UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2014/020
Judgment No.: UNDT/2016/181
Date: 7 October 2016
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

HASSANIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Lennox S. Hinds
Didier Sepho

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

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Introduction

1. On 24 March 2014, the Applicant, a G-4 level staff member in the Publishing Section, Meeting and Publishing Division of the Department for General Assembly and Conference Management ("DGACM"), filed an application contesting the decision to abolish his post effective 1 January 2014, and, as a result, to terminate his permanent appointment.

2. The Applicant was one of fourteen former and current staff members who, in March 2014, filed applications relating to the decision to terminate their permanent appointments following the abolition of a number of posts in DGACM. Several of the applicants subsequently withdrew their applications. With the exception of the present case, the remaining cases were thereafter set down for a hearing. The present case—Case No. UNDT/NY/2014/020—was heard separately from these other cases on 4 April 2016.

3. Due to the extensive detail of facts and issues, and the procedural history in this case, this Judgment contains a table of contents as an *aide mémoire*.

Procedural history

4. On 24 March 2014, the same day he filed the application on the merits, the Applicant filed a motion for expedited hearing.

5. By Order No. 51 (NY/2014), dated 1 April 2014, the Tribunal (Duty Judge) noted that separate groups of cases had been filed by several staff members (14 in total) concerning the same subject matter and that in his responses to similar motions for an expedited hearing in those cases, the Respondent had stated that "a number of new positions have been made available within DGACM and a majority of the Applicants have been interviewed for the positions. The Applicants may continue to be employed beyond 20 April 2014".

The Tribunal directed the parties to file a joint submission regarding the status of these selection processes.

6. In their joint response to Order No. 51 (NY/2014) dated 4 April 2014, the parties stated that the Applicant applied for two of the advertised positions after the closing date and for another two positions. The review of the applications was still being carried out. The Respondent also indicated that "an additional General Service position in the Meetings and Publishing Division, DGACM will be advertised in Inspira imminently".

7. By Order No. 63 (NY/2014) dated 10 April 2014, the Tribunal (Duty Judge) rejected the Applicant's motion for an expedited hearing.

8. The Respondent filed his reply to the application on 24 April 2014.

9. By Order No. 101 (NY/2014) dated 25 April 2014, the Tribunal (Duty Judge) directed that the present case join the queue of cases pending assignment to a Judge in due course.

10. On 20 July 2015, the case was assigned to the undersigned Judge.

11. By Order No. 5 (NY/2016) dated 14 January 2016, the Tribunal instructed the Applicant to file a submission confirming his exact contractual situation and confirming whether he maintained his case. The parties were also directed to file a jointly-signed submission with proposed dates for a hearing on the merits, an agreed list of witnesses, and an agreed bundle of documents to be relied upon at the hearing.

12. By response dated 4 February 2016, Counsel for the Applicant informed the Tribunal that the Applicant maintained his case.

13. By joint motion for an extension of time dated 25 February 2016, the parties requested the Tribunal to extend the time limit for the filing of the jointly-signed submissions pursuant to Order No. 5 (NY/2016) until 3 March 2016.

14. By Order No. 54 (NY/2015) dated 26 February 2016, the Tribunal granted the requested extension of time. The parties were given until 3 March 2016 to file their joint submission in preparation for the substantive hearing.

15. By Order No. 67 (NY/2016) dated 8 March 2016, the Tribunal directed the parties to attend a case management discussion ("CMD") on 18 March 2016 in preparation for a substantive hearing. The purpose of the CMD was to identify, prior to the substantive hearing, issues of receivability, merits, and relief before the Tribunal. The Tribunal also tentatively scheduled this case for a substantive hearing on 4 April 2016.

16. At the CMD held on 18 March 2016, the Tribunal clarified the status of the Applicant; outstanding issues of receivability, merits, and relief; and clarified the lists of witnesses the parties intended to call. The parties agreed that one day (4 April 2016) would be sufficient for the hearing of the case.

17. By Order No. 76 (NY/2016) dated 22 March 2016, the Tribunal ordered the parties to file, by 28 March 2016, summaries of the evidence that they intended to elicit from their witnesses at the substantive hearing. The Tribunal also set the hearing for 4 April 2016.

Substantive hearing

18. On 4 April 2016, the Tribunal held a one-day hearing in the present case, at which several witnesses gave oral evidence in court.

19. The Respondent called the following witnesses:

a. Mr. Narendra Nandoe, Chief, Meeting Support Section, DGACM;

b. Ms. Janet Beswick, Deputy Executive Officer, DGACM;

c. Ms. Christine Asokumar, Chief a.i., Headquarters Staffing Section, Staffing Services, Strategic Planning Division, Office of Human Resources Management ("OHRM").

20. In addition to the Applicant's own testimony, the following witnesses testified on his behalf:

a. Mr. Amgid Ejaz, retired Document Coordinator Assistant;

b. Mr. Pedro Lobo, retired Supervisor of Warehouse (DGACM).

21. It was agreed at the conclusion of the hearing that the parties would file their closing submissions by Friday, 15 April 2016. However, due to developments as set out in the facts below, the matter did not proceed as expected.

Production of documents and closing submissions

22. At the hearing held on 4 April 2016, Ms. Janet Beswick, Deputy Executive Officer, DGACM, one of the witnesses called by the Respondent, referred in her oral evidence to an email that she had sent to OHRM and/or the Executive Officer, DGACM, seeking guidance on the propriety of the issuance of a termination notice the Applicant who was an elected staff official of the Staff Union. She testified that she could not locate a response to her email query.

23. It is common cause that the email referred to by Ms. Beswick was not included in the agreed bundle, nor was it produced at any point in the course of the proceedings. At the hearing, Counsel for the Applicant sought production of the said email, to which the Respondent raised no objections. Accordingly, the Tribunal directed that the email be produced by the Respondent.

Order No. 81 (NY/2016) and subsequent submissions

24. By Order No. 81 (NY/2016) dated 6 April 2016, the Tribunal ordered the Respondent to file a copy of the email referred to by Ms. Beswick and any

response she may have received. The Tribunal also directed the parties to file their closing submissions by 15 April 2016.

25. On 11 April 2016, the Respondent filed copies of emails exchanged between Mr. Magnus Olafsson (Director, Meetings and Publishing Division, DGACM), Ms. Beswick, Ms. Chiulli (Executive Officer, DGACM), and Ms. Francette James, Human Resources Officer, OHRM, dated 17 December 2013 (12:51 p.m. and 2:57 p.m.), 19 December 2013, and 20 December 2013.

26. On 15 April 2016, the parties filed their closing submissions.

27. On 2 May 2016, the Applicant filed a motion for leave to produce two emails. One of the emails had already been disclosed by the Respondent on 11 April 2016. The other email, dated 17 December 2013 (3:01 p.m.) from Ms. Chiulli (Executive Officer, DGACM) to Mr. Olafsson (Director, Meetings and Publishing Division, DGACM), also copied to Ms. Beswick (Deputy Executive Officer, DGACM) and Mr. Nandoe (Chief, Meeting Support Section, DGACM), and which was a response to Ms. Beswick's initial request for guidance as aforesaid, had not been made available to the Tribunal prior to the filing of the Applicant's motion. The Applicant requested the Tribunal to admit the two emails as evidence in the present case or, alternatively, to reopen the hearing and allow the Applicant to call Mr. Chiulli and Mr. Olafsson to testify before the Tribunal.

28. By Order No. 103 (NY/2016), dated 3 May 2016, the Tribunal directed the Respondent to file a response to the Applicant's motion of 2 May 2016.

29. On 10 May 2016, the Respondent filed a submission objecting to the inclusion of the email of 17 December 2013 (3:01 p.m.) as part of the case record on the grounds that the email was neither relevant nor had any probative value. The Respondent further stated that there was no need for a further hearing, noting that Ms. Chiulli and Mr. Olafsson have retired from the Organization.

30. By Order No. 113 (NY/2016) dated 12 May 2016, the Tribunal found that the email of 17 December 2013 (3:01 p.m.) was relevant to the testimony of the Respondent's witness Ms. Beswick. The Tribunal granted the Applicant leave to produce the said email and accepted the email as part of the case record. Even though the Respondent had waived his right to address the Tribunal at a further hearing on this point, the parties were also directed that they may file brief submissions not exceeding two pages, limited specifically to the email of 17 December 2013 (3:01 p.m.), to supplement their closing submissions of 15 April 2016.

31. On 25 and 26 May 2016, both parties complied with Order No. 113.

Facts

Employment with the Organization

32. The Applicant commenced employment with the United Nations in 1989. Since 1994 and throughout his career with the Organization, the Applicant was actively involved in the work of the Staff Association work, including as an elected staff representative.

33. The Applicant received a permanent appointment in 1995.

15 August 2013 report of the ACABQ (A/68/7)

34. On 15 August 2013, the Advisory Committee on Administrative and Budgetary Questions ("ACABQ") published report A/68/7 (First report on the proposed programme budget for the biennium 2014–2015), in which it included proposals for specific posts to be abolished, including in DGACM.

