UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2015/137
Judgment No.: UNDT/2016/204
Date: 11 November 2016
Original: English

Before: Judge Rowan Downing, Presiding
Judge Teresa Bravo
Judge Goolam Meeran

Registry: Geneva

Registrar: René M. Vargas M.

NAKHLAWI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Jérôme Blanchard, UNOG

Introduction

1. By application filed on 22 May 2015, the Applicant contests the decision to abolish her post and the termination of her permanent appointment without prior approval by the Board of Trustees of the United Nations Interregional Crime and Justice Research Institute ("UNICRI").

2. The Respondent filed his reply on 26 June 2015.

Facts

3. The Applicant joined the United Nations on 18 June 2001 at the Economic and Social Commission for Western Africa, as a Research Assistant at the G-5 level, on the basis of a short-term appointment. She was subsequently promoted to the G-6 level and was granted a permanent appointment with effect from 30 June 2009. Her signed letter of appointment for a permanent appointment made it clear that it was with the United Nations Secretariat. It is not in dispute that her letter of appointment did not contain a limitation to a particular office or department.

4. In 2008, she passed the G-to-P examination in Finance. The uncontested evidence of the Applicant is that she ranked first out of more than two thousand candidates. On 28 December 2009, the Applicant was transferred to a post as P-2 Finance Officer in the Department of Field Support ("DFS"). She was later sent on assignment to the Peacekeeping Finance Division of the Department of Management ("DM/OPPBA/PFD"), New York, against a P-3 level post as Finance and Budget Officer, from 20 August 2011 until 13 June 2012. She was in receipt of a special post allowance to the P-3 level.

5. The Applicant was placed on two United Nations rosters for posts at the P-3 level, namely that for "Finance and Budget Officers" and that for "Program Management Officers".

6. In November 2011, UNICRI signed a project contract with the European Commission ("EC"), to select implementing partners to facilitate the implementation of nineteen actions relating to Chemical, Biological, Radiological and Nuclear Risk Mitigation and Security Governance Programme ("CBRN Programme").

7. On 4 January 2012, the project post of Expert (Grant Management), Job Code Title: Finance Officer, P-3, UNICRI, was advertised in *Inspira*, initially for a duration of one year. The vacancy announcement stated under Special Notice that:

> This is a project post. Filling of this position is subject to funding availability and the initial appointment will be for a period of one year. Extension of the appointment is subject to extension of the mandate and/or the availability of funds. Staff members are subject to the authority of the Secretary-General and to assignment by him or her. In this context, all staff are expected to move periodically to new functions in their careers in accordance with established rules and procedures.

8. The Applicant was approached by UNICRI and was told that she was "selected" from the roster and asked whether she would be interested in the post. When the Applicant was informed by the United Nations Office at Vienna ("UNOV") that the post was a project post, she asked how this would affect her status as a permanent appointment holder. She was specifically advised by email of 26 July 2012 that "upon reassignment, your permanent appointment will remain unchanged". The Applicant's further evidence, which was uncontested by the Respondent, was that she was verbally informed that the post was available for a number of years and that she should not worry about the duration of her post. After receiving this advice and assurance, the Applicant confirmed that she was interested in the post, and she was subsequently recruited as Expert (Grant Management), UNICRI, Turin, with effect from 25 September 2012.

9. By email of 6 June 2014, Mr. Francesco Marelli, Head, CBRN, informed Mr. Jonathan Lucas, the then Director, UNICRI, that the first part of the project agreement between the EC/UNICRI, namely the design and implementation of the grant scheme and all activities envisaged for the Grant Expert had been

successfully completed. The outstanding activities relating to grants were to be completed by the P-4 Expert (Monitoring and Evaluation), UNICRI. Therefore, the post encumbered by the Applicant could no longer be justified and financed under the project agreement.

10. In an email dated 17 July 2014, Mr. Lucas referred to a meeting with the Applicant on 9 July 2014, at which she was informed of the assessment of Mr. Marelli, contained in the email of 6 June 2014, on the status of implementation of the project and its impact on the Applicant's post. He noted that the donor had been informed that the activities projected for the Grant Expert had been successfully completed and that the staffing table for the project would no longer include the position of Grants Manager. Therefore, Mr. Marelli had indicated that the post of Grant Manager should be abolished and could no longer be financed under the EC/UNICRI project agreement relating to the CBRN Programme. Mr. Lucas further noted that all UNICRI activities were funded from voluntary contributions—that is, projects—and that the Applicant had been recruited against a project post. Since the position of Grant Manager could no longer be financed through the EC/UNICRI project, Mr. Lucas stated that he had tried to find an alternative post for the Applicant, but was unsuccessful. Given the circumstances, the Applicant was informed that her position would be extended for three further months, corresponding to the required notice period. He concluded that in light of the Applicant being the holder of a permanent appointment, UNICRI would continue its efforts to retain her services in a commensurate P-3 post.

11. By email also of 17 July 2014, Mr. Sergey Agadzhanov, Chief, Human Resources Management Service ("HRMS"), Division for Management ("DM"), United Nations Office at Vienna ("UNOV"), informed a Human Resources Officer at the Office of Human Resources Management ("OHRM"), that the tasks to be performed by the Applicant as Expert (Grants Management) had been completed, and her post was no longer needed and that efforts had been made by Mr. Lucas to retain the Applicant against another P-3 post at UNICRI, without success. He referred to staff regulation 9.3(b), stressing that a permanent appointment could not be terminated under that rule, and that their interpretation

was that the staff member would have to consent to the termination of her appointment. He requested OHRM guidance in this matter.

12. On 1 August 2014, Mr. Agadzhanov received a response to his email of 17 July 2014 to OHRM. Ms. Francette James, a Human Resources Officer, OHRM, stated that the decision to terminate the Applicant's appointment needed the approval of the Secretary-General and that prior to such approval, the Applicant could not be formally advised of the termination of her appointment. She asked whether the Applicant had applied for posts outside of UNICRI, and whether steps had been taken to assist her in securing such posts. She stressed that UNOV should proceed and send a proposal for termination of the Applicant's permanent appointment to the Secretary-General, provided that her case was fully documented.

13. By email of 29 September 2014, Mr. Lucas wrote to Ms. Martha Helena Lopez, then Director, Strategic Planning and Staffing Division, OHRM, noting that UNICRI was not proposing the termination of the Applicant's permanent appointment which he states was beyond their competence. He wrote that it "would appear to us that the permanent appointment of [the Applicant] goes beyond employment within UNICRI and relates to the United Nations as a whole".

14. By email of 24 October 2014, Ms. Tine Hatlehol, the Chief, a.i., Section III, Human Resources Services, OHRM, responded to the email of Mr. Lucas of 29 September 2014 to Ms. Lopez, suggesting that instead of termination, an intermediate alternative could be to put the Applicant on special leave without pay ("SLWOP"), "while making every effort to obtain another position within the Organization". She stressed, however, that "should [the Applicant] not be successful in securing another position within the period on SLWOP, termination of her contract would have to be initiated".

15. By email of 30 October 2014 to the Applicant, Mr. Agadzhanov referred to the meeting of 17 July 2014 (sic) at which she had been told that the post she encumbered was "slated for abolition effective 31 December 2014". He encouraged the Applicant to apply for positions in the United Nations system and

reminded her that the authority of the Head of Department to laterally reassign staff was limited to UNOV/UNODC, hence the Applicant's reassignment to another post before 31 December 2014 depended on her successful application to a vacant post, including any suitable job opening in UNOV/UNODC. Should she not be successful in securing a post within the United Nations before 31 December 2014, she would be separated from UNICRI, resulting in the termination of her permanent appointment due to abolishment, under staff rule 9.6. He further referred to the option to be placed on special leave without pay, without lien to a post, to allow the Applicant to retain her status as an internal staff member.

16. On 3 December 2014, Mr. Agadzhanov advised the Applicant that since the abolition of her post was imminent, in the absence of a response from her by 10 December 2014 with respect to her wishing to avail herself of the option of special leave without pay, UNOV would "proceed with the administrative actions to separate [the Applicant] from UNICRI effective 31 December 2014, which in fact [would] result in the termination of [her] permanent appointment with the Organization".

17. On 5 December 2014, the Applicant requested both management evaluation and suspension of action of the decision to terminate her permanent appointment.

18. On 8 December 2014, Mr. Agadzhanov wrote to the Applicant, informing her that her permanent appointment was not going to be terminated, as neither UNICRI nor UNOV had such authority, and that further action would be suspended by UNOV, pending her request for management evaluation and suspension of action.

