UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/007
Judgment No.: UNDT/2017/080
Date: 29 September 2017
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

TIMOTHY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Brandon Gardner, OSLA

Counsel for Respondent:
Alexandre Tavadian, UNHCR

Introduction

1. On 17 January 2017, the Applicant, a former staff member with an indefinite appointment, who served as a Senior Administrative Associate at the GS-7 level, step 10, in the Liaison Office in New York ("LONY") of the United Nations High Commissioner for Refugees ("UNHCR"), filed an application with the Dispute Tribunal, contesting "the decision by the Administration to not make good faith efforts to absorb her on to a new post after it decided to abolish her existing post". The Applicant seeks rescission of the decision to separate her from service without absorbing her on to a new post or, in the alternative, a minimum of two years of net-based salary in compensation for the Administration's failure to follow its obligations to do so together with appropriate moral damages.

2. The Respondent contends that the application is without merit as UNHCR fully complied with its obligations under staff rule 9.6(e) and (f), as well as with its Comparative Review Policy for Locally Recruited Staff Members.

Factual and procedural background

3. In 1998, the Applicant commenced employment with the United Nations. On 1 September 2004, the Applicant was appointed as a Senior Administrative Associate in LONY, where she served until her separation.

4. On 13 October 2011, the Applicant was given an indefinite appointment in UNHCR retroactive to 1 July 2009. Her indefinite appointment letter stated in pertinent part as follows:

> TENURE OF APPOINTMENT
>
> The indefinite appointment is governed by the Staff Regulations and Staff Rules and in particular by Staff Rule 13.2. The indefinite appointment has no specific expiration date and does not carry any expectancy of conversion to any other type of appointment.

> The indefinite appointment may be terminated by the High Commissioner in accordance with the relevant provisions of the Staff Regulations and Staff Rules, in which case you shall be given a three-month period of notice. Should your appointment be terminated, you will receive such indemnity as may be provided for under the Staff Regulations and the Staff Rules. There is no entitlement to either a period of notice of an indemnity payment in the event of dismissal for misconduct pursuant to Chapter X of the Staff Rules.

5. On 11 January 2016, the Director of LONY sent a letter to the Applicant which stated:

> …
>
> As a result of a comprehensive review of the LONY structure, a number of positions are proposed for change […] it is proposed to discontinue the position you currently encumber, 10008112, Snr. Admin. Associate, G7 […].
>
> There is a six month notification period, and you will be formally notified once Headquarters makes the final decision. There will be newly created positions for which you are encouraged to apply and further details will be provided as they are finalized.

6. On 29 January 2016, the Director of LONY sent a letter to the Applicant informing her that her post would be abolished on 1 August 2016. The letter noted:

> …
>
> [T]he Office will seek confirmation from the Assignment Committee whether a comparative review process will be required […] you are encouraged to apply widely for suitable vacant positions from now on and to contact [human resources personnel]. She will be glad to explain the various options that may be available to you.

7. On 19 February 2016, the Applicant sent a letter to the Department of Human Resources Management ("DHRM") within UNHCR requesting suspension of the abolishment as she and her husband as non-U.S. citizens would be forced to leave the U.S. within 30 days leaving behind her two U.S. citizen daughters. The Applicant explained in her letter that her husband had recently suffered a stroke and the loss of medical insurance would exacerbate the circumstances. The Applicant did not receive a reply.

8. In an annex to her application, the Applicant provided a table setting forth 18 UNHCR job vacancies to which she applied between April and September 2016. The positions to which she applied were at the FS-5, G-5, P-2, P-3 and P-4 levels and located in numerous duty stations throughout Africa, the Middle East, North America, Europe and Asia. According to the Applicant, the Administration did not inform her of the status of 17 of the 18 applications.

9. On 12 August 2016, the Applicant was informed that she was one of two final candidates under consideration for the GS-5 Senior Admin/Finance Assistant in the LONY office of UNHCR. Thereafter, the Applicant learned that her former colleague holding a fixed-term appointment was selected for the post instead of her.