35. At para. I.107, the report recorded the ACABQ's enquiry as to the potential impact of post abolition on staff in the Publishing Section who might lose employment if the budget was approved. The report noted that the

Department was "actively engaged" with OHRM and other offices to "address the matter proactively":

> *Abolishments*
>
> I.106 A total of 99 posts are proposed for abolishment, including 4 General Service (Principal level), 56 General Service (Other level) and 39 Trades and Crafts posts, at Headquarters under subprogrammes 3 and 4, as follows:
>
> …
>
> (c) The abolishment of 39 Trades and Crafts posts and 22 General Service (Other level) posts in the Reproduction Unit and the Distribution Unit, reflecting the completion of the shift to an entirely digital printing operation … ;
>
> …
>
> I.107 The Advisory Committee enquired as to the potential impact of post abolishment on staff and was informed that the staff in the Publishing Section who might lose employment would be affected if the proposed budget were approved. In anticipation of this possibility, the Department had been actively engaged, together with the Office of Human Resources Management and other relevant offices, to address the matter proactively. …
>
> I.108 The Advisory Committee recommends the approval of the proposed abolishment of 99 posts in the Department.

17–20 December 2013 emails regarding the Applicant's status

36. At 12:51 p.m. on 17 December 2013, Mr. Magnus Olafsson (Director, Meetings and Publishing Division, DGACM) sent an email to Ms. Chiulli (Executive Officer), copying Ms. Beswick (Deputy Executive Officer, DGACM) and Mr. Nandoe (Chief, Meeting Support Section, DGACM), stating:

> **Subject: [Applicant] President**
>
> [Ms. Chiulli],
>
> [The Applicant] won the elections, so he becomes vice-president, I think. What does it mean for us? I mean, does DGACM have the obligation to keep him on the Staffing Table?

37. At 2:57 p.m. on 17 December 2013, Ms. Beswick emailed OHRM, copying Ms. Chiulli, asking for guidance with respect to the Applicant's situation. Her email stated:

> **Subject: PS: DGACM s/m: [Mr.] Hassanin (First Vice-President of the 45th Staff Council)**
>
> [Mr.] Hassanin is a DGACM s/m who holds a permanent contract.
>
> He occupies one of the posts earmarked for abolition. Should the [General Assembly] approve the budget, with the resulting abolition, what happens to [Mr. Hassanin]? He has just been elected the First Vice-President of the 45th Staff Council.
>
> In view of our post reductions, grateful for your early guidance.

38. At 3:01 p.m. on 17 December 2013, Ms. Chiulli emailed Mr. Olafsson—the very same contested email contended by the Respondent as irrelevant and of no probative value—copying Ms. Beswick and Mr. Nandoe, stating:

> **Subject: Re: [Applicant] President**
>
> [Mr. Olafsson],
>
> Yes, as an elected official, the Department will be obliged to keep him on one of the Distribution posts.

39. On 19 December 2013, Ms. Beswick sent an email to OHRM, requesting "clarity on this" matter "as we approach [close of business] of December".

40. On 20 December 2013, Ms. Francette James, Human Resources Officer, OHRM, replied to Ms. Beswick's inquiry, copying, among others, Ms. Chiulli and Mr. Nandoe. Ms. James's email stated (emphasis in original):

> **Subject: Re: Fw: PS: DGACM s/m: [Mr.] Hassanin (First Vice-President of the 45th Staff Council)**
>
> [Ms. Beswick],
>
> As per your email message, please note OHRM's advice below:
>
> "*...please note that all affected staff on abolished posts are to be treated equally under the staff regulations and rules*."

General Assembly resolution 68/246

41. On 27 December 2013, the General Assembly approved the Secretary-General's proposed programme budget for the biennium 2014–2016, section 2 of which provided for the abolition of 59 posts in the Publishing Section of the Meetings and Publishing Division of DGACM.

Note of 30 December 2013

42. On 30 December 2013, Mr. Yukio Takasu, the Under-Secretary-General for Management ("USG/DM"), sent a Note to the Chef de Cabinet, stating:

> **Termination of appointments on abolition of posts – DGACM staff members**
>
> 1. I refer to the attached recommendation by the USG/DGACM for the Secretary-General to terminate the appointments of a number of staff members currently serving with DGACM. This recommendation follows General Assembly decision 68/6 (Sect. 2) that led to the abolition of posts effective 31 December 2013.
>
> 2. DGACM has reviewed and is continuing to review possibilities to absorb affected staff members; in line with staff rule 9.6(e) and (t). While it was possible to otherwise accommodate some staff members encumbering-posts slated for abolition, and while others have found alternative employment in the Organization, the attached list concerns staff members where this was not possible at this time.
>
> 3. Given DGACM's confirmation that consultation efforts with staff representatives and affected staff members have been undertaken and that staff rules 9.6(e) and (f) have been taken into account and complied with, I support the recommendation that the Secretary-General consider the termination of the appointments of the staff members listed in the attachment. Once the Secretary-General has taken a decision, such decision will be conveyed to the staff members through their parent department. In case of termination, this will be a termination notice pursuant to staff rule 9.7. Should any of these staff members secure alternative employment in the Organization prior to any termination taking effect, such termination would be rendered moot.

> 4. Please note that the authority to terminate for abolition of posts or reduction of the staff has been retained by the Secretary-General pursuant to Annex I of ST/AI/234/Rev.1. We would appreciate EOSG's assistance in securing the Secretary-General's decision on this matter at the earliest convenience. Given the required standards for delegation of authority, most recently under judgement *Bastet* (UNDT/2013/172), please also assist in ensuring the decision is endorsed by the Secretary-General, preferable in the form of a memorandum. For use of any communication conveying delegations or administrative decisions, the tribunal has indicated its expectation that the name of the signatory must be spelled out if the signature is not readable, and that any such communication must display the functional title of the decision-maker.
>
> 5. A draft decision for the Secretary-General's consideration is attached.

Secretary-General's approval of termination of appointments

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

Termination letter of 31 December 2013

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

> On 27 December, the General Assembly approved the Secretary-General's proposed programme budget for the biennium 2014–2015, section 2 of which provides for the abolition of 59 posts in the Publishing Section of the Meetings and Publishing Division of the Department for General Assembly and Conference Management (DGACM).
>
> I am writing to inform you that the post against which your contract is charged is one of the 59 posts that the General

> Assembly has abolished effective 1 January 2014 and that, as a result, the Secretary-General has decided to terminate your permanent appointment. The present letter, therefore, constitutes the formal notice of termination of your permanent appointment under staff rule 9.7.
>
> You are strongly encouraged to apply for all available positions for which you believe you have the required competencies and skills. Should you submit an application, you are invited to so inform the DGACM Executive Office, which will support you in liaising with the Office of Human Resources Management with a view to giving priority consideration to your application.
>
> In the event that you are not selected for a position, I regret to inform you that you will be separated from service not less than three months (90 days) of receipt of this notice, as per staff rule 9.7. However, you will be entitled to a termination indemnity in accordance with staff regulation 9.3(c).
>
> My office will assist you in every possible way during this difficult time, and I sincerely wish you success with your applications.

31 January 2014 request for management evaluation

45. On 31 January 2014, the Applicant filed a request for management evaluation, contesting the decision of 31 December 2013, notified to him on 6 January 2014, "to abolish [his] post effective 1 January 2014 and as a result to terminate [his] permanent appointment".

24 February 2014 email

46. On 24 February 2014, the Executive Officer of DGACM sent an email to the affected staff members, including the Applicant, stating (emphasis in original):

> Colleagues,
>
> Mr. Gettu [Under-Secretary-General, DGACM] expresses his gratitude to all who attended the meeting held last Wednesday on the 19th, and has asked that we reiterate two important points

> which were shared at the meeting for the benefit of colleagues who might not have attended:
>
> First, that in light of the fact that the termination notices were given out over a period of several weeks in January, that the decision has been taken to separate all permanent staff as of 90 days from the date of the latest letter delivered which was 20 January. For all staff with permanent contracts who do not have an appointment, their separation date will be 20 April. Because that day falls on a Sunday, and the preceding Friday is the Good Friday holiday, any staff separating as of that date will be cleared by the Executive Office on Thursday, 17 April (last work day).
>
> Second, that the deadline for the application to the temporary digitization posts has been extended, once again, until 28 February. Staff need to apply to a job opening in order to be considered for posts.

26 February 2014 contract extension

47. By letter dated 28 February 2014, the Applicant was notified by the Management Evaluation Unit ("MEU") that two days earlier they had been advised by the Administration of the extension of the Applicant's appointment until 20 April 2014. The letter further stated that, since the extension of his appointment superseded the contested decision, it effectively rendered his request for management evaluation moot, and his management evaluation file would therefore be closed.

