogative to assign staff members unilaterally to a position commensurate with their qualifications, under staff regulation 1.2(c). It then has to assess if staff members affected by the restructuring exercise can be retained against such posts, taking into account relative competence, integrity, length of service, and the contractual status of the staff member affected. It is clear from the formulation of staff rules 9.6(e) and 13.1(d) that priority consideration must be accorded to staff members

holding permanent appointments. Preferential treatment has to be given to the rights of staff members who are at risk of being separated by reason of a structural reorganisation. If no displaced or potentially displaced staff member is deemed suitable the Organisation may then widen the pool of candidates and consider others including external candidates, but at all material times priority must be given to displaced staff on permanent appointments. The *onus* is on the Administration to carry out this sequential exercise prior to opening the vacancy to others whether by an advertisement or otherwise. Accordingly, an assertion that the Applicant's suitability could not be considered for any vacant positions if she had not applied for them is an unjustifiable gloss on the plain words of staff rules 9.6(e) and 13.1(d) and imposes a requirement that a displaced staff member has to apply for a particular post in order to be considered. If that was the intention, the staff rule would have made that an explicit requirement. But most importantly, such a line of argument overlooks the underlying policy, in relation to structural reorganisation, of according preferential consideration to existing staff who are at risk of separation prior to considering others and giving priority to those holding permanent contracts.

69. Applying these principles, the Tribunal considers that in the context of UNDP, and for the purpose of the examination of the legality of the decision to terminate the permanent appointment of the Applicant, a distinction has to be made between posts that were part of the Job Fair, which was organized as a result of the structural change, and positions which were not and, particularly, those which were subject to external recruitment.

The Administration's duty to consider the Applicant for posts within the Job Fair

70. UNDP had established Job Fairs, for the purpose of restructuring exercises including the abolition of posts, in order to give staff members affected by structural changes and who are in need of placement, including those on BSE status, an opportunity to find new (regular) assignments, with the aim of avoiding termination of their contracts.

71. In light of the scale of the restructuring exercise within UNDP and the vast number of potentially displaced staff members whose needs had to be met it was

reasonable for the Respondent to set up the job fair. This was a mechanism for assisting the Administration in giving effect to the obligation to give proper, full and reasonable consideration to securing the continuing service of staff members by way of competitive selection. It is but one element of a process by which the Administration was seeking to discharge its obligation to displaced staff members. The circumstances were unique and the Tribunal considers that the Job Fair process was not a wholly irrational means of achieving the policy objective under the Staff Rules. Whilst it was an understandable and administratively expedient measure of dealing on an equal basis with 1,700 potentially displaced staff members, it cannot of itself be the only means and cannot be a substitute for the wider obligation to comply with its duty under staff rules 9.6(e) and 13.1(d).

72. In light of staff rules 9.6(e) and 13.1(d), it would have been unfair to consider the Applicant for positions that were part of the Job Fair and for which she had not applied at the expense of staff members who were equally in need of placement and had expressed their interest in such positions by way of application. By failing to apply for any positions in the Job Fair, the Applicant deprived herself of the opportunity to secure employment through that scheme. However, that is not conclusive of the issue to be determined regarding the duty on the Administration to make all good faith attempts to retain the services of a displaced staff member with a permanent appointment who also has a credible record of achievement.

The duty of the Administration to consider the Applicant for other available posts outside the scope of the Job Fair

73. For reasons stated in paras. 66 to 69 above, the Tribunal does not agree with the Respondent's contention that he could not consider the suitability of the Applicant for any post for which she had not applied, particularly posts open to external recruitment or which were otherwise available for lateral move/placement. The issue is whether there were, prior to termination, any vacant posts for which the Applicant could have been considered as possibly suited to and for which her services could have been utilized effectively. If there were such posts, a plain reading of staff rules 9.6(e) and 13.1(d) requires that the

Administration had an obligation to consider retaining the services of the Applicant in order of first preference as a staff member holding a permanent appointment.

74. The Respondent submits that the Applicant could not be considered for a lateral move neither under the UNDP *Realignment*, nor under the UNDP *Recruitment Policy* since, as a staff member between assignment, she was not “in the same functional unit”, hence could not be considered for any such lateral move or assignment, including for the post of Director, OGC.