10. On 16 September 2016, the Applicant received an email from Director of DHRM, UNHCR attaching a letter dated 13 September 2016. The letter stated:

> …
>
> I am writing to inform you that in light of the abolition of your position, the Headquarters Assignments Committee (AC) met on 25 August 2016 and in accordance with Staff Rule 9.6 (e), (f) and IOM/066-FOM/067/2012, undertook a review of the availability of suitable positions in the LO New York in which your services could be utilized. Following a careful review of the relevant documentation including the Minutes of the AC meeting, the Deputy High Commissioner approved the AC's findings that there were no suitable positions available against which your services could be utilized and therefore against which a comparative review could take place. I have therefore decided, in accordance with paragraph 14 of IOM/066-FOM/067/2012 to terminate your Indefinite Appointment under the terms of Staff Regulation 9.3(a) (i) for abolition of post.

11. The letter further provided the Applicant with a choice between her indefinite appointment being terminated on 30 September 2016 with compensation in lieu of notice, or, in the alternative, termination on 31 December 2016 in order to remain in service during the three month notice period, allowing her to extend her Pension Fund and medical insurance coverage accordingly. The Applicant was informed that, in

light of the abolition of her position and in the absence of suitable positions, the second option would be served on Special Leave with Full Pay.

12. On 25 September 2016, the Applicant informed DHRM that she selected termination on 31 December 2016.

13. On 10 November 2016, the Applicant submitted a request for management evaluation.

14. On 8 December 2016, the Deputy High Commissioner decided to uphold the contested decision to separate the Applicant from service.

15. On 17 January 2017, the Applicant filed the present application.

16. On 18 January 2017, the Registry transmitted the application to the Respondent, instructing him to file his reply by 17 February 2017.

17. On 18 January 2017, the case was assigned to the undersigned Judge.

18. On 8 February 2017, the Respondent filed his reply.

19. On 20 March 2017, by Order No. 43 (NY/2017), the Tribunal instructed the parties, *inter alia*, to file relevant information and supporting documentation.

20. On 24 March 2017, the Respondent submitted a "Motion for Interpretation of Order [No.] 43 (NY/2017) and Motion for Extension of Time" requesting clarification to paragraphs 7(a) and 7(e) of Order No. 43 (NY/2017) which instructed the Respondent to produce various documents as follows (emphasis added):

> a. a table of all available posts located in UNHCR in New York and *in the field* at the Applicant's level or at a lower level with similar and/or comparable job descriptions together with a copy of the job description and vacancy announcements for each post from 29 January 2016 to the present;
>
> …

> e. a list of all temporary positions in the GS category *in the field* from 26 January 2016 to the present;

21. In particular, the Respondent requested the Tribunal to clarify the "precise scope of its request with regard to field offices", stating in his motion as follows:

> [8] UNHCR has 470 field offices in 128 countries and thousands of positions in the General Service category at the GS-7 level and below. Therefore, it would be excessively difficult for the Respondent to comply with the Tribunal's request in these two paragraphs.
>
> [9] In any event, pursuant to [s]taff [r]ule 4.4(a), staff members belonging to the General Service category must be recruited locally. Unless they have legal status in a particular duty station, they cannot be offered positions in the General Service category. Consequently, the availability of posts in the General Service category in the field is not relevant to the facts of this case.

22. The Respondent further indicated that pursuant to staff rule 4.4(a), staff members belonging to the General Service category must be recruited locally and that he considered the requested information for the General Service category in the field irrelevant, stating that, "the availability of posts in the General Service category in the field is not relevant to the facts of this case". With regard to para. 7(h) of Order No. 43 (NY/2017), which requested the Respondent to produce documents relating to positions that remained in UNHCR in New York, the Respondent proposed providing a staffing table for the UNHCR Liaison Office in New York, but requested the Tribunal to specify a time period for the staffing table.