Filing of an application before the Tribunal

48. On 24 March 2014, the Applicant filed the present application.

Four job applications in March–April 2014

Two Publishing Production Assistants posts (G-4 and G-5)

49. On 21 March 2014, the Applicant submitted applications for two job openings of Publishing Production Assistants at the G-4 and G-5 levels in the Meetings & Publishing Division, DGACM. By emails dated 21 and 24 March

2014, the Applicant was informed by the Executive Officer that his applications would not be considered as they were submitted after the deadline, despite two time extensions. Each email further stated that "[a]s the job openings have closed and the interview process is underway, I regret to inform you that your application is not receivable".

Publishing Assistant (G-6)

50. In March or early April 2014, the Applicant submitted an application for a G-6 level position of Publishing Assistant, Meetings & Publishing Division, DGACM. However, his application was rejected on the basis of OHRM's determination that the Applicant could only apply for temporary positions no more than one level above his grade. OHRM stated in their email of 3 April 2016 to Mr. Nandoe: "If this candidate is currently serving at the G-4 level under one of the above mentioned appointments, he will unfortunately not be eligible to apply for the G-6 level".

Meeting Services Assistant (G-5)

51. In March or early April 2014, the Applicant also applied for a position of a G-5 level Meeting Services Assistant, General Assembly Affairs Branch, DGACM.

52. On 4 April 2016, the Chief of the General Assembly Branch, DGACM, emailed the Applicant to inform him that, "based on the overall review of the applications received … [his] application for this position [would] not be considered further". The Tribunal notes that the Applicant was notified in less than 48 hours that his application for the position would not be considered further, and no other explanations or reasons were given.

20 April 2014 termination of permanent appointment

53. On 20 April 2014, the termination of the Applicant's permanent appointment took effect, following which he went on early retirement.

Applicant's submissions

54. The Applicant's principal contentions may be summarized as follows:

a. The decision to abolish the Applicant's post and to terminate his permanent appointment was contrary to General Assembly resolution 54/249, adopted on 23 December 1999, which emphasized that "the introduction of new technology should lead neither to the involuntary separation of staff nor necessarily to a reduction of staff". The ACABQ approved the budget for 2014–2015 and proposed abolishment of posts in the Publishing Section based upon the assurances that DGACM was acting proactively to address the matter consistent with resolution 54/249. The Administration has failed to show that the General Assembly has rescinded its mandate as reflected in General Assembly resolution 54/249;

b. The Secretary-General lacked the authority to terminate the Applicant's permanent appointment. Pursuant to staff rule 13.1(a), the Applicant retained his permanent appointment until his separation from the Organization, and therefore the Secretary-General could not terminate that appointment (i.e., initiate the separation from service) under staff regulation 9.3(a)(i) as read with staff rules 9.6(a) and 9.6(b);

c. The procedures adopted in the implementation of the reduction of staff, including for the Applicant, breached the obligations of good faith and fair dealing. The written and oral evidence in this case demonstrates that the Organization's policy to require staff on abolished posts to apply and be considered for vacancies misplaced and shifted the responsibility for searching out and finding suitable positions onto the shoulders of the affected staff. This was contrary to the requirements of staff rules 13.1(d) and (e);

d. The Applicant was targeted for termination because of his history of advocacy on behalf of staff against the Administration, particularly in the period of 2006 to 2013.

Respondent's submissions

55. The Respondent's principal contentions may be summarized as follows:

a. The termination of the Applicant's permanent appointment was lawful. The General Assembly abolished 59 posts in the Publishing Section when it adopted the programme budget for the 2014–2015 biennium by resolution 68/246 of 27 December 2013. General Assembly resolutions are binding upon the Secretary-General and on the Organization. The Secretary-General has the legal authority and obligation to implement the General Assembly's decision to abolish the posts (*Ovcharenko et al. and Kucherov* UNDT/2014/035, paras. 30–33);

b. Staff regulation 9.3 and staff rules 13.1 and 9.6(c)(i) give the Secretary-General the authority to terminate permanent appointments due to abolition of posts. This authority is also reflected in the Applicant's letter of appointment;

c. The Organization complied with its obligations under staff rule 13.1(d) and (e). Starting 2013, well in advance, the Organization made substantial good faith efforts to find available and suitable positions at Headquarters. DGACM consulted with the staff representatives to ensure that the Organization made good faith efforts to assist permanent staff. The Organization provided training and career support to the affected staff. The Organization took active steps to identify available and suitable positions for affected staff members, including: (i) DGACM implemented a hiring freeze on external recruitment in the General Service category from 2012; (ii) the Executive Office, with the assistance of OHRM,

notified staff directly of vacancies (in the Secretariat and other agencies) in New York; (iii) in February 2013, the ASG/OHRM approved a measure whereby the OHRM initially released to Hiring Managers only the profiles of eligible and qualified internal candidates in the Publishing Section in order for Hiring Managers to give them priority consideration for positions advertised in Inspira; (iv) in October 2011, the Organization allowed on an exceptional basis 31 staff members in the Trades and Crafts category to be eligible for positions in the General Services category by waiving the requirements for the Administrative Assessment Support Test ("ASAT"). DGACM and the Department of Public Information also established a digitization project, to which 8 staff members were assigned from June 2013. As a result of these steps, 24 affected staff members found new positions;

d. The Organization's efforts to assist staff members in identifying available and suitable positions continued after the General Assembly's approval of the 2014–2015 budget. On 31 December 2013 and 2 January 2014, DGACM published 19 job openings (including five temporary job openings) in the General Service category for printing and distribution operations in the Meetings and Publishing Division. All of the 19 staff members selected for these positions had received notices of termination of their permanent appointments or non-renewal of their fixed-term appointments;

e. In 2013, DGACM secured extra-budgetary funding from the Government of Qatar to establish a digitization project. On 7 February 2014, temporary job openings were posted at the G-4, G-5 and G-6 levels. As an exceptional measure, these job openings were limited to DGACM staff only;

f. The Applicant shared the responsibility for searching and finding a position. It was not unreasonable to expect that he would demonstrate his

interest in positions by applying for the positions in a timely manner for which he considered himself suitable. This is a fundamental requirement of the staff selection system. A job application in the form of a personal history profile ("PHP") form, combined with a job interview, are commonly and generally accepted as the most efficient method of assessing whether a staff member is suitable for a position. Nor is it unduly burdensome to require a staff member to express his or her interest before engaging in the task of considering him or her for a job opening. The overwhelming majority of affected staff members were able to apply for positions for which they considered themselves suitable and were successful in their applications;

g. The Applicant bears, in large part, the responsibility for his separation from service due to his repeated failure to apply for positions in within the deadlines. The Applicant unsuccessfully applied for four temporary positions in DGACM. His lack of success does not demonstrate that the Organization failed to give them the required consideration. The obligation to retain permanent staff under staff rule 13.1(d) in preference to other types of appointments contains a caveat that regard shall be given to "relative competence". The Applicant has not adduced any persuasive evidence to demonstrate that he was not afforded due consideration in the assessment of his relative competence;

h. The new positions created in DGACM in 2014 were filled through a transparent and competitive selection process. In the alternative restructuring proposal submitted to the Secretary-General in May 2013, a staff representative for DGACM proposed that "[s]election of the staff would be carried out in accordance with the staff regulations and rules, and in full transparency and consultation with the staff, with priority given to the permanent and long-serving fixed-term staff". This is exactly what happened. In accordance with the staff selection system, staff members

were required to apply for the positions that they considered themselves suitable for and compete for those positions;

i. The Applicant has sought to introduce a new claim at the hearing that the decision to separate him was motived by personal animus on the part of Mr. Franz Baumann, the former Assistant Secretary-General, DGACM. The Applicant did not pursue the claim in his request for management evaluation or his initial application. In any event, the Applicant does not meet his burden of proof in proving a personal animus claim.

Applicable law

Applicable law on termination of permanent appointments

56. 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;

57. Staff regulation 9.3(a)(i) states:

> **Regulation 9.3**
>
> (a) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment or for any of the following reasons:
>
> (i) If the necessities of service require abolition of the post or reduction of the staff;

58. Staff rule 9.6 states in relevant parts:

> **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.
>
> …
>
> **Termination for abolition of posts and reduction of staff**
>
> (e) Except as otherwise expressly provided in paragraph (f) below and staff rule 13.1, if the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post or the reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in the following order of preference:
>
> (i) Staff members holding continuing appointments;
>
> (ii) Staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment;
>
> (iii) Staff members holding fixed-term appointments.
>
> …
>
> (f) The provisions of paragraph (e) above insofar as they relate to staff members in the General Service and related categories shall be deemed to have been satisfied if such staff members have received consideration for suitable posts available within their parent organization at their duty stations.

59. Staff rule 13.1 states in relevant parts (emphasis added):

> **Rule 13.1**
>
> **Permanent appointment**
>
> (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. …
>
> (e) The provisions of paragraph (d) above insofar as they relate to staff members in the General Service and related categories shall be deemed to have been satisfied if such staff members have received consideration for suitable posts available within their parent organization at their duty station.