19. On the same day, Mr. Agadzhanov wrote to Ms. Lopez, describing the situation of the Applicant stating that in light of "the authority invested in ASG/OHRM to reassign staff members between departments under provisions of sec. 11 of ST/AI/2010/3 and read in conjunction with the staff rule 9.6(e)(i), we hereby request your assistance to explore possibilities of lateral reassignment of [the Applicant] within the Secretariat". He further stressed that the Applicant was on the *Inspira* roster. He noted that they "would continue [their] efforts to

encourage [the Applicant] to apply to all suitable job openings in *Inspira* and inform [them] of such applications", "nevertheless, there may be suitable for her profile temporary vacancies elsewhere which she may not be aware of but which may be known to OHRM. Such positions should also be shared with her to consider, so that she can go on assignment from UNICRI". He further noted that "absent [the Applicant's] full time or temporary selection/re-assignment/assignment elsewhere, [they] will have no choice but to pursue the request for termination of her appointment, and if no decision is made by the end of the year – place her on SLWOP as of 1 January 2015 until a solution is found". He finished his email by stating that they "would highly appreciate OHRM consideration of this case, which is of systemic nature, and advice on a further course of action". OHRM did not reply to that email.

20. By email of 16 December 2014 the Applicant informed Mr. Agadzhanov of six posts she had applied to within the Secretariat. Mr. Agadzhanov forwarded the information to Mr. Hong Sok Kwon, OHRM, on 23 December 2014. He replied on the same day stating that OHRM would certainly support the Applicant. Mr. Agadzhanov sent a follow-up email on 23 January 2015, requesting an update in this matter.

21. On 22 December 2014, the Applicant requested management evaluation of the alleged decision by Mr. Lucas, not to endorse and/or decline the Applicant's reassignment within available alternatives.

22. By memorandum dated 20 January 2015, Mr. Christian Rohde, then Chief, Management Evaluation Unit, informed the Applicant that her request for management evaluation and suspension of action of 5 December 2014 with respect to the alleged decision and administrative actions to terminate her permanent appointment with effect from 31 December 2014 was not receivable, for lack of a final administrative decision. He noted that under staff rule 9.6(c)(i), the Secretary-General may terminate a permanent appointment, on the grounds of abolition of post, *and that such authority has not been delegated to either UNICRI or UNOV*. As such, the procedures UNICRI and UNOV had stated they would initiate were only preparatory, without legal effect. Since the Secretary-General

had not yet taken any decision to terminate the Applicant's appointment, any reference by UNICRI or UNOV to the Applicant having been given appropriate notice of her termination should be disregarded.

23. By memorandum dated 22 January 2015, Mr. Rohde informed the Applicant that her request for management evaluation of 22 December 2014 was equally not receivable, as no decision with respect to the termination of her appointment had yet been taken, and also that as a consequence, the decision precedent for her request for reassignment no longer existed, rendering her request moot.

24. By interoffice memorandum also dated 22 January 2015 entitled "[the Applicant]—separation from UNICRI and termination of appointment", Mr. Lucas informed Ms. Carole Wamuyu Wainaina, the Assistant Secretary-General for Human Resources Management, that the Applicant's efforts to actively search for other employment possibilities in the Secretariat were unknown to UNICRI, which precluded him from assisting her vis-à-vis the Hiring Managers and asked her to take appropriate action for consideration of termination of the Applicant's appointment. He noted that alternatively, she may want to pursue the option of agreed termination. He stressed that both UNICRI and UNOV supported the reassignment of the Applicant elsewhere in the United Nations Secretariat, given that no alternative opportunities were available within UNICRI. No response was received to that memorandum.

25. By memorandum dated 30 January 2015, from Mr. Suren Shahinyan, Officer-in-Charge, Office of the Director, LDSD, OHRM, to Mr. Yukio Takasu, Under-Secretary-General for Management, the former sought the Secretary-General's consideration for UNICRI to proceed with the Termination of the Applicant's appointment on the grounds of abolition of post pursuant to staff regulation 9.3(a)(i), effective 31 January 2015. Paragraph 4 of that memorandum reads as follows:

> The considerable efforts made to assist the staff member in securing another appointment, within UNICRI or within the United Nations system proved unsuccessful, leaving her parent office with the last option to request for her separation from the Organization. UNICRI is thus requesting the termination of the permanent appointment of [the Applicant] with payment of a termination indemnity as per Annex III of the Rules and three months' salary in lieu of notice, as per staff rule 9.7(a).

26. The note to Mr. Takasu dated 2 March 2015, entitled "Recommendation for your approval—Termination of Permanent Appointment [Applicant]", stated in paras. 5 and 6 the following:

> 5. After abolition of her post, [the Applicant's] contract has been extended on temporary funding. During this time her parent office have (sic) put considerable efforts to find a possible placement under their authority within UNICRI. At the same time, the staff member was encouraged and supported to find a suitable position in the Global Secretariat by applying to available vacant posts through the Staff selection system. Unfortunately, none of these efforts provide successful, leaving her parent office with their last option – to request her separation from the Organization effective 6 March 2015.
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> 6. UNICRI is thus requesting the termination of [the Applicant's] permanent appointment based on provisions of Staff Regulations 9.3(a)(i) with payment of termination indemnity as per Annex III and payment of three month's salary in lieu of notice.

27. Mr. Takasu approved the termination of the Applicant's permanent appointment on 6 March 2015.

28. According to the Respondent, on 5 March 2015, the Applicant submitted another request for management evaluation and suspension of the decision of the UNICRI Director to submit a request for termination of her permanent appointment.

29. The MEU informed the Applicant that while the request by Mr. Lucas did not constitute an administrative decision, it would consider it as if she had requested management evaluation of the decision by the USG for Management to terminate her appointment. MEU further informed the Applicant that implementation of the termination decision had been suspended pending management evaluation.

30. By letter dated 9 March 2015 to the Applicant, Mr. Agadzhanov recalled that Mr. Lucas had informed her on 2 March 2015 that since efforts to find another post for the Applicant had been unsuccessful, UNICRI had to request termination of her appointment. She was further informed that since the post she had encumbered had been abolished, Mr. Takasu (under his delegation of authority) had decided to terminate her appointment with effect from 6 March 2015, on grounds of necessities of service which required the abolition of her post. Mr. Agadzhanov stated that his letter constituted notice of termination in accordance with staff rule 9.7(a), in conjunction with staff rule 13.1(a). He stressed that she was entitled to termination indemnities and that "[she might] be entitled to payment in lieu of notice under staff rule 9.7(d), as applicable". The letter added that: "the Secretary-General has decided to suspend the implementation of this decision, pending the finalisation of the management evaluation process, which should normally be concluded within 45 days. Therefore, the implementation of the decision to terminate [her] permanent appointment [was] suspended accordingly".

31. By letter dated 8 April 2015, Ms. Susana Malcorra, Chef de Cabinet, informed the Applicant that the Secretary-General had decided to accept the MEU recommendation to uphold the decision to terminate her permanent appointment.

32. Mr. Agadzhanov sent a letter dated 22 April 2015 to the Applicant, informing her that following the Secretary-General's decision of 8 April 2015, she shall separate from service with the United Nations Secretariat effective 22 April 2015. He stressed that since the Applicant had already served part of the notice period, following his letter of 9 March 2015 to 22 April 2015, she shall receive payment in lieu of notice for the remainder of the notice period, that is, from 23 April to 8 June 2015, plus termination indemnities.

33. On 28 April 2015, the Applicant requested management evaluation of the decision to abolish her post and to terminate her permanent appointment.

Procedural history

34. The application was filed on 22 May 2015, and was assigned to Judge Downing. The Respondent filed his reply on 26 June 2015. With his reply, the Respondent filed Annex 10 on an under seal basis and several annexes on an *ex parte* basis. By Order No. 161 (GVA/2015) of 28 August 2015, the Tribunal ordered that the confidentiality setting of the *ex parte* documents filed by the Respondent be set to "none" and that Annex 10 to the Respondent's reply remain under seal. It further ordered the Applicant to file comments, if any, on the Respondent's submission by 10 September 2015, which she did.

35. By Order No. 222 (GVA/2015) of 3 November 2015, a case management discussion ("CMD") was held on 3 December 2015. After the CMD, the parties engaged in mediation discussions under the auspices of the Office of the Ombudsman and Mediation Services. The Tribunal suspended proceedings pending mediation. The matter was referred back to the Tribunal on 20 May 2016, after mediation efforts failed.

36. By Order No. 118 (GVA/2016) of 9 June 2016, another CMD was held on 15 June 2016. At the CMD, the Tribunal ordered the Respondent to provide it with information as to the Organization's implementation of orders for rescission and compensation in lieu of it under art. 10.5(a).

37. By Order No. 135 (GVA/2016) of 16 June 2016, the parties were ordered to attend a hearing on the merits from 20 to 22 September 2016. They were further asked to file additional written submissions to address issues raised at the CMD.

38. By Order No. 175 (GVA/2016) of 30 August 2016, the parties were asked to address, at the hearing on the merits, the *ratio decidendi* of Judgment *El-Kholy*, issued on 22 July 2016, and its applicability to the present case.

39. By Order No. 183 (GVA/2016) of 7 September 2016, the matter was referred to the undersigned Panel of three Judges, pursuant to art. 10.9 of the Tribunal's Statute and Practice Direction No. 1 on Three-Judge Panels.

40. The hearing was held from 20 to 21 September 2016, in the presence of both Counsel. The Applicant attended via telephone from Beirut; Mr. Marelli, Head, CBRN, attended in person, while two witnesses (Mr. Sergey Agadzhanov, Chief, HRMS, UNOV; and Mr. Idrees Mamundzai, then Administrative Officer, UNICRI) attended via videoconference, from Vienna and New York, respectively.