23. On 6 April 2017, by Order No. 70 (NY/2017), the Tribunal denied the Respondent's motion for interpretation as unwarranted, noting that the Respondent did not indicate what aspects of paras. 7(a) and 7(e) of Order No. 43 (NY/2017) were unclear or ambiguous, but rather indicated that producing such documents were difficult. The Tribunal's original instructions remained and the Tribunal further instructed the Respondent to produce documentation containing the special circumstances and conditions determined by the Secretary-General, and by UNHCR, based on which staff members who have been recruited to serve in posts in the General Service and related categories may be considered internationally

recruited, if any, pursuant to staff rule 4.5(c). The Respondent was instructed to inform the Tribunal if the Applicant was considered to be internationally recruited on or after 1 September 2004 pursuant to staff rule 4.5(c). With regard to the time period for the proposed staffing table, the Tribunal instructed the Respondent to provide the requested information for the positions that remained in UNHCR in New York from the date the Applicant's post was abolished (13 September 2016) to the present. The Respondent was granted an extension to comply with Order No. 43 (NY/2017) and the requested documents in para. 12 of Order No. 70 (NY/2017) by 24 April 2017.

24. On 24 April 2017, the Respondent filed his submission pursuant to Order No. 43 and Order No. 70 (NY/2017).

25. On 1 May 2017, pursuant to Orders No. 43 and 70 (NY/2017), the Applicant filed a submission setting forth her comments to the Respondent's 24 April 2017 submission.

26. On 15 May 2017, the parties filed a joint submission responding to Order Nos. 43 and 70 (NY/2017) indicating that the parties are not amenable to resolving the matter informally either through the mediation division or through *inter partes* discussions. The parties also informed the Tribunal that they did not require the production of additional evidence or a hearing on the merits, and thus agreed to the matter being decided on the papers alone.

27. On 18 May 2017 and 24 May 2017, the Respondent and Applicant, respectively, filed their closing submissions.

Applicant's submissions

28. The Applicant's principal contentions, are as follows (emphasis in the original and footnotes omitted):

> … After UNHCR terminated [the Applicant's] indefinite appointment, it did not make a good faith effort to absorb her onto a suitable alternative post, and in fact took no tangible steps towards finding [the Applicant] a post, despite there being a plethora of suitable alternatives. Instead, UNHCR put all onus for finding another position on [the Applicant]. […] In June 2016, [the Applicant] applied for two suitable posts in the General Service category in her duty station. Instead of placing her in either of those vacant posts, UNHCR made [the Applicant] compete for each of them. In the first post, UNHCR selected a fixed-term appointment holder instead of [the Applicant]; in the second—after [the Applicant] and another indefinite appointment holder purportedly failed the tests—UNHCR re-advertised the post and thereafter it has remained vacant; […] UNHCR failed to place [the Applicant] in any of the myriad of other suitable vacant UNHCR posts that she was eligible for, including the 15 other vacancies that she applied for. As such, the Administration failed to meet its obligations to [the Applicant] as the holder of an indefinite appointment and violated Staff Rule 9.6(e) as well as the jurisprudence of the UNDT.
>
> … UNHCR did not proactively assist [the Applicant] in finding her a suitable alternative post. […] In the UNDT case *Hassanin* [UNDT/2016/181], the Tribunal established a principle regarding the necessary steps for the Administration to take in relation to its obligations under Staff Rule 9.6(e) to staff members with indefinite appointments. Specifically:
>
> > "*The Administration must give proper consideration, on a priority basis, with the view to retaining those permanent staff members whose posts have been abolished…nothing in the Staff Rules states that such suitability can only be assessed if that staff member has applied for a post and competed for it against staff on other types of contracts. Rather, under the framework envisaged by staff rules 9.6 and 13.1, it is incumbent upon the Organization to review all possible suitable posts vacant or likely to be vacant in the future, and to assign affected staff members holding indefinite [appointments] on a priority basis*."