75. The Tribunal notes that the purpose of staff rules 9.6(e) and 13.1(d) and the Administration’s obligation under these provisions to secure employment, cannot be undermined by norms of a lower level, such as the UNDP Recruitment Policy. Indeed, the Staff Rules and Regulations do not provide for such a restriction, and the Secretary-General’s prerogative, under staff regulation 1.2(c), to assign staff members does not exclude lateral moves outside a particular unit, or simply because a staff member does not, at a certain point in time, belong to a particular “business unit”. To find otherwise would be arbitrary if staff members, like the Applicant, were precluded from a lateral move by the mere fact that they were between-assignment, hence, at a certain point in time, did not belong to a particular “business unit”. As noted above, the limitation under staff rule 9.6(f) only applies to staff members in the General Service category, but not to those of the Professional category, as the Applicant. The duty vis-à-vis the Applicant, under staff rules 9.6(e), (g) and 13.1(d) extends to all available suitable positions against which the staff member’s service can be retained, throughout UNDP as a whole, without any limitation to a particular department or duty station.

76. Yet again, there may be an exception to that general principle in circumstances where a staff member has a permanent appointment limited to a particular department or office, within UNDP. If the post encumbered by that staff member is abolished, the Administration has to make good faith efforts to find a suitable position for that staff member only within the department (e.g. if a permanent appointment were limited to BDP) for which the staff member has a permanent appointment. That restriction cannot, by way of an inferior norm (such

as the Recruitment policy providing for lateral moves only in the same business unit), be applied to staff members who hold a permanent appointment without any limitation to a particular office.

77. In this respect, it is noteworthy that under para. 116 of the UNDP Recruitment Policy, Hiring Managers may select an unassigned staff member³

to fill a vacant post without a competitive process if the staff member has been vetted by OHR/BoM and found to fully meet the required qualifications for the position. The decision to place an unassigned staff member is at the discretion of management and only after consultation with the concerned staff member. While an unassigned staff member may express his/her interest in being placed without a competitive process, such a placement is not an entitlement. The management decision to fill a post through the placement of an unassigned staff member is discretionary.

78. The Tribunal notes that under para. 116 of its Recruitment Policy, UNDP did in fact have the discretion to consider the Applicant for available, suitable posts, outside the job fair, by way of placement. It was indeed known that her assignment would come to an end at the end of March 2015 and that she would be on an unassigned status, unless a new assignment was found for her. In light of the Tribunal's considerations with respect to staff rules 9.6(e) and 13.1(d) above, the discretion for the Administration to consider the Applicant for vacant, suitable posts outside the Job Fairs turned into an obligation before terminating her appointment.

79. Further, with respect to the Respondent's argument that the Applicant could not be considered for lateral moves under the *Realignment* policy, since she was not part of a particular unit, the Tribunal notes that the policy provides in sec. I, para. 2, "Lateral move" that:

Lateral move. In situations where positions belong to the same field of work in accordance with the UN Global Scheme of Occupational Groupings, management may decide to assign a staff member to another post in the same field of work with similar functions at the same level, in the same business unit, without a

³ Unassigned staff members are defined as a "current UNDP staff member holding a Permanent Appointment ... **and** who 1) is displaced as a result (sic) the abolition of his/her most recent position or 2) ..."

competitive process. Within the framework of the structural change, lateral moves to another business unit will also be allowed.

80. Since the policy explicitly allows for lateral moves to another business unit within the framework of the structural change exercise, the Respondent's argument in this respect must fail.

81. The Tribunal tried to assess which, if any, posts, might have been available at the relevant time, and for which the Applicant should thus have been considered. It noted that the Respondent, upon the Tribunal's express request (cf. Order No. 115 (GVA/2016) and the Respondent's filing of 15 June 2016) confirmed that at the relevant time, several posts at the P-5 and D-1/P-6 level were filled by way of lateral move or placement of an unassigned staff member holding a permanent appointment who fully met the required qualifications for the position. That presupposes that the suitability of these staff members against these positions was assessed by the Administration, without them having applied for such posts. In any event, the Administration's duty to find suitable alternative employment for a displaced staff member with a permanent appointment includes, if appropriate, the consideration and offers of posts at the same level or one level lower. Given that the Respondent confirms that there were such posts, they were in error by not considering the Applicant for any such post.