Parties' submissions

41. The Applicant's principal contentions are:

a. The discontinuance of the post she encumbered was due to termination of a mandate and not to post abolition. Therefore, staff regulation 9.3(b) applied to her situation;

b. Alternatively, if her post was abolished and that was the reason for the termination of her permanent appointment, that abolition was procedurally flawed, because:

i. According to art. 3.1 of its Statute, UNICRI is an entity of the United Nations which is part of the UN system;

ii. According to its Statute, UNICRI is governed by a Board of Trustees which, *inter alia*, "(a) Formulates principles, policies and guidelines for the activities of UNICRI; and (b) Considers and approves the work programme and budget proposals of UNICRI on the basis of recommendations submitted to it by the Director of the Institute";

iii. It is clear from the evidence that the decision to discontinue the Applicant's post was taken before the meeting of 9 July 2014 with the Applicant. The budget proposal—which purportedly indicates the abolishment of the Applicant's post—was submitted to the Board of Trustees for consideration only on 13-14 November 2014. Accordingly, it is clear that Mr. Lucas acted unilaterally in deciding to discontinue the Applicant's post;

iv. In any event, the budget proposals submitted to the Board did not mention the abolition of the Applicant's post. Accordingly, the ratification of the budget by the Board does not constitute approval for abolition of the Applicant's post;

v. Public officials may only act within the scope of their delegation of authority, and any such delegation must be read carefully and restrictively (cf. *Baig et al.* 2013-UNAT-357);

vi. UNICRI's Statute allows the Director only to make recommendations for the creation and abolition of posts;

vii. The distinction between core funds—for which, according to the Respondent, Board approval was required—and project funds—for which, according to the Respondent, no Board approval was required—is absent from the UNICRI Statute. The Respondent's witness in this respect seems to support the Applicant's contention that project posts are discontinued for reasons of termination of mandate rather than for abolishment of posts. In other words, the distinction appears to be between post abolition for regular budget posts and termination of mandate where funding for particular actions is no longer considered to be available;

viii. The memorandum of 9 March 2015 notes that the position encumbered by the Applicant was "slated for abolishment" once the Director had advised that the functions envisaged for that post had been completed in September 2014. It is clear from the evidence that there was no prior approval or endorsement from the Board of the decision by the UNICRI Director to abolish the position encumbered by the Applicant;

ix. The Appeals Tribunal held that administrative decisions which are based on factual errors are reversible (*Islam* 2011-UNAT-115). In this case, there has been a clear error, which warrants that the decision be overturned;

x. The Applicant tried to challenge the decision to abolish her post several times, but MEU told her on each occasion that it was not reviewable until it was authorized by the Secretary-General or it was final;

xi. Now, after approval by the Secretary-General, the Applicant challenges the unlawful abolishment of the post she encumbered at UNICRI and the basis, or lack thereof, on which that approval to terminate her permanent appointment was made;

xii. The Secretary-General should have made sure that the underlying abolishment was proper before proceeding to terminate her permanent appointment; the termination decision is tainted by the illegality of the decision of the Director, UNICRI;

c. If the decision to abolish the Applicant's post was lawful, the Administration failed to make good faith efforts to re-absorb the Applicant against a suitable post;

i. It is uncontested by the Respondent that under staff rules 13.1 and 9.6(e), the Administration is obliged to make efforts to consider permanent staff members facing post abolition for suitable posts. The Applicant was at all times a staff member of the UN Secretariat. The Respondent's interpretation to limit the Administration's obligation under staff rule 9.6(e) to suitable posts within the department in which the staff member concerned was employed (here: UNICRI) cannot stand;

ii. Under the relevant rules, namely staff regulation 1.2(c), staff rule 9.6(e) and sec. 11 of ST/AI/2010/3, the Administration was obliged to consider the Applicant for suitable posts and the Secretary-General had the authority to reassign her anywhere within the Secretariat. While UNICRI did make efforts to find a suitable post within UNICRI, albeit unsuccessfully, the Administration failed to

make good faith efforts to find a suitable post for the Applicant anywhere within the Secretariat; and

d. During the hearing, the Applicant made it clear that she requests rescission of the decision and her reinstatement, and/or compensation over two years' net base salary for the unlawful termination of her permanent appointment, for material loss and moral damages, for which she gave evidence.

42. The Respondent's principal contentions are:

a. The decision to terminate the Applicant's permanent appointment was based on the abolition of the post she encumbered, not on the termination of a mandate under staff regulation 9.3(b). The reference to termination of a mandate under that provision refers to the mandate of a unit/department, in this case, UNICRI, and not the "mandate" of a particular post;

b. Only the decision to terminate the Applicant's permanent appointment is an administrative decision, and as the Appeals Tribunal held, staff members "cannot challenge the discretionary authority of the Secretary-General to restructure the Organization or to abolish a post", or other decisions which are "merely acts prefatory to or preceding an administrative decision that would 'produce direct legal consequences' to [the Applicant's] employment" (cf. *Lee* 2014-UNAT-481; *Caselli*, Order No. 74 (2015/GVA));

c. As a consequence, the budgetary process leading to the abolition of the post encumbered by the Applicant is a prefatory fact which does not produce direct legal consequences for the Applicant, hence the application is not receivable*, ratione materiae*, in this respect;

d. When the decision is not vitiated by bias or improper motivation and is supported by the evidence, a permanent appointment may be terminated on the basis of abolition of post (*Ruyooka* 2014-UNAT-487);

e. The Tribunal has to determine whether the Applicant's appointment could be terminated on the basis of abolition of post under staff rule 9.6 and 13.1, and whether she was granted priority consideration over staff members with fixed-term appointments. Further, the Tribunal has to consider whether the decision was reasonable, fair, legal, rational, procedurally correct and proportionate, without substituting itself for the Secretary-General (*Sanwidi* 2010-UNAT-084; *Abbassi* 2011-UNAT-110);

f. In the present case, the decision was based on the abolition of the post encumbered by the Applicant following the delivery of the project activities for which it had been established; the Applicant does not argue that the decision was biased or otherwise improperly motivated;

g. UNICRI's decision to restructure its work was reasonable and fell within its power (cf. *Gehr* 2012-UNAT-236; *Pacheco* 2013-UNAT-281), and the Applicant's consent in this respect was not necessary;

h. The process leading to the abolition of the post encumbered by the Applicant was lawful. UNICRI is entirely funded by extra-budgetary contributions; hence, there are no "established" posts and the Applicant did not encumber one that could be abolished from the regular budget;

i. Under the provisions of UNICRI's Statute, responsibility for budgetary matters is shared between the Board and the Director. In practice, while the Board approves overall budget levels, the Director maintains "operational flexibility in implementing the budget and work programme within the approved overall levels". By the Board's approval of the budget, including the abolition of the post, the question whether the Director did or could abolish the post encumbered by the Applicant without such approval has become moot. Further, nothing in the UNICRI's Statute or its practice can be understood as limiting the Director's authority to abolish or create new posts, or that it requires endorsement by the Board. In this case, the discretion to abolish the post was exercised properly. The decision was legal, rational and based on the fact that the project had been almost completed;

j. Further, UNICRI's 2015 budget—which was approved by the Board—does not include the position encumbered by the Applicant. However, since it was a project post, concurrence of the donor was required. In light of the nature of the funding, even if the Board had approved the project post, the separation of the incumbent of the post could have been the result of discontinuance of funds by the donor;

k. The agreement between the EC and UNICRI provided for a project of a three-year duration, from December 2011 to December 2014, with the implementation subsequently being extended through June 2015; UNICRI's assessment that the specific functions of the Expert post had been fulfilled was reasonable;

l. In this case, the lack of funding for the post that the Applicant encumbered is supported by the facts (cf. *Adundo* et al. UNDT/2012/118). Further, the special notice contained in the Vacancy Announcement for the Expert post explicitly provided that it was a "project post", subject to extension of the mandate and/or availability of funding; as such, the Applicant was aware of the "temporary" nature of the post and its funding;

m. The Organization made efforts to secure another appointment with UNICRI or within the United Nations system; however, these efforts proved unsuccessful. Staff members affected by abolition of post are entitled to preference in appointment only if their qualifications at least match in substance those of the other candidates (*Messinger* 2011-UNAT-123);

n. Mr. Lucas made good faith efforts to find an available suitable post within UNICRI, and offered to place the Applicant on SLWOP. The Applicant was found to not fulfil the necessary requirements of two posts of Programme Officer (P3), UNICRI, for which she had requested reassignment. The Applicant's rights were observed;

o. Since the contested decision was legal, the Applicant is not entitled to compensation. Further, the Applicant, who had been informed about the matter in 2014, failed to mitigate her possible losses (*Appleton* UNDT/2012/125); and

p. The presumption of lawfulness of official acts stands satisfied (*Rolland* 2011-UNAT-122) and the application should be dismissed.