… In the UNDT case *El-Kholy* [UNDT/2016/102], the Tribunal stated that in case of abolition of post or reduction of staff, the Organization may be expected to review all possible 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).

… [The Applicant] has proffered evidence that there was no real effort made by UNHCR to review all suitable vacant posts and assign her to one. After being told in January 2016 that her post was scheduled for abolishment, she was informed by [Human Resources] that *"[t]here will be newly created positions for which you are encouraged to apply and further details will be provided as they are finalized*". However, this never actually occurred; she was never informed about any newly created positions and certainly was never approached by HR to assist her in finding a suitable alternative post.

… [The Applicant] has evidenced that in February 2016, she explicitly requested assistance from UNCHR's DHRM to find a suitable post, but her request went on deaf ears and was never deigned with a response. Only on 16 September 2016, with her appointment scheduled to terminate on 30 September 2016, did UNHCR inform that it did not have any suitable posts for her within her office, the UNHCR Liaison Office in New York (LONY). This information was obviously in error as [the Applicant] had applied for two suitable vacancies within LONY. As such, […] the Administration failed to meet its obligations to make good faith efforts to reassign her as a matter or priority to another suitable post.

… In the UNDT cases *El-Kholy* and *Nakhlawi* [UNDT/2016/102, UNDT/2016/204], the Tribunal stated that if a staff member is willing to accept a post at a lower grade the Administration must look for posts at that grade as well. […] [the Applicant] has proffered evidence that in June 2016, [the Applicant]—on her own initiative and with no assistance from UNHCR—applied for two posts in the General Service category in LONY, Senior Finance and Administrative Assistant (GS-5) and Senior External Relations Assistant (GS-5), respectively. These posts were lower in grade than her GS-7 post that was being abolished.

… The Respondent has argued that it had no obligation to consider her for these posts because UNHCR's Comparative Review Policy staff members can only be placed at their grade level. But [the Applicant] argues that this interpretation should be rejected as it contravenes both the Staff Rules and the Tribunal's jurisprudence. […]

Staff Rule 9.6(e) and the relevant [Dispute Tribunal] jurisprudence do not make any mention of grade levels, only that the Administration is obliged to make a good faith effort to find a suitable alternative post. As such, she could have been placed in these posts. The Tribunal clearly stated the same in *El-Kholy* and *Nakhlawi*. … The Respondent has argued that because [the Applicant] was not the only staff member with an indefinite appointment whose position had been abolished, placing her on either of these two posts without a competitive process would have been discriminatory. […] [The Applicant] wholly rejects this argument. Regarding the post of Senior Finance and Administrative Assistant, the Respondent proffered evidence that the successful candidate for this post was the holder of a fixed-term appointment. This is a violation of Staff Rule 9.6(e) which necessitates that staff on indefinite appointments who are affected by post abolition be retained on a priority basis as compared with fixed-term staff. Prior to having a competitive process for this post, the Administration should have just selected [the Applicant].

… Regarding the post of Senior External Relations Assistant, the Respondent evidenced that [the Applicant] and another indefinite appointment holder competed against each other for this post. [The Applicant] argues that this was unnecessary: UNHCR should have placed either her or her colleague in this post and found another suitable post for the remaining staff member.

… The Respondent also averred that because [the Applicant] and the other staff member failed the written assessment and interview for this post, it was appropriate to then re-advertise the post externally. [The Applicant] argues that this is totally incorrect. If UNHCR mistakenly assumed that there needed to be a competitive process between the two indefinite appointment holders, then at least it should have selected the most successful candidate as either would have been suitable.

… The Respondent has also evidenced that after the successful candidate for the Senior External Relations Assistant post refused to take it up, it has remained vacant. [The Applicant] argues that UNHCR could have easily met obligations towards her at any time by simply placing her in this post. Instead, UNHCR's violated its obligations under the Staff Rules and in violation of the UNDT's jurisprudence by neither placing nor selecting [the Applicant] in either of these posts.