82. The Respondent stated that the post of Director, OGC, advertised on 7 November 2014, was not part of the Job Fairs under the structural change process. The Tribunal does not agree with the Respondent's submission that since the Applicant chose not to apply for the position, she could not be considered for it, and the Administration could lawfully proceed to recruit an external candidate. Given its obligation of good faith under staff rules 9.6(e) and 13.1(d), before proceeding to recruit an external candidate, the Respondent should have examined whether the services of the Applicant as a permanent staff member between assignment, and who was subject to abolition of post, could be retained against that post, irrespective of whether she had applied for it or not. Applying the above to the facts of this case, even if the Respondent could be considered as having made a legitimate management decision, by appointing an OIC while the structural review and reorganisation was being conducted, they were obliged at

the point at which the job description was finalised, in or about November 2014, to consider whether the Applicant's services could effectively be utilized, as required under staff rules 9.6(e) and 13.1(d). The Tribunal finds that the Respondent advertised the job without any consultation with the Applicant and without considering if she was or even could be a suitable candidate. The Respondent's failure, or omission, in this regard is based on the view that they were not required to consider the Applicant since she did not apply. Such an approach is not consistent with a fair reading of staff rules 9.6(e) and 13.1(d) and the policy imperative of these rules which is clearly and unambiguously intended to preserve the rights of staff members with priority consideration being accorded to permanent appointees.

83. The Respondent's argument that the new post of Director, OGC, was different from that previously held by the Applicant is contested by the latter. The Tribunal examined the job descriptions both of the post of Director, OGC, encumbered by the Applicant, and the one advertised in November 2014. The Tribunal reminded itself that it is not for it to make definitive assessments and evaluations of particular job contents. However, for purposes of the obligation on the Administration under staff rules 9.6(e) and 13.1(d), although there were material changes to the job description, the majority of functions and requirements appeared to be identical. In the circumstances, before proceeding to external recruitment and terminating the permanent appointment of the Applicant, the Administration had a duty to examine her suitability against the new post. Had proper consideration been given to the question whether the Applicant's services can be effectively utilized in the new post they would have satisfied the requirements under staff rules 9.6(e) and 13.1(d) in relation to this particular post. However, the Respondent acknowledged that no such consideration was given to the Applicant's suitability, on the sole ground that she had not applied for the post. In the Tribunal's view, this constitutes a violation of the Administration's obligations under staff rules 9.6(e) and 13.1(d).

84. The foregoing notwithstanding, the Tribunal will not substitute its assessment for that of the Administration to consider whether the Applicant would have been suitable for the post of Director, OGC, as advertised in November

2014. It limits its conclusion to finding that there was in fact a vacancy prior to the termination of the Applicant's permanent appointment. This vacancy was subject to external recruitment, without first assessing the Applicant's suitability for that post, in violation of the Administration's duty under staff rules 9.6(e) and 13.1(d). Whether such consideration would have resulted in the Applicant being deemed suitable or not is not the issue. The error of procedure was that she was not even considered.

85. The same rationale applies to any possibly suitable posts which were or became vacant and were either open to external recruitment or open to placement of unassigned staff members, around the time the Applicant's temporary assignment with UNV came to an end, and until her effective date of termination of her appointment, that is, 30 June 2015, and within a reasonable period thereafter. Apart from the post of Director, OGC, it is impossible for the Tribunal to know which positions, if any, were indeed available at that time and for which the Applicant ought to have been considered. It notes, however, that the Respondent admitted that several positions at the P-5 and D-1 level existed, which were filled by way of lateral move/placement at the relevant time.

86. By simply stating that he could not consider the Applicant for any position for which she had not applied and that she could not be considered for placement or lateral move, the Respondent admits that no consideration whatsoever for any such available posts was given to the Applicant. The Administration did not even look for available posts for which the suitability of the Applicant, by way of placement or lateral move, could have been considered before the termination of her appointment took effect.

87. The Applicant's appointment was terminated on 30 June 2015. The fact that efforts were made in April 2014 to support her to find a one-year temporary appointment, did not absolve the Administration from its obligation to make all good faith efforts to find a suitable posting for the Applicant at the time of her termination in June 2015.

88. The Tribunal concludes that while the Administration offered the Applicant an opportunity to secure a regular placement through the Job Fair, and also

supported her to find (and finance) a temporary appointment immediately after the abolition of her post in April 2014, it did not exhaust its efforts of good faith in compliance with staff rules 9.6(e) and 13.1(d) to find a suitable alternative post for the Applicant.

89. By failing to consider the Applicant for the new post of Director, OGC, prior to and/or after the issuance of the vacancy announcement in November 2014, solely on the ground that she did not apply for it and by filling it with an external candidate in spring 2015, precisely at the time when the Applicant's temporary appointment with UNV came to an end, the Administration failed to fulfil its obligations under staff rules 9.6(e) and 13.1(d). It also failed in this duty when it did not at least make an assessment of her suitability for other available posts. It follows that the decision to terminate the employment of the Applicant by reason of an organisational restructuring was not in compliance with the duty on the Respondent under staff rule 9.6(e) read together with staff rule 13.1(d). The termination in these circumstances was unlawful.