Applicable law on staff representation

60. ST/AI/293 (Facilities to be provided to staff representatives) states in relevant parts:

> **Facilities to be afforded**
>
> 3. Staff representatives as well as staff representative bodies shall be afforded such facilities as may be required to enable them to carry out their functions promptly and efficiently, while not impairing the efficient operation of the organization. The precise nature and scope of the facilities to be provided at each duty station shall be determined in accordance with the procedures set out in chapter VIII of the Staff Rules.
>
> …
>
> **Official time for staff representational activities**
>
> 10. The President or Chairman of the Executive Committee of each Staff Council or corresponding staff representative body at New York, Geneva, Vienna, Addis Ababa, Baghdad/Beirut (ECWA), Bangkok, Nairobi and Santiago shall, if he/she wishes, be released from assigned duties during his/her term of office … .
>
> …

> 11. Other members of the Executive Committee should be afforded the necessary time required for them to carry out their functions promptly and efficiently. The details of such arrangements are to be determined in accordance with the procedures set out in chapter VIII of the Staff Rules.

International standards on retrenchment and retention

61. The Preamble to the United Nations Charter, in reaffirming faith in fundamental human rights, equal rights, and the dignity and worth of the human person undertakes "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". The Secretary-General's Note on the Report of the Redesign Panel on the new system of justice A/61/758 (23 February 2007), in recognizing that staff members have no legal recourse to national courts emphasized that

> the United Nations as an organisation involved in setting norms and standards and advocating for the rule of law, has a special duty to offer its staff timely, effective and fair justice. It must therefore 'practice what it preaches' with respect to the treatment and management of its own personnel. The Secretary-General believes that staff are entitled to a system of justice that fully complies with the applicable international human rights standards.

62. The General Assembly in adopting the statutes setting up the Tribunals by resolution 63/253 established the new "system of administration of justice consistent with the relevant rules of international law and the principles of rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike".

63. It has been noted that while the United Nations Organization "does not deal with labour matters as such, and recognizes the ILO [International Labour Organisation] as the specialized agency responsible for taking appropriate action for the accomplishment of the purposes set out in [the ILO] Constitution, some

UN instruments of more general scope have also covered labour matters".[1] For example, some provisions concerning employment or labour matters are contained in the 1948 Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights, and also in the International Covenant on Economic, Social and Cultural Rights. It has been observed that the Covenants, because of their comprehensive nature, are drafted in general terms, and the various rights relating to labour are dealt with in a less precise and detailed way than ILO standards.[2]

64. There are international norms and standards regarding the termination of employment of work due to economic, technological or structural change, and the rights of retrenched workers and of staff representatives. The International Labour Organization Convention on Termination of Employment (Convention No. C158) (1982), which contains provisions applicable to all branches of economic activity and to all employed persons (art. 2), states at art. 4 that the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service. Union membership or participation in union activities; seeking office or acting or having acted in the capacity of a workers representative; the filing of a complaint or participation in proceedings against an employer involving alleged violation of laws or regulations, shall not constitute valid reasons for termination (art. 5).

65. Article 19 of ILO Recommendation on Termination of Employment (Recommendation No. R166) (1982), enjoins all parties concerned to seek to minimize and mitigate the adverse effects of the termination of employment of workers for reasons of an economic, technological, structural or similar nature, without prejudice to the efficient operation of the undertaking. Amongst measures to avert or minimize termination, Recommendation No. R166 recommends, *inter*

[1] Nicolas Valticos and Geraldo W. von Potobsky, *International Labour Law* (Kluwer Law and Taxation Publishers, 1995), pp. 70–71.
[2] *Id*.

alia: restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal working hours. Recommendation No. R166 also emphasizes the need for established criteria for selection for termination and priority on rehiring.

International standards on staff representation

66. The ILO Convention on the Right to Organise and Collective Bargaining (Convention No. 98) (1949), and the ILO Workers Representative Convention (Convention No. C135) (1971), state that workers representatives shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers representative or on union membership or participation in union activities, insofar as they act in conformity with existing laws or collective agreements. Article 6(2) of ILO Recommendation on Workers Representatives (Recommendation No. R143) (1971) recommends specific measures to be taken to ensure effective protection of workers representatives, *inter alia*: detailed and precise definition of reasons justifying termination of employment of workers representatives, requirement of consultation with an advisory opinion from an independent body before dismissal of workers representatives, special recourse procedure where workers representatives consider their employment has been unjustifiably terminated or they have been subjected to an unfavourable change in the conditions of employment or to unfair treatment, provision for an effective remedy including reinstatement with payment of unpaid wages and maintenance of the acquired rights and recognition of a priority to be given to workers representatives with regard to their retention in employment in case of reduction of the workforce (see art. 6 (2)(f)).

67. The ILO Committee on Freedom of Association (see the Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO Fifth (revised edition) emphasizes the need for the

protection of staff representatives as set out in the aforementioned Conventions and Recommendations. In particular, paragraphs 799, 800, 804, and 832–833 of the Digest state:

> 799. One of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom.
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> …
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> 800. The Committee has drawn attention to the Workers' Representatives Convention (No. 135) and Recommendation (No. 143), 1971, in which it is expressly established that workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as workers' representatives or on union membership, or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements.
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> …
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> 804. The Committee has pointed out that one way of ensuring the protection of trade union officials is to provide that these officials may not be dismissed, either during their period of office or for a certain time thereafter except, of course, for serious misconduct.
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> …
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> 832. In cases of staff reductions, the Committee has drawn attention to the principle contained in the Workers' Representatives Recommendation, 1971 (No. 143), which mentions amongst the measures to be taken to ensure effective protection to these workers, that recognition of a priority should be given to workers' representatives with regard to their retention in employment in case of reduction of the workforce.

> …
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> 833. The Committee has emphasized the advisability of giving priority to workers' representatives with regard to their retention in employment in case of reduction of the workforce, to ensure their effective protection.

Consideration

Receivability

68. The Respondent submitted that the present application was not receivable because the notice of termination given to the Applicant was not an administrative decision as it was dependent on whether or not the Applicant was subsequently selected for a position.

69. The letter of termination stated in no uncertain terms that the post against which the Applicant had been placed was abolished by the General Assembly effective 1 January 2014, and "as a result, the Secretary-General has decided to terminate [his] permanent employment". The letter further stated that it "constitute[d] the formal notice of termination of [the Applicant's] permanent appointment" and that, "[i]n the event [the Applicant is] not selected for a position, … [he] will be separated from service not less than three months (90 days) of receipt of this notice". This letter, without any doubt, affected the Applicant's terms of employment, as it resulted in the termination of his employment by abolishment of the post he encumbered, with a three-month notice.

70. The Tribunal finds that, pursuant to art. 2.1 of the Tribunal's Statute, the present application is receivable. The Tribunal will now examine whether the termination of the Applicant's employment by abolishment of post was lawful.

Overview of relevant case law

United Nations Dispute and Appeals Tribunals

71. As noted by the United Nations Appeals Tribunal in *Masri* 2016-UNAT-626 (para. 30), "it is within the remit of management to organize its processes to lend to a more efficient and effective operation of its departments." However, there is a long line of authorities regarding the Respondent's duties towards staff members on abolished posts. In one of the earliest Dispute Tribunal cases on the subject matter—*Dumornay* UNDT/2010/004 (case concerning the United Nations Children's Fund ("UNICEF"), affirmed on appeal)—the Tribunal examined in paras. 30–34 whether there were reasonable efforts by the Administration to find alternative employment for the applicant who was a permanent staff member on an abolished post. The Tribunal found that the applicant failed to show that UNICEF did not fulfil its obligations.

72. In *Dumornay* 2010-UNAT-097, the Appeals Tribunal affirmed *Dumornay* UNDT/2010/004, referring in para. 21 to "reasonable efforts … to try to find [the Applicant] a suitable post":

> … Dumornay [permanent staff member] was given a three-month temporary appointment after her post was abolished and reasonable efforts were made by the Administration to try to find her [the Applicant—a permanent staff member] a suitable post …

73. In *Bye* UNDT/2009/083 (case concerning the United Nations Office of the High Commissioner for Human Rights; no appeal), the Tribunal observed that it was unclear whether the requirement of good faith efforts to find alternative employment applied to staff on non-permanent appointments other than permanent staff on abolished posts. However, the Tribunal noted that the former United Nations Administrative Tribunal ("UNAdT") held the view that the requirement of good faith in the search for alternative employment extended to other, non-permanent categories of staff. The Tribunal therefore considered and found that the Administration made *bona fide* efforts to find alternative

employment for the applicant, the holder of a fixed term appointment, although those efforts were unsuccessful.