… UNHCR could have assisted [the Applicant] in securing one of the vacant professional level posts**.** [The Applicant] proffered evidence that she had passed the G to P exam. Thus, besides being eligible for GS posts, she was eligible to be placed in vacant professional posts as

> well. In fact, [the Applicant] gave evidence that she applied for 15 such posts but was not selected for any of them. […] The Respondent has evidenced that there were dozens of vacancies in the professional categories that UNHCR had the discretion to place [the Applicant] in. However, UNHCR apparently never even considered this option.

Respondent's submissions

29. The Respondent's principal contentions, are as follows (emphasis in the original and footnotes omitted):

> … UNHCR fully complied with its obligations under Staff Rules 9.6(e) and (f) as well as with its *Comparative Review Policy for Locally Recruited Staff Members*. […] The Applicant failed to establish that the contested decision was unlawful, unfair or otherwise flawed. Consequently, the Respondent respectfully requests that this Application be dismissed.
>
> … In accordance with paragraph 5 of UNHCR's *Comparative Review Policy for Locally Recruited Staff Members*, any vacant post that was not at the G-7 level and in the same functional group as the title of the Applicant's position is deemed not be suitable within the meaning of Staff Rule 9.6(e) of the Staff Rules.
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> … Moreover, pursuant to Staff Rule 9.6(f), any vacant post that was not in the Applicant's duty station, which is New York City, is entirely irrelevant.
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> … Similarly, according to Staff Rule 9.6(g), any vacant post that is outside UNHCR is also entirely irrelevant.
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> … The Applicant failed to rebut the "*presumption that official acts have been regularly performed. This is called the presumption of regularity*." More specifically, the Applicant had an obligation to demonstrate that "*the applicable Regulations and Rules have* [not] *been applied* […] *in a fair, transparent and non-discriminatory manner*".
>
> … UNHCR "*necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff*". The Organization "*has broad discretion in relation to the internal organization of its units and department*".
>
> … The only obligation that the Respondent had to comply with before terminating the Applicant's indefinite appointment is set out in

Staff Rule 9.6(e). This provision requires the Organization to examine "*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*".

… It is noteworthy that the Staff Rules and Regulations do not define the term "*suitable posts*". Undoubtedly, the legislative intent was to allow each organization to determine what a "*suitable post*" is. Some organizations, including the United Nations Secretariat and the United Nations Development Programme chose not to specify or define this term. Other UN entities, including UNHCR, decided to promulgate a separate policy for the sole purposes of interpreting and applying Staff Rule 9.6(e).

… UNHCR's *Comparative Review Policy for Locally Recruited Staff Members* was reviewed and endorsed by the Organization's Joint Advisory Committee which is composed of 16 members evenly nominated by the Staff Council and the Division of Human Resources. This Policy was duly promulgated and is an integral part of UNHCR's statutory framework. Paragraph 1 of this Policy provides as follows:

> *This policy provides principles and procedures for the comparative review to be followed in cases of anticipated termination for abolition of posts and reduction of staff pursuant to Staff Rules 9.6 (e) and (f) in the General Service and National Officer categories.*

… The Applicant relies on the judgments of this Tribunal in *El Kholy*, *Hassanin*, *Lemonnier*, and *Tiefenbacher* [UNDT/2016/102, UNDT/2016/181, UNDT/2016/186, UNDT/2016/18] in support of her argument that any post for which she had the required qualifications was suitable within the meaning of Staff Rule 9.6(e). The aforementioned cases dealt with Organizations that did not have a separate policy for interpreting and applying Staff Rule 9.6(e). Therefore, in these cases, the Tribunal had to interpret the term "*suitable post*".