Is the Applicant entitled to a remedy arising from the termination of her appointment?

90. By resolution 69/203, adopted on 18 December 2014 and published on 21 January 2015, the General Assembly amended art. 10.5 of the Tribunal's Statute to read as follows:

As part of its judgement, the Dispute Tribunal may *only* order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation for harm, *supported by evidence*, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation, and shall provide the reasons for that decision. (emphasis added)

91. Having concluded that the decision to terminate the employment of the Applicant is unlawful, the Tribunal rescinds it in accordance with art. 10.5, para. (a). Given that the decision concerns a termination, the Tribunal has to determine an amount of compensation to be paid as an alternative to the rescission of the contested decision. According to the jurisprudence of the Appeals Tribunal, such alternative compensation is not compensatory damages based on economic loss (*Eissa* 2014-UNAT-469). The Tribunal did consider whether the exceptional circumstances of this case justified the award of compensation exceeding the equivalent of two years' net base salary, set down in art. 10.5(b) of its Statute, on the grounds that the activating cause of the Applicant's loss of employment was principally due to the Respondent's default in misconstruing and misapplying the Staff Rules as identified in this judgment. However, the Tribunal decided not to exceed the two years limit, having regard to the fact that the Applicant herself could have done more to apply for certain positions in the job fair.

92. Under art. 10.5 of the Tribunal's Statute, as amended, which modifies the rules of evidence in respect of a claim for moral damages, an award for moral damages can no longer be granted on the mere basis of a fundamental breach of a staff member's due process rights, but only if it is supported by evidence. The Tribunal notes that the Applicant claims "moral damages [she] has suffered in being prematurely terminated" and, more specifically, she asks for two years' net base pay in compensation "for the violation of [her] contractual rights and the resulting damage to her career and reputation". In appropriate cases a claim for moral damages may be supported by medical reports or other evidence. The requirement under art. 10.5, as amended, for supporting evidence is not restricted to the provision of reports from the medical and ancillary professions. Oral evidence is frequently accepted as being sufficient. In the absence of a hearing, the Tribunal considers that it may be sufficient to arrive at an assessment on the basis of the documents before the Tribunal. The Tribunal will subject any assertion and description of anxiety and distress to a sensible and rational examination and will arrive at a reasonable conclusion. In the circumstances of this case, it is reasonable for the Tribunal to conclude that the Applicant suffered distress as a direct consequence of the failure by the Respondent to carry out his

obligations under Staff Rules 9.6(e) and 13.1(d). The Tribunal will award the sum of USD2,000 as moral damages.

93. The Tribunal sets the amount of compensation that the Respondent may elect to pay instead of rescinding the decision at two years' net base salary and entitlements. This amount shall include the sum of USD2,000 as moral damages which is to be paid separately if the Respondent elects to rescind the decision.

Conclusion

94. Where a staff member with a permanent contract is at risk of termination of employment as a result of an organizational restructuring, the Organization has a duty under staff rules 9.6(e) and 13.1(d) to make good faith efforts to retain the services of the staff member against an available suitable post. The Organization failed in its obligation to do so. The Applicant is entitled to a remedy for this breach.

Judgment

95. The application succeeds.

96. The decision to terminate the permanent contract of employment of the Applicant is rescinded.

97. As an alternative to specific performance, the Respondent may elect to pay to the Applicant compensation of two years' net base pay calculated at the rate of her last salary payment at the time of termination, under art. 10.5(a) of the Tribunal's Statute.

98. The Applicant is awarded the sum of USD2,000 as moral damages.

99. Given the cap of two years net base salary under art. 10.5(b) of the Tribunal's Statute, the total compensation awarded is limited to two years net base salary, which will include the sum of USD2,000 as moral damages, to be paid separately should the Respondent elect to rescind the decision.

100. The award of compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said award. An additional five per cent shall be applied to the United States of America prime rate 60 days from the date this Judgment becomes executable.

101. All other claims raised in this application are dismissed.

102. No further award in respect of damages or costs.

(Signed)

Judge Goolam Meeran

Dated this 22nd day of July 2016

Entered in the Register on this 22nd day of July 2016

(Signed)

René M. Vargas M., Registrar, Geneva