Consideration

43. The Tribunal has to examine the legality of the decision to terminate the permanent appointment of the Applicant after almost fourteen years of service. The Applicant joined the Organization in 2001 and successfully passed the G-to P examination in Finance in 2008, in which she ranked first out of 2000 candidates. At the time of the contested decision, the Applicant served as a P-3 Finance Officer at UNICRI, and was on two United Nations Secretariat rosters for posts at the P-3 level, both for Finance and Budget Officers and Programme Managers Officers.

Applicable law

44. Permanent appointments may be terminated only under conditions set by the Staff Regulations and Rules. The Tribunal also took into consideration relevant provisions of ST/AI/2010/3 and of the Statute of UNICRI. The Tribunal found the following provisions relevant for the adjudication of the present case:

45. 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;

46. Chapter XIII *Transitional measures* provides under staff rule 13.1 with respect to permanent appointments that:

> (a) A staff member holding a permanent appointment as at 30 June 2009 or who is granted a permanent appointment under staff rules 13.3 (e) or 13.4 (b) shall retain the appointment until he or she separates from the Organization. Effective 1 July 2009, all permanent appointments shall be governed by the terms and conditions applicable to continuing appointments under the Staff Regulations and the Staff Rules, except as provided under the present rule.
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> …
>
> (c) Staff regulation 9.3(b) and staff rule 9.6(d) do not apply to permanent appointments.
>
> (d) If the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts for which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments, provided that due regard shall be given in all cases to relative competence, integrity and length of service. Due regard shall also be given to nationality in the case of staff members with no more than five years of service and in the case of staff members who have changed their nationality within the preceding five years when the suitable posts available are subject to the principle of geographical distribution.
>
> (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.
>
> (f) Staff members specifically recruited for service with the United Nations Secretariat or with any programme, fund or subsidiary organ of the United Nations that enjoys a special status in matters of appointment under a resolution of the General Assembly or as a result of an agreement entered by the Secretary-General have no entitlement under paragraph (e) above for consideration for posts outside the organ for which they were recruited.

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

> **Rule 9.6**
>
> **Termination**
>
> **Definitions**
>
> (a) A termination within the meaning of the Staff Regulations and Staff Rules is a separation from service initiated by the Secretary-General.
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> …
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> **Reasons for termination**
>
> (c) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds:
>
> (i) Abolition of posts or reduction of staff;
>
> …
>
> (d) In addition, in the case of a staff member holding a continuing appointment, the Secretary-General may terminate the appointment without the consent of the staff member if, in the opinion of the Secretary-General, such action would be in the interest of the good administration of the Organization, to be interpreted principally as a change or termination of a mandate, and in accordance with the standards of the Charter.
>
> **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;
>
> …
>
> (g) Staff members specifically recruited for service with the United Nations Secretariat or with any programme, fund or subsidiary organ of the United Nations that enjoys a special status

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

48. Administrative Instruction ST/AI/2010/3 (Staff Selection System) provides in sec. 11 *Placement authority outside the normal process*:

> 11.1 The Assistant Secretary-General for Human Resources Management shall have the authority to place in a suitable position the following staff members when in need of placement outside the normal process:
>
> …
>
> (b) Staff, other than staff members holding a temporary appointment, affected by abolition of posts or funding cutbacks, in accordance with Staff Rule 9.6(c)(i);

49. The Statute of UNICRI relevantly provides:

> Article III
>
> STATUS, ORGANIZATION AND LOCATION OF THE INSTITUTE
>
> 1. The Institute shall be a United Nations entity and thus form part of the United Nations system.
>
> 2. The Institute shall have its own Board of Trustees and a Director and supporting staff. It shall be subject to the Financial Regulations and Staff Regulations of the United Nations, except as may be provided otherwise by the General Assembly. It shall also be subject to the Financial Rules, the Staff Rules and all other administrative issuances of the Secretary-General, except as may be otherwise decided by the Secretary-General.
>
> Article IV
>
> BOARD OF TRUSTEES
>
> 1. The Institute and its work shall be governed by a Board of Trustees (hereinafter referred to as "the Board") under the overall guidance of the Committee on Crime Prevention and Control.
>
> 2. The Board shall be composed of the following:
>
> …

> (b) A representative of the Secretary-General, who shall normally be the Head of the Crime Prevention and Criminal Justice Branch of the Centre for Social Development and Humanitarian Affairs, a representative of the Administrator of the United Nations Development Programme, a representative of the host country and the Director of the Institute shall serve as *ex officio* members of the Board.
>
> 3. The Board, under the guidance of the Committee on Crime Prevention and Control, shall:
>
> (a) Formulate principles, policies and guidelines for the activities of the Institute;
>
> (b) Consider and approve the work programme and budget proposals of the Institute on the basis of recommendations submitted to it by the Director of the Institute;
>
> …
>
> 4. The Board shall meet at least once every two years. It shall adopt its own rules of procedure. It shall elect its own officers, including its President, in accordance with the adopted rules of procedure. It shall take its decisions in the manner provided in its rules of procedure.

Issues

50. The Applicant held a permanent appointment. Under staff regulation 9.3(b) and staff rule 9.6(d), the Secretary-General may terminate a continuing appointment without the staff member's consent in circumstances where termination is in the interests of good administration of the Organisation, which is "to be interpreted principally as a change or termination of a mandate". However, pursuant to staff rule 13.1(c) these provisions do not apply to permanent appointments, such as that of the Applicant's.

51. As per staff rule 13.1(d), a termination of a permanent appointment based on the abolition of a post is potentially lawful, provided that the provisions of the Staff Rules are complied with in a proper manner.

52. In light of the foregoing, in deciding whether the termination of the Applicant's appointment was lawful, the Tribunal has identified the following issues, which it will examine in turn:

a. Was the reason for the termination of the Applicant's appointment the abolition of the post she encumbered at UNICRI or the termination of the mandate of that post within the EC/UNICRI project?

b. As a result, is the legality of the termination of the Applicant's permanent appointment to be assessed under staff rule 13.1(d) or under staff rule 13.1(c), read in conjunction with staff rule 9.6(d)?

c. Assuming that the termination of the Applicant's appointment was post abolition, was that abolition genuine and arrived at following proper procedures?

d. Assuming that the reason for the termination of the Applicant's appointment was post abolition, did the Administration comply with its obligations under staff rule 13.1(d) when it terminated the Applicant's permanent appointment?

e. If it did not, is the Applicant entitled to any remedy arising from the termination of her appointment, and does this case give rise to exceptional circumstances, for the purpose of art. 10.5(b) of the Tribunal's Statute?

Was the reason for the termination of the Applicant's appointment the abolition of her post or the termination of its mandate?

53. The Applicant argues that the mandate of her post was terminated, but that her post was not abolished. Given staff rule 13.1(c), the termination of her permanent appointment was illegal. The Respondent holds that staff regulation 9.3(b) and staff rule 9.6(d) only cover the change or termination of a mandate of an entity, a mission or a department, in this case UNICRI, but not that of a single post. In his view, this case is one of abolition of post, and not of termination of a mandate pursuant to the above-referenced rules.

54. While the term "abolition of post" is not defined by the Staff Regulations and Rules, staff regulation 9.3(b) and staff rule 9.6(d) define termination "in the interests of the good administration of the Organization" as "a change or termination of a mandate". The plain wording of these provisions does not indicate whether it meant the change or termination of the mandate of a department/mission, or simply the mandate of a particular post.

55. The Tribunal finds that the distinction between staff regulation 9.3(b) and staff rule 9.6(d) refers to a change or termination of a mission/department, as opposed to a change or termination of the mandate of a particular post, and may be relevant in the case of termination of a continuing appointment. It is, however, irrelevant in case of termination of a permanent appointment. Indeed, a permanent appointment cannot be terminated on the grounds of termination of mandate, either of a mission, or of a particular post, unless it is accompanied by a decision to abolish the relevant post. Therefore, the relevant question for the Tribunal to consider is whether the mandate of the Applicant's post was terminated, and, if in the affirmative, whether such termination of the post's mandate was accompanied by the abolition of said post? Stated differently, the Tribunal has to determine whether there can be situations in which the mandate for a post changed or terminated, without a decision to abolish such post being taken, and whether this is what occurred in this case?

56. The Tribunal finds that there may be situations where the mandate of a Unit or of a given post is terminated, and a separate decision is taken to abolish (a) post(s). In such a scenario, staff rule 13.1(d), rather than staff rule 13.1(c) would apply to permanent appointees.

57. The Respondent himself concedes that while "in many instances a change of mandate will involve abolition of post or reduction of staff", "there may be circumstances where this is not the case. For example, a mission established primarily for peacekeeping purposes may, as it achieves its mandate, evolve into a mission more focussed on post-conflict/institutional support objectives". The Tribunal notes that in such a scenario, the needs of the mission and the profile of staff needed to accomplish the new mandate may change. If, in such a scenario,

posts are not formally abolished, the permanent appointment of a staff member working at the mission may not be terminated, while that of a staff member with a continuing appointment may.

58. Similarly, in cases of projects of the nature in which the Applicant worked as an Expert (Grant management) there will often be several phases, requiring different skills and functions during the project's life-cycle. Depending on the status of implementation of the project, the functions, hence the posts, that are needed to finalize the project may change. If the functions of a particular post have been completed, that post may become redundant, while the project keeps running.