74. In *Shashaa* UNDT/2009/034 (case concerning the United Nations Development Programme ("UNDP"); no appeal), paras. 25–27 and 39, the Dispute Tribunal referred to some of UNAdT pronouncements on good faith efforts in finding alternative employment for displaced permanent staff, noting that "the employer can expect reasonable cooperation" from the affected staff member.

75. In *Mistral Al-Kidwa* UNDT/2011/199 (case concerning UNICEF; no appeal), paras. 50–74, the Tribunal addressed UNICEF's rules for staff on abolished posts, including additional obligations of the Administration with respect to search for alternative employment.

76. In *Tolstopiatov* UNDT/2010/147 (case concerning UNICEF; no appeal), the Tribunal addressed UNICEF's rules for staff on abolished posts, including additional obligations of the Administration with respect to search for alternative employment. In para. 45, the Tribunal stated in essence that the obligation of "good faith effort" is implicitly part of staff rule 9.6(e) in respect of the preference given to staff members in cases of abolishment of posts. The Tribunal found that the burden of proving that the Organization made a diligent search rests with the Organization.

77. In *Abdalla* UNDT/2010/140 (case concerning the UN Secretariat, affirmed in *Abdalla* 2011-UNAT-138), the applicant was a temporary staff member outside the scope of preference stated in staff rule 9.6(e). The Tribunal stated in paras. 27–28:

> … The Tribunal also noted the jurisprudence of the former United Nations Administrative Tribunal applicable to cases of abolishment of post to assess whether the Organization was obliged to find alternative employment for the applicant, as a staff member of a downsizing Organization before his reassignment to

> UNAMI, and after that, as a staff member of UNAMI on temporary assignment whose post had been abolished.
>
> 28. The former United Nations Administrative Tribunal has consistently held that "a good faith effort must be made by the Organization to find alternative posts for permanent staff members whose post are abolished" (see UNAT Judgement No. 910, *Soares* (1998), citing Judgement No. 447, *Abbas* (1989); Judgement No. 85, *Carson* (1962); Judgement No. 1128, *Banerjee* (2003)). The Tribunal has stated that such a duty is strictly speaking limited to staff members with permanent appointments and that to apply the same duty to staff members with fixed-term appointments appeared to fall out of the scope of application of the former staff rule 109.1 (see Judgment No. UNDT/2009/083, *Bye*). Even if the jurisprudence refers to former staff rule 109.1, the current staff rule 9.6 (e) cited above, embodies a similar rule in respect of the preference given to staff members in cases of abolishment of posts.

78. In *Abdalla* 2011-UNAT-138 (para. 25), the Appeals Tribunal found that there were "no provisions in the Staff Regulations and Rules that require the Organization to create or find a suitable post for a staff member on a *temporary* assignment in cases of abolition of post" (emphasis added).

79. In *Pacheco* UNDT/2012/008 (case concerning the Office for the Coordination of Humanitarian Affairs ("OCHA"); affirmed on appeal), the Tribunal dismissed the applicant's claim that OCHA was obliged to make a good faith effort to find an alternative suitable post. The Tribunal found that the applicant's fixed-term contract expired and hence staff rule 9.6(e) did not apply (see paras. 71–77 of *Pacheco*).

80. In *Rosenberg* UNDT/2011/045 (case concerning UNDP; no appeal), the Tribunal found that reorganization was a valid exercise of the Respondent's discretion and the decision not to retain the staff member further was not unlawful.

81. The most recent pronouncement of the Dispute Tribunal is *El-Kholy* UNDT/2016/102 (presently under appeal). Although that judgment concerned UNDP, which has a number of internal issuances concerning abolishment of posts

and related matters, the Tribunal provided a detailed examination of the relevant case law and made a number of significant legal pronouncements of general application. The Tribunal stated:

> 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.
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> …
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> 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.
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> …
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> 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.

…

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.

…

89. … [T]he 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.

Former United Nations Administrative Tribunal

82. In Judgment No. 85, *Carson* (1962) (case concerning a former staff member of UNICEF), the UNAdT stated at paras. 8–11 that a good faith effort must be made by the Organization to find alternative posts for permanent staff members whose posts are abolished. The UNAdT stated that "[i]n order to prove that the staff rights have not been disregarded, the Respondent has to show in this case: (a) that the Applicant was in fact considered for available posts and (b) that the Applicant was genuinely found not suitable for any of them".

83. The UNAdT long noted the importance of respecting the rights of staff members on permanent appointments. In Judgment No. 679, *Fagan* (1994) (case concerning a former staff member of UNICEF), the UNAdT stated at para. XIII that the application of former staff rule 109.1(c), which under the former edition of the Staff Rules set out the order of retention of staff on abolished posts, was "vital to the security of staff who, having acquired permanent status, must be presumed to meet the Organization's requirements regarding qualifications". The UNAdT further stated that "while efforts to find alternative employment cannot be unduly prolonged and the staff member concerned is required to cooperate fully", such efforts must be conducted "in good faith with a view to avoiding, to the greatest possible extent", a situation in which permanent staff members with a significant record of service are dismissed and forced "to undergo belated and uncertain professional relocation".

84. In Judgment No. 1409, *Hussain* (2008) (concerning a former staff member of UNDP), 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".

85. In Judgment No. 910, *Soares* (1998) (concerning a former staff member of UNDP), the UNAdT reiterated that a good faith effort must be made by the Organization to find alternative posts for permanent appointment staff members whose posts are abolished. The Respondent must show that the staff member was considered for available posts and was not found suitable for any of them prior to termination. The Tribunal has held in the past that where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given (see also Judgment No. 447, *Abbas* (1989); Judgment No. 1128, *Banerjee* (2003)).

86. Although the rulings of the UNAdT referred to above relate to cases involving UNICEF and UNDP, the UNAdT found that a duty to deploy good faith efforts to find alternative employment for the displaced staff member existed for any permanent staff member whose terms of employment were governed by the Staff Regulations and Rules. See, e.g., para. VIII of Judgment No. 1163, *Seaforth* (2003), stating that "where there is an abolition of a 100 series post, the Respondent has an obligation to make a bona fide effort to find staff members another suitable post, assuming that such a post can be found, and with due regard to the relative competence, integrity and length of service of that staff member". See also para. VII of Judgment No. 1254 (2005).

Administrative Tribunal of the International Labour Organization

87. In *El-Kholy* UNDT/2016/102, the Dispute Tribunal included a number of relevant pronouncements of the Administrative Tribunal of the International Labour Organization ("ILOAT").

88. In Judgment No. 1782 (1998), at para. 11, the ILOAT stated:

> What [staff rule 110.02(a) of the United Nations Industrial Development Organization] 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.

89. In Judgment No. 3238 (2013), the ILOAT decided that the advertising of a post inviting reassigned staff members to apply would not be sufficient to comply with the duty to give them priority consideration. The ILOAT stated at para. 12:

> 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.

90. In Judgment No. 3437 (2015), at para. 6, the ILOAT stated:

> 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, Judgments 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).

Legal status of "permanent staff"

91. The status of a "permanent" staff member signifies a particular type of an employment relationship, whereby the Organization, in recognition of the staff

member's exemplary and long service, provides her or him with additional legal protections and guarantees.

92. The historic reasons for the creation and importance of permanent staff were eloquently articulated by Mr. Dag Hammarskjöld, the second Secretary-General of the United Nations, in a lecture entitled "The International Civil Servant in Law and in Fact", delivered at Oxford University on 30 May 1961, several months before his tragic death. The Secretary-General spoke to the independent nature of the international civil service and, in a key part of his lecture, underlined the significance of permanent status for the staff of the Organization:[3]

> A risk of national pressure on the international official may also be introduced, in a somewhat more subtle way, by the terms and duration of his appointment. A national official, seconded by his government for a year or two with an international organization, is evidently in a different position psychologically—and one might say, politically—from the permanent international civil servant who does not contemplate a subsequent career with his national government. This was recognized by the Preparatory Commission in London in 1945 when it concluded that members of the Secretariat staff could not be expected 'fully to subordinate the special interests of their countries to the international interest if they are merely detached temporarily from national administrations and dependent upon them for their future'. Recently, however, assertions have been made that it is necessary to switch from the present system, which makes permanent appointments and career service the rule, to a predominant system of fixed-term appointments to be granted mainly to officials seconded by their governments. This line is prompted by governments which show little enthusiasm for making officials available on a long-term basis, and, moreover, seem to regard—as a matter of principle or, at least, of 'realistic' psychology—the international civil servant primarily as a national official representing his country and its ideology. On this view, the international civil service should be recognized and developed as being an 'intergovernmental'

[3] Dag Hammarskjöld, *The International Civil Servant in Law and in Fact: Lecture delivered to Congregation at Oxford University* (30 May 1961), available at http://www.un.org/depts/dhl/dag/docs/internationalcivilservant.pdf (United Nations Department of Public Information, Dag Hammarskjöld Library, "Dag Hammarskjöld" http://www.un.org/depts/dhl/dag/time1961.htm).