… In the present case, the Tribunal is not required to interpret this term because paragraph 5 of UNHCR's Comparative Review Policy defines "suitable posts" as "*posts at the staff member's duty station and at the staff member's grade level* ***and*** *within the same functional group as per the position title (Annex I lists the different functional groups and for the purposes of this policy, groupings under Level Three shall apply).*" … The text of this provision is very clear. In the Scott judgment [*Scott* 2012-UNAT-225], the Appeals Tribunal cautioned against interpreting clear provisions:

> *The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the intent of the statute or regulation under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author.*

… In accordance with the Appeals Tribunal's reasoning, this Honourable Tribunal should resist the Applicant's invitation to add to UNHCR's Comparative Review Policy requirements that are not expressly provided therein. If this Tribunal determines that a G-5 position was a suitable post for the Applicant (whose grade was G-7), it would effectively legislate. The Appeals Tribunal held that it is not the role of this Honourable Tribunal to legislate:

> *Under these circumstances, granting the present appeal would mean to substitute UNRWA's lawful authority to administer the budget relating to its staff and to assume legislative prerogatives to rule on the matter of hazard pay and redesign the general policies of that Agency. This Court does not find any infringement of Mr. Tabari's rights in the present case. We observe that this matter should have been submitted through the collective negotiation of the working conditions to UNRWA's legislative or administrative branches.*

The Dispute Tribunal must interpret and apply the text of the provision literally.

… [T]he Applicant contends that if the UNHCR Comparative Review Policy dictated the non-placement of the Applicant on G-5 posts, this policy should have been set aside as it does not comply with the higher norm of Rule 9.6(e). […] The Applicant does not explain how UNHCR's Comparative Review Policy contradicts or is otherwise inconsistent with Staff Rule 9.6(e). This Staff Rule does not preclude UNHCR from defining what it considers to be a suitable post. There are no inconsistencies between Staff Rule 9.6(e) and paragraph 5 of the Comparative Review Policy. The former is a general principle whereas the latter is a more detailed and specific rule. […] In

De Aguirre judgment [2016-UNAT-705], the Appeals Tribunal had an opportunity to examine UNHCR's Comparative Review Policy in the context of abolition of post and termination of appointment. The Appeals Tribunal did not find or identify any inconsistency between the Policy and Staff Rule 9.6(e).

… The Applicant also takes issue with her non-selection for some 18 posts. It is important to recall that 16 of these 18 posts were in different categories. More specifically, the Applicant submitted 14 applications for vacant posts in the professional category and 2 applications in the Field Service category. None of these vacant posts was in New York or the United States. The Respondent had no obligation to look for suitable posts for the Applicant in the Field Service or Professional categories especially outside her duty station.

… Staff Rule 9.6(f) leaves no doubt that staff members in the General Service category are entitled to consideration for suitable posts available at their duty stations only. Vacant posts outside New York City are irrelevant.

… The Applicant also applied for two posts in the General Service category that were available in the New York Office. These two posts were Senior Finance/Administrative Assistant (G-5) and Senior External Relations Assistant (G-5). Although these posts were at her duty station, they were two grades lower than her post and personal grade.

… In addition, the post of Senior External Relations Assistant (G-5) belongs to an entirely different functional group with completely different job description, duties and responsibilities. The argument that this post was suitable within the meaning of Staff Rule 9.6(e) is not only inconsistent with the UNHCR's Comparative Review Policy but also nonsensical. […] It is important to point out that the Applicant was allowed to compete for these two posts with other internal applicants before they were advertised externally.

… The Applicant's challenge against the decision not to select her for either of the two vacant G-5 posts in the New York Office is also jurisdictionally flawed. Essentially, the Applicant is attempting to collaterally challenge decisions that are already time-barred.

… Indeed, the Applicant applied for the post of Senior Admin/Finance Assistant at the G-5 level in the New York Office on 24 June 2016. On 12 August 2016, the Applicant was informed of the decision not to select her for the post. The Applicant did not contest this decision by way of management evaluation request. Therefore, the decision not to select her for the post can no longer be reviewed.