59. The vacancy announcement for the post encumbered by the Applicant reflects exactly that reality, when it indicates, as a standard phrase for VAs for UNICRI's projects, that "extension of appointment is subject to the finite mandate of one year or more for carrying out the activities related to the design and implementation of the grant scheme and the availability of project funds". This formulation shows that it was clear from the beginning that in light of the finite character of the very specific and limited mandate of the post of Expert (Grant Management) to carry out activities relating to the design and implementation of the grant scheme, the post encumbered by the Applicant would naturally come to an end once the post holder had accomplished all the functions falling in his/her portfolio. It was, however, not predictable with precision when that would occur.

60. The evidence before the Tribunal shows that the management of UNICRI was of the view that when the mandate of the Applicant's post had been completed, it was no longer justified in employing her against these functions. It is, thus, clear that the discontinuance of the Applicant's post was related to her having accomplished all the functions for which she had been recruited.

61. To support the argument that the present case concerns a post abolition, the Respondent submits that "the decision by a donor to discontinue funds for a project may result in the abolition of a post" (referring to *Gehr* UNDT/2011/142), and that "discontinuation of funding by a donor breaks the financial authorization for the job to be performed, and results in the abolition of posts financed under the project". The Tribunal does not question this assertion, but finds that it does not assist the Respondent in this case.

62. In his evidence to the Tribunal, Mr. Marelli confirmed that the funds provided by the donor, as reflected in the contribution agreement between the EC and UNICRI on the CBRN, were made in a global amount/contribution, which remained unaffected by the discontinuation of the Applicant's post. In other words, the decision to discontinue the Applicant's post did not imply a reduction of the (global) funds/financial contribution provided by the donor under the project. Also, the mere extension of the implementation period for the EC/UNICRI project until the end of 2015 did not imply any other change to the "contribution agreement" governing the project. Therefore, one cannot qualify the present case as one of abolition of post because of discontinuance of funding by the donor.

63. In light of the foregoing, the Tribunal is satisfied that the Applicant's post, advertised as per the above-referred VA for a finite mandate, came to an end when the Applicant completed its functions. It was sound management by UNICRI to inform the donor of the completion of the mandate, and to conclude that it could no longer justify the employment of the Applicant against a portfolio of functions which had been accomplished. However, that conclusion did not result in the reduction of the funds contributed by the donor for the overall completion of the project in the course of its life-cycle. As such, the Applicant's post was not abolished; rather, when the finite mandate of her post had been completed, her position became redundant, and the funds provided by the donor had to be used for the implementation of the second phase of the project, which required functions distinct from those performed by the Applicant. That, in the Tribunal's view, has to be distinguished from a post abolition for the purpose of staff rule 13.1(d).

As a result, is the legality of the termination of the Applicant's permanent appointment to be assessed under staff rule 13.1(d) or under staff rule 13.1(c) (read in conjunction with staff rule 9.6(d))?

64. Having concluded that the present case is one of termination of the (finite) mandate of the Applicant's post, rather than one of its abolition, the Tribunal finds that the legality of the termination of the Applicant's permanent appointment has to be assessed under staff rule 13.1(c), rather than under staff rule 13.1(d). Since pursuant to staff rule 13.1(c), staff rule 9.6(d)—which allows termination on grounds of change or termination of mandate—does not apply to permanent appointments, and in the absence of the abolition of her post, the decision by the Administration to terminate the Applicant's permanent appointment was illegal and should be rescinded.

If the reason for the termination of the Applicant's appointment was post abolition, was that abolition genuine and arrived at following proper procedures?

65. Assuming that the Respondent's argument is correct and that the Applicant's post had been subject to abolition, the Tribunal has to assess whether that abolition was arrived at following proper procedures.

66. The Applicant argued that the decision to discontinue her post by way of post abolition was *ultra vires*, since Mr. Lucas did not have the authority to abolish her post and that, under the UNICRI Statute, prior approval by the Board of Trustees was required. He noted that Mr. Lucas had no delegation of authority in this matter and that the approval of the Board had not been obtained, prior to the decision to discontinue the Applicant's post. Finally, she notes that the budget submitted to the Board was misleading, and particularly that it was not apparent from that budget that the Applicant's post had been "abolished".

67. The Respondent, on his part, argues that the Board's approval was not required for the abolition of the Applicant's post, since the latter was part of the special purpose fund, and not of the general purpose fund. According to the Respondent, similarly to regular budget posts and project posts, Board approval was only required in case of abolition of a post that was part of the general

purpose fund, but not of one that was part of the special purpose fund. Further, in the Respondent's view, the ratification by the Board in November 2014 constituted its approval of the budget. Accordingly, even if such approval was required, it was in fact obtained.

68. The Tribunal has looked closely at the relevant provisions of the UNICRI Statute and did not find any support for the Respondent's argument that a distinction has to be made between posts from the general project fund and those from the special project fund. It noted that the *[UNICRI] Programme of Work and Budget Estimates for the year 2015* referred to General purpose (GP) funds and Special purpose (SP) funds, as follows:

> General-purpose (GP) funds are un-earmarked voluntary contributions, which partially finance the executive direction and management of UNICRI. GP Funds may also be used to finance advances for special purpose funded projects in exceptional circumstances after a careful review and approval by the UNICRI Director.
>
> Special-purpose (SP) funds are earmarked voluntary contributions, which finance the Office's applied research activities at headquarters (Turin) and in the field.

69. The Respondent further submitted an email of the current President of the Board of Trustees, dated 27 September 2016, in which the latter expresses his view that "for any SP position and projects it was left to the Director to add a position or abolish one depending on the available funding". The Tribunal cannot but note that this email was sent, *ex post facto*, and thus appears to be designed to address one of the problems raised in this case.

70. However, the UNICRI Statute states under art. IV.3.(b) that:

> The Board, under the guidance of the Committee on Crime Prevention and Control, shall: (b) Consider and approve the work programme and budget proposals of the Institute on the basis of recommendations submitted to it by the Director of the Institute.

71. Under art. V.2.(a), the Statute provides that:

> The Director shall have overall responsibility for the organization, direction and administration of the Institute in accordance with general directives issued by the Board and within the terms of the authority delegated to the Director by the Secretary-General. The Director shall, *inter alia*:
>
> (a) submit the work programmes and the budget estimates of the Institute to the Board for its consideration and adoption;
>
> …
>
> (e) Appoint and direct the staff of the Institute on behalf of the Secretary-General;

72. The Respondent conceded that from the Director's authority to appoint and direct the staff of the Institute under art. V.2(e), an authority cannot be deduced to abolish a post, nor can the authority to terminate the Applicant's permanent appointment.

73. As such, while for operational reasons, a distinction was established between GP and SP funded posts, that distinction is not reflected in the UNICRI Statute. Under that Statute, the Director, UNICRI, can make recommendations on UNICRI's budget—which includes the abolition of posts—to the Board of Trustees for the adoption/approval by the latter, without a distinction to GP or SP funded positions.

74. Moreover, the Tribunal noted that although the issuance of a Secretary-General's bulletin ("SGB") on UNICRI has been the subject of discussion already in 2011, it was confirmed that no such SGB had been issued to date. The UNICRI Statute thus remains the only legal document governing, *inter alia*, the interaction between the Director, UNICRI, and its Board of Trustees.

75. Further, despite the Tribunal's request, the Respondent was not able to produce any document in support of his argument that the Board of Trustees had delegated the authority to administer project-funded activities, in particular, in relation to the authority to abolish a position, to the Director, UNICRI. The only document referred to by the Respondent was the *Report of the Board of Trustees*,

which stresses the operational flexibility of UNICRI to enter into funding agreements for projects, and to initiate implementation of the project upon receipt of funds.

76. The Tribunal recalled the jurisprudence of the Appeals Tribunal, which ruled in *Baig et al.* 2013-UNAT-357 that "in matters of delegation of authority, the legal instrument delegating authority must be read carefully and restrictively". It also held in *Bastet* 2015-UNAT-511 that "[a]ny adequate mechanism can be used for the purpose of delegation, provided that it contains a clear transmission of authority to the grantee concerning the matter being delegated", and that "[a]bsent any express requirement of prior publication, the delegation becomes effective upon issuance and may be known by staff members and other departments or offices once it is exercised". The Tribunal notes that in the absence of any official document delegating such authority from the Board of Trustees to the Director, UNICRI, the standards set by the Appeals Tribunal with respect to the delegation of authority were not met in this case.

77. The Tribunal considered the Respondent's claim that the Board of Trustees did in fact give its approval for the abolition of the Applicant's post. The Tribunal expressed its concern that the evidence shows that the decision to discontinue the Applicant's post was in fact taken, and conveyed to the Applicant on 9 July 2014, at the meeting held with her , prior to the Board meeting. The evidence further shows that after that meeting, no further consideration was given to the question whether the post encumbered by the Applicant was to be discontinued, but only to the issue whether the Applicant's services could be used otherwise, within UNICRI. The budget, on the other hand, was submitted to the Board of Trustees only in November 2014, after the decision to discontinue the post encumbered by the Applicant had been taken.