> secretariat composed principally of national officials assigned by their governments, rather than as an 'international' secretariat as conceived from the days of the League of Nations and until now. In the light of what I have already said regarding the provisions of the Charter, I need not demonstrate that this conception runs squarely against the principles of Articles 100 and 101.

93. It is important to keep in mind the reasons for the creation and existence of an institute of permanent staff in the context of an international organization such as the United Nations. Staff members of the Organization owe their allegiance to no national government. Having complied with all the necessary requirements and criteria for a permanent appointment, and having received such an appointment, they become entitled to certain legal protections and advantages as articulated in the Staff Regulations and Staff Rules, including as compared to staff on other types of appointments. This reasoning applies equally to permanent staff regardless of the type of their contractual arrangement (professional-level, general service-level, or other).

94. Several years prior to Secretary-General Hammarskjöld's Oxford lecture, the UNAdT expressed similar sentiments in one of its earlier judgments, remarking that permanent appointments have "been used from the inception of the Secretariat to ensure the stability of the international civil service and to create a genuine body of international civil servants freely selected by the Secretary-General" (UNAdT Judgment No. 29, *Gordon* (1953)). The UNAdT subsequently remarked that "[p]ermanent appointments are granted to those staff members who are intended for the career service" (UNAdT Judgment No. 85, *Carson* (1962)).

Alleged breach of General Assembly resolution 54/249

95. The Applicant submits that the decision to terminate his permanent appointment was contrary to General Assembly resolution 54/249 (Questions relating to the proposed budget for the biennium 2000–2001), adopted on 23 December 1999.

96. General Assembly resolution 54/249 (adopted on 23 December 1999) stated:

> *The General Assembly*,
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> ...
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> 59. *Requests* the Secretary-General to undertake a comprehensive review of the post structure of the Secretariat, taking into account, inter alia, the introduction of new technology, and to make proposals in the proposed programme budget for the biennium 2002-2003 to address the top-heavy post structure of the Organization;
>
> 60. *Welcomes* the use of information technology as one of the tools for improving the implementation of mandated programmes and activities;
>
> …
>
> 62. *Emphasizes* that the introduction of new technology should lead neither to the involuntary separation of staff nor necessarily to a reduction in staff;

97. The Applicant submits that, subsequently, on 27 December 2013, the General Assembly adopted resolution 68/246 based upon the recommendation of the ACABQ (see ACABQ report A/68/7) which relied on the assurances provided by DGACM to address the matter proactively in view of the explicit mandate of the General Assembly that the abolishment of posts in the Publishing Section should not lead to involuntary separation of staff.

98. General Assembly adopted resolution 68/246 stated:

> *The General Assembly*,
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> ...
>
> 18. *Also endorses*, subject to the provisions of the present resolution and without establishing a precedent, the recommendations of the Advisory Committee concerning posts and non-post resources as contained in chapter II of its first report on the proposed programme budget for the biennium 2014–2015.

99. The Tribunal notes that the General Assembly resolution 54/249 pre-dated the events in question by approximately 14 years, and was obviously issued in the

context of a different biennial cycle. The General Assembly's statement in para. 62 of resolution 54/249 that "the introduction of new technology should lead neither to the involuntary separation nor necessarily to a reduction in staff" were limited to the biennium 2000–2001. The language of the resolution indicates that its intention was not to take away the Secretary-General's lawful authority under the Staff Regulations and Rules to terminate appointments following the abolition of posts (hence the use of the phrase "*should* [not]" as opposed to "*shall* [not]"). Notably, in this case it was the General Assembly's own approval by resolution 68/246, adopted on 27 December 2013, of the proposal to abolish 59 posts that precipitated the termination of contracts of the affected staff. The General Assembly's approval of the proposed abolition demonstrates that the General Assembly did not consider its own resolution 54/249 as preventing the abolishment of posts.

100. The Tribunal therefore finds that the language of General Assembly resolutions 54/249 and 68/246 did not have the effect of taking away the authority of the Secretary-General to terminate permanent appointments based on approved abolition of posts, particularly in changed circumstances as the evidence indicated.

101. Moreover, it is generally recognized that where the employer contemplates the introduction of major changes in production, program, organization, structure or technology, terminations of employment may arise as a result of such changes (see ILO Convention on Termination of Employment (Convention No. C158) and Termination of Employment Recommendation (Recommendation No. 166). This is also recognized in the case law of the Dispute Tribunal and the Appeals Tribunal (see, e.g., *Rosenberg* UNDT/2011/045 (not appealed); *Adundo et al.* UNDT/2012/077 (not appealed); *Masri* 2016-UNAT-626). Further, in cases of *bona fide* downsizing or redundancy, the employer has a wide but not unfettered discretion in the implementation thereof. Whilst the Administration has to take into account operational requirements and the need for the efficient operation of

the Organization, its decisions must be informed by established facts and supported on a legal basis, and it must also establish fair and reasonable procedures, including fair and objective criteria for selection for retrenchment and retention. More specifically, in the context of the United Nations, staff rule 13.1(d) sets out some of these criteria, for example, permanent appointees shall be retained in preference to those on other types of appointments, due regard shall be given to competence, integrity and length of service, nationality, etc.

102. The Tribunal therefore finds that there was no breach of General Assembly resolution 54/249.

Authority to terminate the Applicant's contract

103. The Applicant submits that the Secretary-General lacked the authority to terminate his permanent appointment. The Applicant refers to staff regulation 9.3(a)(i) and staff rule 9.6. He also relies to staff rule 13.1(a), which states:

> (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.

104. In his closing submission, the Applicant presented the following argumentation in support of his contention that the Secretary-General lacked the authority to terminate his permanent appointment:

> 15. … [S]ince a staff member holding a permanent appointment as of 30 June 2009 shall retain the appointment until he separates from the Organization, the Secretary-General may not terminate that appointment (i.e., initiate the separation from service) under [staff regulation] 9.3(a)(i). This is an exception to the rule pursuant to which all permanents appointments shall be governed by the terms and conditions applicable to continuing appointments.

…

> 17. The evidence established that [the Applicant] was granted a permanent appointment prior to 30 June 2009 and has been holding such appointment since then. Therefore, pursuant to Staff [Regulation] 13.1(a), [the Applicant] had retained his permanent appointment until he separated from the Organization. The separation of [the Applicant] cannot be initiated by the Secretary-General, i.e., [the Applicant's] permanent appointment cannot be terminated by the Secretary-General (Staff Rules 9.6(a) and 9.6(b)).

105. This submission advanced by the Applicant is unpersuasive. Staff rule 13.1(a) states clearly that 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 [i.e., under staff rule 13.1]".

106. This means that, in the event of a conflict between staff rules 9.6 and 13.1, the provisions of staff rule 13.1 would prevail as *lex specialis*. However, because the Staff Regulations are superior to the Staff Rules (*Villamoran* UNDT/2011/126), provisions of staff rule 13.1 cannot override the application of staff regulation 9.3(a)(i), which provides that the Secretary-General may terminate continuing appointments, particularly given the language of staff rule 13.1(a), which provides that "permanent appointments shall be governed by the terms and conditions applicable to continuing appointments, except as provided under the present rule".

107. Notably, staff rule 13.1(d) specifically discusses abolition of posts and reduction of staff, including the order of retention of staff, with preference given to staff on permanent appointments, "provided that due regard shall be given in all cases to relative competence, integrity and length of service".

108. Therefore, it follows from the language of staff rule 13.1(a), 13.1(d), and staff regulation 9.3(a)(i) that contracts of permanent staff may be terminated by

the Secretary-General, provided that it is lawfully done, i.e., that relevant conditions concerning preferential retention are satisfied.

109. Therefore, the Tribunal concludes that the Secretary-General had the legal authority to terminate the Applicant's permanent appointment.

Compliance with the requirements of staff rule 13.1

110. The Applicant submits that the Organization breached its obligations of good faith and fair dealing by failing to respect the protections enjoyed by the Applicant as a permanent staff member. The Applicant submits that the Administration misplaced and shifted the responsibility for searching out and finding suitable positions unto the shoulders of the Applicant, contrary to the established jurisprudence and rule 13.1(d), which place the onus on the employer to be protective of the permanent staff members.

111. In the termination letter of 31 December 2013, the Executive Officer wrote:

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

112. This paragraph demonstrates that, from the outset of the process, the Administration considered, contrary to staff rule 13.1(d) and the extensive jurisprudence hereinbefore cited, that the primary responsibility for finding alternative employment rested with the Applicant, who was to "apply for all available positions" that he felt matched his competencies and skills. This set the overall tone for the subsequent efforts to find an alternative post for the Applicant.

113. The Tribunal will examine briefly the four job applications submitted by the Applicant in the period of March to April 2014. All of these applications were rejected on various grounds.