78. The Tribunal is satisfied, on the evidence, that the Board had not been provided with sufficiently clear information to take an informed decision in this matter at any time. The budget document provided by the Respondent, and submitted to the Board in November 2014, made no reference, direct or otherwise, to the Applicant's post, let alone to its abolition. Rather, the document contained

information that was misleading in that Table 10 of the budget report (Human Resources Table 10: *Staffing table for Security governance and counter terrorism unit*) refers to eight P-3 posts approved in 2014, as opposed to eleven proposed for 2015, and indicates that the change in P—3 posts was "three". If, however, a decision was to be made by the Board (in adopting the report) to abolish the P-3 post encumbered by the Applicant, the table should have referred to a change of "four" rather than "three" P-3 posts. Further, in the first paragraph of the narrative under Table 10, reference is made to the creation of a new P-4 post (for the De-radicalization programme in Yemen). In contrast, the Tribunal notes that no mention is made there, nor anywhere else in the report, of the abolition of a P-3 post or any other post, let alone of the specific P-3 post encumbered by the Applicant (Expert (Grant Management)). The Respondent's witnesses were unable to explain the contradictions contained in the document. One witness gave evidence that the information in the budget with respect to project posts was rather a "wish list".

79. After the hearing, the Respondent produced a document prepared as part of an original draft of papers to go to the Board, which made explicit reference to the fact that the P-3 post encumbered by the Applicant was no longer needed in Turin. That document was never submitted to the Board. The final document presented to the Board did not mention the abolition of the Applicant's post. It would appear that a conscious decision was taken not to mention to the Board the fact that a decision had already been taken to abolish the Applicant's post. The original reference to this abolition was clearly edited out. As such, and in light of the misleading information provided to the Board, the Tribunal concludes that the ratification of the budget by the Board can in no way be interpreted as constituting an approval of the abolition of the P-3 post encumbered by the Applicant.

80. It follows that even if one were to adopt the Respondent's argument that the decision to terminate the Applicant's permanent appointment was based on post abolition, under staff rule 13.1(d), such abolition was *ultra vires*. It can thus not serve as a legal basis for the termination of the Applicant's permanent appointment.

If the reason for the termination of the Applicant's appointment was post abolition, did the Administration comply with its obligations under staff rule 13.1(d) when it terminated the Applicant's permanent appointment?

81. The Respondent did not contest that in case of termination of permanent appointment under staff rule 13.1(d), the Administration has to make good faith efforts to place the concerned staff member in a suitable post. However, the Administration argues that the extent of that obligation is limited to the department in which the Applicant was employed at the time of separation. The Respondent notes that the Applicant had been transferred, between departments, from DFS to UNICRI, in 2012, and that any obligation to make efforts to place her were limited to the "parent department", which he notes was UNICRI. It is the Respondent's view that since UNICRI made genuine efforts, and since the Applicant's candidature to a few positions in the Secretariat were given due consideration, the Administration complied with its duty under the relevant rule.

82. The Applicant submits that the duty of the Organization to make efforts to retain her services by way of placement to a suitable post extended to the whole United Nations Secretariat. It is the Applicant's case that by limiting these efforts to UNICRI, the Administration did not fulfil its obligations under staff rule 13.1(d). She argues that the mere fact that Hiring Managers were alerted in respect of her application for four posts within the Secretariat and that she should be given "due consideration" since her post had been abolished does not meet the Organization's obligation under staff rule 13.1(d). Merely to claim, without having provided any particulars, to have given "due consideration" is not compliant with the policy objectives of giving priority consideration to permanent staff members whose posts have been abolished. Such due consideration must be clearly demonstrable.

83. In determining whether the Administration complied with its duty under staff rule 13.1(d), the Tribunal finds it necessary to take into account the *rationale* behind the creation of a career service at the United Nations. It notes that from its inception, the United Nations gave particular importance to the consideration of granting staff members the status of permanency. The *rationale* for the

establishment of career appointments at the United Nations is first reflected in the report of the Preparatory Commission of the United Nations, in 1945, which underlined the need for a career service, and its special character:

> Unless members of the staff can be offered some assurance of being able to make their careers in the Secretariat, many of the best candidates from all countries will inevitably be kept away. Nor can members of the staff 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 remain dependent upon them for their future. Finally, it is important that the advantages of experience should be secured and sound administrative traditions established within the Secretariat.[1]

84. Following that advice, the General Assembly, at its first session, adopted Provisional Staff Regulations providing for staff members having passed a period of probation to be granted permanent contracts.

85. In his report of 1998 on Human resources management (A/53/342), the Secretary-General, underlined the importance of a career service, "as an element which underpins the independence of the international civil service, and which itself is a requirement of the Charter". In resolution 51/226, the General Assembly underlined the importance of the concept of career service for staff members who perform continuing core functions. In its resolution 51/241 of 31 July 1997, the General Assembly stated, *inter alia*, that "[i]t is essential for the successful functioning of the Organization that it has a career international civil service for its core functions. There is also an important role for term contracts for various categories of staff".

86. It is clear from the above that from its inception, and until today, the Organization has made a conscious choice for a dual-track system of career and non-career appointments. It has also been observed that while there has been a change to the earlier "career concept", Organizations have to increasingly compete with a range of other global employers for a talented workforce, hence, the importance of competitive employment conditions (cf. Note by the

[1] Report of the Preparatory Commission of the United Nations (UN Document PC/20, December 23, 1945), p 92.

Secretary-General on the Report of the Joint Inspection Unit on young professionals in selected organizations of the United Nations system: recruitment, management and retention, A/55/798/Add.1, 9 March 2001).

87. The General Assembly in 2009, referring *inter alia* to the above-referenced resolution 51/226, approved new contractual arrangements comprising three types of appointments (temporary, fixed-term and continuing), under one set of Staff Rules, effective 1 July 2009 (A/RES/63/250).

88. With the introduction, in 2009, of continuing appointments, and by constantly increasing the number of fixed-term and temporary appointments over time, the United Nations seems to be giving more weight to considerations of its operational flexibility.

89. The foregoing notwithstanding, the Tribunal notes that the workforce of the United Nations, as it currently stands, still contains staff members enjoying the status of permanent staff members, and that they are given particular protection by the Staff Rules and Regulations. As such, pursuant to staff rule 13.1(c), and unlike continuing appointments, their appointment cannot be terminated without their consent on the grounds of "interests of the good administration of the Organization" (cf. above). Further, under the conditions of staff rule 13.1(d), staff members with permanent appointments shall be retained in preference to those on all other types of appointments, including continuing appointments. It is the Tribunal's view that staff rules 13.1(c) and 13.1(d), read together with staff rule 9.6(e) have to be read and interpreted in light of the *rationale* behind permanent appointments/career service, as it has been discussed since the inception of the United Nations.

90. With this in mind, the Tribunal recalls what it held in *El-Kholy*[2] with respect to the obligations of the Administration pursuant to staff rule 9.6(e) and 13.1(d) when considering the termination of the appointment of a permanent staff member:

[2] Followed in *Hassanin* UNDT/2016/181.

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

56. With respect to staff members specifically recruited for service with a programme, fund or subsidiary organ of the United Nations, staff rule 9.6(g) clarifies that their entitlement for consideration for suitable posts is limited to those available within the relevant organ for which they were recruited. In this case it would be within UNDP.

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

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

59. A review of the case law indicates that there has to date been a very limited opportunity for UNAT to rule on the proper interpretation to be given to the obligation upon the Administration to use good faith efforts to find displaced staff members alternative employment particularly, those on permanent appointments, under current staff rules 9.6(e) and 13.1(d) in case of abolition of their post. In *Dumornay* UNDT/2010/004, this Tribunal found that the Applicant was shortlisted and considered for twenty-nine posts, including a number of posts for which she did not even apply. Her permanent appointment was ultimately terminated, since, despite these efforts by the Administration, the Applicant had not been found suitable for any of those posts. The Tribunal found in that case that the Organization had met its obligation of good faith under former staff rule 109.1(c)(i). The Appeals Tribunal ruled that reasonable efforts were made by the Administration to find suitable alternative employment given the factual findings (*Dumornay* 2010-UNAT-097).

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

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

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

62. According to the former UNAdT, since "the circumstances under which the staff member is being separated are not of his making at all" "it is for the Administration to prove that the incumbent was afforded that consideration", a duty that is "not discharged by a simple *ipse dixit* but by showing what posts existed; that the staff member was considered against them and found unsuitable and why that was so (Hussain Judgment No. 1409 (2008); *Soares* Judgment No. 910 (1998); Carson Judgment No. 85 (1962)).

63. The ILOAT stated in Judgment No. 3437 (2015), para. 6, that: The Tribunal's case law has consistently upheld the principle that an international organization may not terminate the appointment of a staff member whose post has been abolished, at least if he or she holds an appointment of indeterminate duration, without first taking suitable steps to find him or her alternative employment (see, for example, Judgment 269, under 2, 1745, under 7, 2207, under 9, or 3238, under 10). As a result, when an organisation has to abolish a post held by a staff member who, like the complainant in the instant case, holds a contract for an indefinite period of time, it has a duty to do all that it can to reassign that person as a matter of priority to another post matching his or her abilities and grade. Furthermore, if the attempt to find such a post proves fruitless, it is up to the organisation, if the staff member concerned agrees, to try to place him or her in duties at a

lower grade and to widen its search accordingly (see Judgments 1782, under 11, or 2830, under 9).

64. In Judgment No. 1782 (1998), the ILOAT applied staff rule 110.02(a)2 of the United Nations Industrial Development Organization, which is similar to staff rule 9.6(e) and, in para. 11, ruled as follows: What [staff rule 110.02(a)] entitles staff members with permanent appointments to is preference to "suitable posts in which their services can be effectively utilized", and that means posts not just at the same grade but even at a lower one. In a case in which a similar provision was material (Judgment 346: in re Savioli) the Tribunal held that if a staff member was willing to accept a post at a lower grade the organisation must look for posts at that grade as well.

65. In relation to the Respondent's contention that vacancy lists were published and the Applicant did not apply, the ILOAT, in Judgment No. 3238 (2013), in considering whether the mere advertising of posts inviting individuals to apply was sufficient to comply with the duty to give priority to reassigned staff members, said:

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

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

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

> 68. On the contrary, in case of abolition of post or reduction of staff, the Organization may be expected to review all possibly suitable available posts which are vacant or likely to be vacant in the near future. Such posts can be filled by way of lateral move/assignment, under the Secretary-General's prerogative to assign staff members unilaterally to a position commensurate with their qualifications, under staff regulation 1.2(c). It then has to assess if staff members affected by the restructuring exercise can be retained against such posts, taking into account relative competence, integrity, length of service, and the contractual status of the staff member affected. It is clear from the formulation of staff rules 9.6(e) and 13.1(d) that priority consideration must be accorded to staff members holding permanent appointments. Preferential treatment has to be given to the rights of staff members who are at risk of being separated by reason of a structural reorganisation. If no displaced or potentially displaced staff member is deemed suitable the Organisation may then widen the pool of candidates and consider others including external candidates, but at all material times priority must be given to displaced staff on permanent appointments. The *onus* is on the Administration to carry out this sequential exercise prior to opening the vacancy to others whether by an advertisement or otherwise. Accordingly, an assertion that the Applicant's suitability could not be considered for any vacant positions if she had not applied for them is an unjustifiable gloss on the plain words of staff rules 9.6(e) and 13.1(d) and imposes a requirement that a displaced staff member has to apply for a particular post in order to be considered. If that was the intention, the staff rule would have made that an explicit requirement. But most importantly, such a line of argument overlooks the underlying policy, in relation to structural reorganisation, of according preferential consideration to existing staff who are at risk of separation prior to considering others and giving priority to those holding permanent contracts.

91. The same *rationale*, which is supported by the Tribunal's considerations under paras. 81 to 90 above, applies to this case. However, the Tribunal notes that unlike the case of *El-Kholy*, where the Applicant had been recruited for service with UNDP, the Applicant was not recruited by a "programme, fund or subsidiary organ of the United Nations that enjoys a special status in matters of appointment under a resolution of the General Assembly or as a result of an agreement entered by the Secretary-General". As such, in contrast to the case of *El-Kholy,* the limitation contained in staff rule 13.1(g) does not apply to the Applicant.

92. Indeed, according to art. III.1 of the Statute of UNICRI, "[t]he Institute shall be a United Nations entity and thus form part of the United Nations System"; it was established in 1986 by the Economic and Social Council (resolution 1986/56 of 24 May 1989). According to art. V of its Statute, it is subject to the United Nations Financial Staff Regulations and Rules, and all other administrative issuances of the Secretary-General except as otherwise decided by the Secretary-General. The terms and conditions of service of the Director and the staff are governed by the United Nations Staff Regulations and Rules.

93. In this respect, the Tribunal notes that upon the transfer of the Applicant between departments, from DFS to UNICRI, she did not sign a new letter of appointment with UNICRI. Rather, during her tenure with UNICRI, she continued to be employed against her permanent appointment with the United Nations Secretariat. The Applicant had been approached by UNICRI, in relation to the vacancy announcement for the Expert (Grant Management, UNICRI) published in *Inspira*, which is the Human Resources internet portal for publishing job openings at the United Nations. She was selected for that post from the United Nations roster of candidates pre-approved for similar functions at the level of the job opening. The Applicant gave evidence that at the time of her taking up the functions at UNICRI, she was told that no contract was to be signed with the latter, since she had a permanent appointment with the United Nations Secretariat. The evidence further shows that the Applicant was given specific advice and assurance, on 26 July 2012, in writing, that her taking up the position of Expert (Grant Management) with UNICRI would have no impact on her status as a holder of a permanent appointment. The Tribunal finds that throughout her tenure with UNICRI, the Applicant's contractual status remained that of a permanent staff member of the United Nations Secretariat, and that her permanent appointment was not subject to any limitations.

94. Both Mr. Lucas and Mr. Agadzhanov expressed in several communications to OHRM their understanding that the matter of placement of the Applicant went beyond UNICRI and UNOV, and extended to the whole Secretariat. Despite these communications, some of which were addressed to high level officials within OHRM, the responses from OHRM were either non-existent or failed to address

the systemic issue raised by both Mr. Lucas and the Chief, HRMS, UNOV. The Tribunal is particularly concerned that the email of Mr. Agadzhanov to Ms. Lopez of 8 December 2014 remained unanswered. In that email, Mr. Agadzhanov after explaining, in detail, the situation of the Applicant, had expressly stated that "in view of this situation and bearing in mind the authority vested in the ASG/OHRM to reassign staff members between departments under provisions of ST/AI/2010/3 and read in conjunction with Staff Rule 9.6(e)(i), we hereby request your assistance to explore possibilities of lateral reassignment of [the Applicant] within the Secretariat. … We would highly appreciate OHRM consideration of this case, which is of systemic nature, and advice on a further course of action".

95. In light of all of the foregoing, the Tribunal stresses that it is clear that in contrast to Applicant *El-Kholy*, the permanent appointment of the Applicant in this case was one with the United Nations Secretariat. The duty of the Administration under staff rule 13.1(d) was not limited to a particular office or department. No such limitation can be drawn from staff rule 13.1(e), which only applies to staff members on the General Service category. In light of the above provisions of the Staff Rules, the Respondent's argument that the duty of the Administration to make good faith efforts to place the Applicant against a suitable post extended only to her "parent department", which he defined as being UNICRI, cannot stand. As an international professional staff member, with a permanent appointment with the United Nations Secretariat, the limitations under staff rule 13.1(e) and (f) did not apply to the Applicant.

96. The Administration's duty, arising from staff rule 13.1(d), finds its reflection in the terms of sec. 11.1(b) (Placement authority outside the normal process) of ST/AI/2010/3 (Staff selection system). Under that provision, upon the abolition of the Applicant's post, on the assumption that one were to follow the Respondent's argument that her post had been abolished, the Assistant Secretary-General for Human Resources Management had the authority to place the Applicant in a suitable position. In light of the staff rules as referred to above, that authority turned to a positive duty and extends to any available suitable post anywhere within the United Nations Secretariat.

97. The Respondent admits, and the evidence shows, that the Administration made efforts to place the Applicant only against available suitable posts at UNICRI, and there were none. The Tribunal is fully satisfied that Mr. Lucas made good faith efforts to consider the Applicant, who did not possess the required expertise for the limited positions that were available at UNICRI at the time of her termination. While Mr. Agadzhanov also sent a follow-up email to OHRM to give consideration to the Applicant's candidature for four posts within the Secretariat, OHRM's efforts to assist the Applicant, as a displaced permanent staff member, were limited simply to informing the Hiring Managers about the Applicant's situation and asking them to give her "due consideration". In fact there was scant evidence of any consideration being given to placing the Applicant, who was on two Secretariat rosters at the P-3 level, against any roster post, or to otherwise place her against available positions within the Secretariat, by way of lateral transfer or assignment. Such an approach is clearly not in conformity with the Administration's duty under staff rule 13.1(d).

98. The Tribunal further notes that the USG/DM, who took the decision to terminate the Applicant's permanent appointment on behalf of the Secretary-General, was given incorrect and misleading information, when he was told that considerable efforts were made to assist the staff member in securing another appointment, within UNICRI or within the United Nations system, but that such efforts had proven unsuccessful (cf. paras. 25 and 26 above). In fact, the evidence shows that those concerned did not make "considerable efforts" as claimed. There is no evidence that any efforts were made by the Administration to find a suitable post within the Secretariat, where her services could most effectively be utilised.

99. In light of all of the foregoing, the Tribunal concludes that the Administration failed to comply with its obligations under staff rule 13.1(d) when it terminated the Applicant's permanent appointment.

Issue four: Remedies

100. By resolution 69/203, the General Assembly amended art. 10.5 of the Tribunal's Statute as follows (emphasis added):

> As part of its judgment, the Dispute Tribunal may *only* order one or both of the following:
>
> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph.
>
> (b) Compensation for harm *supported by evidence*, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation, and shall provide the reasons for that decision.