114. The first two job applications (Publishing Production Assistant, G-4 and G-5 levels) were submitted after the deadline and rejected, despite the fact that the selection processes were ongoing at the time. The Applicant testified that the Director had told him that, even though the deadline for applications had expired, the Applicant should nevertheless apply for the two temporary job openings on the assurance that DGACM had control of the applicable deadlines. When he submitted his applications, he was informed that they could not be considered, although candidates were being interviewed and no final selections had been made at that time.

115. The third job application (Publishing Assistant, G-6 level) was rejected because the Applicant was applying for a position that was more than one level above the G-4 level post he held at the time. His application was rejected outright without consideration of his exceptional situation or contemplation of some arrangement that would allow the Applicant to be utilized for those functions, albeit at a lower level (*El-Kholy*).

116. The fourth job application (Meeting Services Assistant, G-5 level) was rejected because the Applicant provided an incomplete PHP form. The Respondent submitted that the Applicant's PHP form did not have enough information about his work experience and, as a result, he was found not to have met the requirements of the job opening. Mr. Nandoe testified that other staff members managed to complete their PHP forms, so it was not unduly burdensome to expect the Applicant to do so as well; however, the Applicant never asked for any assistance in this regard. The Applicant on the other hand stated that he was asked to submit his performance appraisal reports which contained all the information, and that in any case he was applying for a job in the same department so all his information was available to both DGACM and the Printing

Section, and that any additional information could have easily been requested of him. Mr. Hassanin testified that, had he applied to a different Department, he would have submitted his full PHP form. The Tribunal finds that, with respect to the fourth job application, the Administration fell short of the required standard under staff rule 13.1. It had the Applicant's relevant information and should not have removed him from consideration on these technical grounds. There is no evidence that the Administration even asked the Applicant to re-submit any missing information—instead, his application was simply rejected.

117. Mr. Nandoe testified that he had told the Applicant that it was in his interests to apply for the new positions created in the Meetings and Publication Division, and that all staff members were repeatedly informed that they had to apply. Further, the Organization deferred the deadline for the first two job openings twice and the Executive Office reminded the Applicant in writing that he was required to apply for the positions. However, the advertising of a post with an invitation to apply does not give priority to affected staff, nor does it equate with a formal proposal to assign a permanent staff member to a new position (see ILOAT Judgement No. 3238 (2013)).

118. It is troubling that the Applicant, a permanent staff member on an abolished post, was required—in breach of staff rule 13.1—to apply competitively for vacant positions, let alone compete for them with other, non-permanent staff. There is no record, and indeed the Respondent did not produce any evidence, of any distinction being made during these selection exercises between permanent staff and other categories of staff. The Applicant's unrebutted evidence is that he and other permanent colleagues were competing with staff members on fixed-term and/or temporary contracts. There was no actual preference afforded to permanent staff. The Applicant identified several staff members by name who had less seniority than him and held fixed-term contracts but nevertheless remained with the Organization.

119. It is trite law that it is management's prerogative to downsize or retrench workers for sound, valid, lawful, and good faith reasons. That such prerogative is not unfettered is also trite law. With regard to permanent appointees, the law is clearly set out in the aforementioned jurisprudence, including *El-Kholy*. Termination as a result of the abolition of a post is lawful provided the provisions of the Staff Rules are complied with in a proper manner. The Administration must give proper consideration, on a priority basis, with the view to retaining those permanent staff members whose posts have been abolished. Even though in assessing the suitability of staff members, due consideration must be given to relative competence, integrity and length of service, nothing in the Staff Rules states that such suitability can only be assessed if that staff member has applied for a post and competed for it against staff on other types of contracts. Rather, under the framework envisaged by staff rules 9.6 and 13.1, it is incumbent upon the Organization to review all possible suitable posts vacant or likely to be vacant in the future, and to assign affected permanent staff members on a priority basis.

120. Unlike in *El-Kholy*, where the applicant was offered posts which she declined, the Applicant in this case was not offered any positions prior to the abolishment of his post, or subsequent thereto. The Respondent in this case placed not an iota of evidence before the Tribunal to show that the required criteria were applied or considered, such as the Applicant's contract status, suitability for vacant posts, special skills, length of service, competence and integrity, nationality, etc., with a view to positioning him or offering him a position. There was no evidence of him being placed in a redeployment pool or of any effort to match his special skills, experience, taking into account other material criteria with a view to matching him with any vacant, new, or opening positions. The documentary evidence in this case, as well as the oral testimony of Mr. Nandoe and the Applicant, illustrates unequivocally that the main method of retention of staff was through a competitive process, without consideration of priority criteria such as contract type or seniority. The result of this was that fixed-term staff

members with less seniority than the Applicant were retained in preference to permanent staff, such as the Applicant.

121. Although the Administration took certain actions in an effort to find employment for the affected staff, as attested to by Ms. Asokumar—such as, since 2013, training, temporary reassignments to learn new skills, and waiving the ASAT to allow staff in the Trades and Crafts category to apply to posts in General Service category—the Administration not only shifted the onus of finding a suitable post onto the affected staff members, but did not give proper consideration to the distinction between permanent staff, like the Applicant, and other types of staff. As a result, the Administration contravened the requirement of priority for retention of permanent staff and failed to fully honour the material provisions of staff rule 13.1 with respect to the Applicant. As the Tribunal stated in *El-Kholy*, the onus was on the Administration to carry out a matching exercise prior to opening the vacancy to others, whether by an advertisement or otherwise.

122. Staff rule 13.1 is clear that permanent staff on abolished posts, if they are suitable for vacant posts, should only be compared against other permanent staff—it would be a material irregularity to place them in the same pool as continuing, fixed-term, or temporary staff members.

123. Furthermore, the evidence in this case, including the Applicant's testimony, shows that the Administration had created certain positions, for instance, "Front Desk", and chose staff members who were on fixed-term contracts at the G-4 and G-5 level with less seniority than the Applicant to occupy those posts. No evidence was tendered at the hearing to show that the Applicant did not satisfy the required criteria, or to show that any distinction was drawn between permanent staff and staff on other types of appointments in the process. Mr. Nandoe testified that, in fact, seniority was not one of the factors considered in the process.

124. The evidence also suggests that there were other posts against which the Applicant could have been considered. For instance, the Applicant gave unrebutted testimony that he subsequently discovered that there was a vacancy in the Arabic Language Group in desktop publishing for which he was qualified but was never informed about, let alone considered for. Mr. Nandoe also testified that he was not aware that the Applicant had a degree in accounting, although there was at one stage an accounting post available.

125. Further, no evidence has been introduced that, in the event no posts were available at the Applicant's level, the Organization considered placing him against a lower level post so as to secure his employment. As noted in *El-Kholy*,

> 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).

126. The Tribunal finds the Respondent failed to meet the requirements of staff rule 13.1 to reassign the Applicant as a matter of priority to another post matching his abilities and grade, and if this proved fruitless, to at least offer him duties at a lower grade and widen its search accordingly (ILOAT Judgment No. 3437). The Tribunal also accepts the Applicant's evidence that there were posts he could have been matched to, or was considered for, this that were only subsequently discovered by him.

127. The Tribunal therefore concludes that the Organization committed material irregularities and failed to act fully in compliance with the requirements of staff rule 13.1(d) and (e) and 9(6)(e).

Alleged bias against the Applicant for staff advocacy

128. The Applicant submits that he was targeted for his advocacy of staff rights. The Applicant provided a list of some of his activities which he believed caused the Administration to develop an animus against him and to target him for termination.

129. The Respondent submits that the Applicant's claims of bias are unsubstantiated. The Respondent states that the Applicant was a member of a large group of staff affected by the abolition exercise, and most of these staff members had no involvement in Staff Union activities, therefore he was not targeted for his union activities.

130. The Applicant testified that Mr. Nandoe was anxious to approve his transfer to a peacekeeping mission in Darfur because he told the Applicant that when he was in the office, staff would seek his advice before carrying out instructions given by Mr. Nandoe. Mr. Nandoe denied this statement by the Applicant, but stated that he had been told when he joined the Section that the Applicant was an irritant, although that was not Mr. Nandoe's view.

131. The Applicant introduced two witnesses, Mr. Pedro Lobo and Mr. Amjid Ejaz. Mr. Lobo was a Retired Warehouse Supervisor and worked for the Organization for 30 years. Mr. Amjid Ejaz was a Retired Document Coordinator Assistant (DGACM) and had been employed by the United Nations for 36 years. He retired in August 2011. Both Mr. Lobo and Mr. Ejaz testified that they knew the Applicant since 1987 and had first-hand knowledge of the Applicant's extensive advocacy work on behalf of staff members and on staff related issues. Indeed, it is a matter of record that the Applicant over the years has initiated, or been involved in, several proceedings before the Tribunals in this regard.

132. Mr. Lobo testified that on 17 December 2013, after the Applicant was elected 1st Vice President of the 44th Session of the Staff Union, several individuals were congratulating him at an office gathering, and that Mr. Nandoe

also congratulated him, adding, however, something along the lines of "this will be the first time in the history of the United Nations that an elected Vice President will be terminated". Mr. Nandoe confirmed that he had made such a statement as he felt that it could happen, although his remark was made by him in his capacity as a staff member and not a manager. He testified that he was aware of the request for an advice, made at the time through the Executive Office, as to whether the appointment of an elected Vice President of the Staff Union could be terminated. He said that there was no response to this enquiry. Mr Nandoe's candid evidence that the Applicant was considered by some senior managers to be troublesome shows that, at the very least, there was some discomfort in certain quarters of management

133. Mr. Ejaz testified that on 4 December 2010, while he and the Applicant were serving the Climate Control Conference in Cancun, Mexico, Mr. Stan Fernandez, then Chief of the Document Control Unit, stated that Assistant Secretary-General Franz Baumann was working towards getting the Applicant fired from the Organization. Mr. Baumann was not called to testify and this hearsay evidence remains uncorroborated.

134. Although the Applicant raised a number of troubling exchanges, there is insufficient evidence to demonstrate that the termination of his appointment was directly influenced by any particular animus against him. Having considered the totality of the evidence, the Tribunal finds that there is insufficient evidence to establish that the Applicant was terminated because of his involvement in Staff Union activities.

Applicant's status as an elected official of the Staff Union

135. At the time of the events, it was well known to management that the Applicant was recognized as an elected official of the Staff Union. In fact, the issue of whether his status as elected Vice President should affect the extension of his contract was raised and discussed within the Administration. The emails

produced in the course of the proceedings demonstrate that certain elements of the Administration were well aware that the Applicant could not be let go, and that he had to be retained as a senior staff official. This is further evidenced by Mr. Nandoe's remark, made on 17 December 2013, as discussed above.

136. Ms. Beswick testified that, in December 2013, she sought advice on whether the Applicant, as an elected Vice President, could have his contract terminated. She testified that to the best of her recollection she received no response to her enquiry. Pursuant to Order No. 81 (NY/2016), the Respondent was directed to produce Ms. Beswick's email and any response she received. Following submissions from both parties, it became clear that there were email exchanges beyond what Ms. Beswick recalled during her testimony and produced by the Respondent. In particular, the Applicant produced by way of a motion, an email dated 17 December 2013, which the Respondent not only failed to reveal during the proceedings and thereafter following Order No. 81 (NY/2016), but which the Respondent subsequently contended was irrelevant and not material. For reasons following hereunder, the Tribunal finds the email dated 17 December 2013 to be relevant and admissible, its prejudicial value if any, far outweighed by its probative value.

137. In the subject matter email of 17 December 2013 , Ms. Chiulli (Executive Officer) informed Mr. Olafsson, Ms. Beswick, and Mr. Nandoe that "Yes, as an elected official, the Department will be obliged to keep [the Applicant] on one of the Distribution posts". Inexplicably, this was followed three days later, on 20 December 2013, by an email from Ms. Francette James, Human Resource Officer, OHRM, stating, without any reference to any legal authority, that "As per your email message, please note OHRM's advice below [that] … all affected staff on abolished posts are to be treated equally under the staff regulations and rules".

138. While Ms. Chiulli, the Executive Officer of DGACM, expressed in her email a clear understanding of the General Assembly pronouncements; OHRM issued arbitrary and unsupported advice, concluding that the Applicant was not

entitled to any special consideration by virtue of his election as First Vice President of the Staff Union. OHRM's advice, referred to in Ms. James' email of 20 December 2013, was erroneous and lacked any basis in law. In fact, it disregarded and contradicted several issuances, which provide protections to staff representatives.

139. Indeed, as it was pointed out by the Applicant, these email exchanges indicate that management was aware of the impact of General Assembly resolution 51/22 (sec. II, paras. 10–12), which mandated that the functions of the elected staff representatives be considered official business and granted them time release, as recognized in other administrative instructions (ST/AI/293) and by the Fifth Committee (A/C.5.50/64 Annex).

140. These issuances are consistent with the internationally-accepted norms for elected officials. See, for example, The Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (Fifth (revised) edition), quoted above under "Applicable law".

141. The Tribunal finds that, in addition to the Organization's failure to fully apply staff rule 13.1 to the Applicant as a permanent staff member, the Organization also failed to give proper consideration to his status as a newly elected Vice President of the Staff Union. Had that factor been properly considered, in all likelihood the Organization would have reached the conclusion that the Applicant's appointment could not be terminated as a result of his staff representative status under the relevant legal instruments.

142. Thus, the Applicant's termination was unlawful because he did not receive proper consideration as a permanent appointee and as an elected high-level official of the Staff Union.

Relief

143. 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:

> 5. 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 for harm, supported by evidence, and shall provide the reasons for that decision.

144. The purpose of compensation is to place the staff member in the same position he or she would have been in, had the Organization complied with its contractual obligations (*Warren* 2010-UNAT-059; *Iannelli* 2010-UNAT-093). In *Antaki* 2010-UNAT-095, the Appeals Tribunal stated that "compensation may only be awarded if it has been established that the staff member actually suffered damage".

Emotional distress

145. The Applicant seeks compensation for emotional pain and suffering. At the hearing, the Applicant testified that the termination of his permanent contract affected his health, family, and emotional well-being. He testified that he was going through a marital separation due to the upheaval caused by the sudden premature termination of his contract. He felt that, after years of dedicated service

and many personal sacrifices in the name of the Organization, he was simply discarded. It was apparent during the course of the Applicant's testimony that the contested decision and its aftermath took a heavy personal and emotional toll on him. The Tribunal is satisfied that the Applicant gave convincing evidence of the emotional distress he suffered from the contested decision.

146. Given the circumstances of this case and the evidence given by the Applicant, the Tribunal finds it appropriate to award the sum of USD20,000 as compensation for emotional distress.

Pecuniary loss

147. The Applicant seeks compensation for the loss of income between April 2014 and 2024, when he would reach mandatory retirement age at 65. He also seeks compensation for loss of pension benefits and dependency allowance.

148. Pursuant to art. 10.5(b) of its Statute, the Tribunal may award compensation in appropriate cases for harm supported by evidence, normally not exceeding the equivalent of two years' net base salary. The Tribunal may not award exemplary or punitive damages (art. 10.7), but may, however, order in exceptional circumstances the payment of a higher compensation for harm supported by evidence, providing reasons for such decision. The Tribunal considers that this case involved termination with aggravating, egregious and exceptional circumstances, including the Applicant's length of service, his seniority, his status as a senior elected staff official at the time of the contested decision, and the breach of the relevant rules on retention of permanent staff and elected staff representatives. Even as a holder of a permanent appointment and elected Vice President of the Staff Association, he was made to undergo competitive recruitment exercises, whilst less senior non-permanent members were placed or retained in preference to him. Accordingly, in all these circumstances, this case constitutes an "exceptional case" within the meaning of art. 10.5(b) of the Tribunal's Statute.

149. Both the Dispute Tribunal and the Appeals Tribunal have stated that the injured party has a duty to mitigate losses and that any earnings should be taken into account for the purposes of calculating compensation (*Koh* UNDT/2009/078; *Tolstopiatov* UNDT/2011/012; *Garcia* UNDT/2011/068; *Mmata* 2010-UNAT-092). In Judgment No. 679, *Fagan* (1994), at para. XIII, the UNAdT also noted that the Administration should avoid, "to the greatest extent possible, the 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". The Applicant testified that he has been unable to secure alternative employment. He served the United Nations for nearly 26 years and is at an advanced age, his chances of securing alternative full-time employment at a comparable level are remote if not negligible.

150. It appears that the Applicant was paid termination indemnity upon his separation from service. As the Appeals Tribunal stated in *Bowen* 2011-UNAT-183, the Applicant's termination indemnity should be taken into account when awarding compensation. This is consistent with the Appeals Tribunal's pronouncement in *Warren* 2010-UNAT-059 that "the very purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations". Therefore, any amount of termination indemnity paid to the Applicant upon his separation is to be deducted from the final amount of compensation to be paid as alternative to rescission (see also *Koh* UNDT/2010/040 (no appeal); *Tolstopiatov* UNDT/2011/012 (no appeal); *Cohen* 2011-UNAT-131).

151. In all the circumstances of the present case, the Tribunal finds it appropriate, under arts. 10.5(a) and (b) of its Statute, to order rescission of the decision to terminate the Applicant's permanent contract or, alternatively, compensation in the amount of three years' net base salary, minus any termination indemnity paid to him upon his separation.

Orders

152. The decision to terminate the Applicant's permanent contract is rescinded.

153. As an alternative to rescission, the Respondent may elect to pay the Applicant compensation in the amount of three years' net base salary, minus any termination indemnity paid to him upon his separation.

154. The Applicant is awarded the sum of USD20,000 as compensation for emotional distress.

155. The aforementioned amounts shall bear interest at the U.S. 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.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 7th day of October 2016

Entered in the Register on this 7th day of October 2016

(*Signed*)

Hafida Lahiouel, Registrar, New York