101. In light of its findings that the contested decision was unlawful, the Tribunal decides to rescind it in accordance with art. 10.5(a). The Applicant informed the Tribunal at the hearing that she was still unemployed, and that in light of the situation of her home country, working opportunities there were extremely limited.

102. The Tribunal notes that the terms of art. 10.5(a) give staff members an expectation that there is a chance that the contested decision will be rescinded, and that they may be reinstated, if so ordered by the Tribunal. The Tribunal requested the Respondent to provide it with information as to the number of cases in which the Administration rescinded the contested decision, as ordered by the Tribunal, instead of opting for the compensation granted by the Tribunal "in lieu of" said rescission. In his written response to Order No. 135 (GVA/2016), the Respondent stated the following:

> 14. There is no "undisclosed policy" to always elect to pay compensation instead of rescinding a decision regarding appointment, promotion or termination pursuant to Article 10 (5) of the Tribunal's Statute. Decisions to reinstate, to cancel a promotion, or to instead pay compensation are taken based on administrative and operational reasons. The fact that the Administration may often elect to pay compensation in other cases does not in and of itself constitute grounds for warranting the payment of a higher compensation in this case pursuant to Article 10 (5) (b).

103. During the hearing, and upon the Tribunal's further inquiry, the Respondent informed that while at UNOG there was no case at which the Administration opted for rescission (noting that they in general concerned non-selection/promotion cases, rather than termination decisions), there was no statistical data from ALS/OHRM with respect to cases in the larger Secretariat.

104. In light of the statements made at the hearing, the Tribunal found that the Respondent's written statement that "the Administration may often elect to pay compensation" appeared to be incorrect. It notes that the reality is that in cases where the Tribunal found that a staff member had been wrongly separated, through no fault of his/her own but rather as a result of managerial error, the decision was systematically taken to pay compensation, instead of considering the reintegration of the staff member.

105. The Tribunal expressed its concern that the failure of management to give individual consideration to each case in which rescission of a termination decision is ordered, contradicts the spirit and legislative intent of the General Assembly of art. 10.5 of its Statute. By that article, the General Assembly created an expectation for staff members that in cases where the Tribunal orders rescission, for example, of a termination decision, the Administration will give due consideration to the possibility of reintegration before it considers the payment of the amount of compensation set in lieu of rescission, as determined by the Tribunal. The Respondent's submission suggests, however, that no matter what the Tribunal found, Applicants would consistently be given compensation, "for administrative and operational reasons". In other words, no individual consideration is given to the particular situation and no weight is given to the

reasons for the rescission. There may, thus, be cases in which the career of staff members, who dedicated their entire professional life to the Organization and its mission, is completely ruined by an act carried out by the Respondent and found to be unlawful. It is apparent to the Tribunal, as demonstrated by the Applicant in this matter, that in light of their specialization in their career at the United Nations, staff members, who are found to have been wrongly terminated as a matter of law, are virtually unemployable outside the Organization. Notwithstanding this, no individual consideration is given to the possibility of reintegration, for "administrative and operational reasons".

106. The Tribunal is of the view that this matter goes to the core of the creation of the "new" internal justice system and the very nature of the accountability of management and the duty of management, and the Organization, towards each and every member of staff, if he or she has done no wrong. It finds that the policy behind the Tribunal's Statute and the whole system of justice is put at risk by the attitude of management to systematically opt for the payment in lieu of rescission under art. 10.5(a). It also expresses its concern that the Statute is silent on how the discretion under art. 10.5 should be exercised and what reasonable consideration under these terms should entail. The foregoing notwithstanding, the Tribunal finds the fact that the Administration was unable to present a single case where individual consideration was given to rescission and subsequent re-integration under art. 10.5(a) of the Statute, shows that it fails to exercise the discretion accorded to it under that article. Failure to exercise discretion is in itself illegal and improper. It is for the General Assembly to consider whether the underlying policy objective is being frustrated by what appears to be an unwritten policy operated by senior managers (see *Valimaki-Erk* 2012-UNAT-276).

107. The Tribunal requests that in this case, actual individual consideration be given to the possibility of rescinding the decision to terminate the Applicant's appointment and to reinstate her in a post commensurate with her qualifications, experience and the grade she had at the time of her separation. This is of particular importance in this case, since the decision- maker himself had taken the contested decision on the basis of incorrect information.

108. The foregoing notwithstanding, the Tribunal is mandated, under the Statute, to set an amount of compensation "in lieu of" rescission. It finds that the exceptional circumstances of this case justify the award of compensation exceeding the equivalent of two years' net base salary, set down in art. 10.5(b) of its Statute. The Appeals Tribunal recalled in *Hersh* 2014-UNAT-433 what it had held in *Mmata* (2010-UNAT-092), namely that "art. 10.5(b) of the UNDT Statute does not require a formulaic articulation of aggravating factors; rather it requires evidence of aggravating factors which warrant higher compensation".

109. The Tribunal notes that the Applicant's case is particularly serious, since she had a considerable career with the Organization, in terms of its length, but also since she successfully passed the G-to-P examination and was on two Secretariat rosters.

110. The G-to-P examination is an instrument that allows career advancement for persons who have worked in the system, through a mechanism that ensures objectivity and the selection of the best qualified persons (cf. General Assembly resolutions A/Res/35/210 and A/Res/33/143 (Personnel questions)). The Applicant, who started her career with the Organization in 2001, successfully passed the G-to-P examination in Finance in 2008 and scored first out of two thousand candidates. Moreover, at the time of her separation, the Applicant was on two Secretariat rosters, for "Finance and Budget Officers" and "Program Management Officers". The foregoing shows that the Applicant has a broad profile and is highly competent and qualified to work in posts as Finance and Budget or Program Management Officer at the P-3 level. Further, according to the roster policy, and the jurisprudence of the Appeals Tribunal on the automatic appointment of a rostered candidate without a selection process (*Charles* 2014-UNAT-416; *Skourikhine* 2014-UNAT-468), the Applicant could have been approached and directly selected from the roster.

111. Further, the Tribunal notes that staff members are encouraged to be mobile, and the General Assembly has in the past requested the Secretary-General "to submit proposals aimed at encouraging voluntary mobility of staff" (cf. A/RES/63/250, under Chapter VII *Mobility*). The Applicant accepted her selection for a P-3 project position, from the P-3 roster, upon the explicit written advice and assurance, which she received in direct response to her specific inquiry, that her status as a permanent staff member would not be affected by that move. She had every right to rely upon such advice.

112. The Tribunal is concerned that staff members will be discouraged from opting for voluntary mobility if acceptance of a project funded post, which is known to be of a temporary nature, may result in the termination of at least a permanent appointment, on the mere grounds that the functions of that post were no longer needed. This could seriously undermine the policy of (voluntary) mobility. In the Tribunal's view, the fact that the Applicant had been given an advice and assurance that her taking on a post with functions that were limited in time would not affect her status as a permanent staff member and that nevertheless, her appointment was terminated exactly on these grounds, adds to the seriousness of the Applicant's case and constitutes another exceptional circumstance.

113. In light of all of the foregoing, and the seriousness of the breaches of the Applicant's rights as presented above, the Tribunal finds it appropriate to set the amount of compensation under art. 10.5(a) at three years' net base salary. In addition, the Applicant shall receive compensation in the amount equal to the contributions (the staff member's and the Organization's) that would have been paid to the United Nations Joint Staff Pension Fund for a three year period.

114. The Tribunal notes that the Applicant also requested moral damages. Under art. 10.5 of its Statute, as amended, the rules of evidence with respect to an award of moral damages have been modified, and they can only be granted if evidence to sustain such an award is presented (*Featherstone* 2016-UNAT-683). The evidence as required under art. 10.5, as amended, may be in the form of medical reports or other evidence, but is not so restricted and oral evidence can be sufficient. The

Tribunal is satisfied, by the evidence provided by the Applicant, that she suffered a considerable degree of stress and anxiety, as a consequence of the premature termination of her appointment. She also gave evidence as to the disappointment and sorrow caused by the treatment she endured at the hands of the Organization, to which she had dedicated a long time of her life and career, and which she felt was like a betrayal. The Tribunal finds it appropriate to award the sum of USD20,000 as moral damages.

JUDGMENT

115. It is the Judgment of the Tribunal that:

a. The decision to terminate the Applicant's permanent appointment is rescinded;

b. The Respondent is ordered to reinstate the Applicant to a post commensurate with the grade she had at the time of her separation;

c. If reinstatement is not possible, the Respondent may elect to pay to the Applicant compensation of three years' net base pay calculated at the rate of her last salary payment at the time of termination, under art. 10.5(a) of the Tribunal's Statute, plus compensation in the amount equal to the contributions (the staff member's and the Organization's) that would have been paid to the United Nations Joint Staff Pension Fund for a three-year period;

d. The Respondent is ordered to pay to the Applicant the sum of USD20.000 as moral damages;

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

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

(Signed)	*(Signed)*	*(Signed)*
Judge Rowan Downing	Judge Teresa Bravo	Judge Goolam Meeran

Dated this 11th day of November 2016

Entered in the Register on this 11th day of November 2016

(*Signed*)

René M. Vargas M., Registrar, Geneva