> … Also in June 2016, the Applicant applied for Senior External Relations Assistant at the G-5 level in the New York Office. The Applicant did not pass the written test or the interview. Although she was notified of the decision not to select her for this post, she chose not to contest this decision by way of management evaluation request.
>
> … Therefore, the decisions not to select her for the two G-5 posts cannot be reviewed by this Tribunal because they are time-barred and have not been subject to management evaluation requests. Reviewing the decisions not to select the Applicant for the G-5 posts of Senior External Relations Assistant and Senior Finance/Administrative Assistant would be an excess of this Tribunal's jurisdiction.
>
> … It is important to recall that contrary to the Applicant's assertion, the documentary evidence filed by the Respondent establishes without any doubt that UNHCR made extraordinary efforts to recommend the Applicant to other UN agencies.
>
> … The Respondent also allowed the Applicant to remain in service and to dedicate a significant amount of her working time to her job search. The Respondent had no obligation to take such steps.

Consideration

Applicable law

30. Staff regulation 9.3 provides that:

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

(iv) If the conduct of the staff member indicates that the staff member does not meet the highest standards of integrity required by Article 101, paragraph 3, of the Charter;

(v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter, have precluded his or her appointment;

(vi) In the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned;

(b) 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;

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

(d) The Secretary-General may, where the circumstances warrant and he or she considers it justified, pay to a staff member whose appointment has been terminated, provided that the termination is not contested, a termination indemnity payment not more than 50 per cent higher than that which would otherwise be payable under the Staff Regulations.

31. Staff rules 9.6 and 9.7 state, in relevant parts, regarding termination:

Rule 9.6

Termination

Definitions

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

…

Reasons for termination

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

(i) Abolition of posts or reduction of staff;

…

Termination for abolition of posts and reduction of staff

(e) Except as otherwise expressly provided in paragraph (f) below and staff rule 13.1, if the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post or the reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in the following order of preference:

(i) Staff members holding continuing appointments;

(ii) Staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment;

(iii) Staff members holding fixed-term appointments.

…

(f) The provisions of paragraph (e) above insofar as they relate to staff members in the General Service and related categories shall be deemed to have been satisfied if such staff members have received consideration for suitable posts available within their parent organization at their duty stations.

Rule 9.7

Notice of termination

…

(b) A staff member whose fixed-term appointment is to be terminated shall be given not less than 30 calendar days' written notice of such termination or such written notice as may otherwise be stipulated in his or her letter of appointment.

…

32. Staff rule 13.2 states:

> **Rule 13.2**
>
> **Indefinite appointment**
>
> (a) A staff member holding an indefinite appointment as at 30 June 2009 shall retain the appointment until he or she separates from the Organization. Effective 1 July 2009, the staff member's indefinite appointment 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.
>
> (b) Staff members holding an indefinite appointment may resign by giving 30 days' written notice.
>
> (c) The Secretary-General may at any time terminate the appointment of a staff member who holds an indefinite appointment if in his or her opinion such action would be in the interest of the United Nations. Staff regulation 9.3 (b) and staff rule 9.6 (d) do not apply to indefinite appointments.

33. Relevant parts of the UNHCR Comparative Review Policy for Locally Recruited Staff Members (footnotes omitted):

> **UNHCR Comparative Review Policy for Locally Recruited Staff Members**
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> 2. As UNHCR is an organization which frequently needs to adjust its structure and presence both in the field and at Headquarters, based on the operational requirements, post discontinuations are an unavoidable occurrence. Staff members whose posts are discontinued will not automatically be separated. Where staff remain without a position following a staffing review and the most recent Assignments Committee (AC) posting session, the Deputy High Commissioner (for Headquarters in Geneva) or Representative/Head of Office (outside Geneva) will decide whether a comparative review needs to take place.
>
> 3. A comparative review will, in principle, cover one duty station rather than all duty stations in one country. Regional Hubs and out-posted Headquarters units will neither be combined with any regular UNHCR office at that duty station, nor with headquarters, for the purposes of a comparative review. The authority to approve a comparative review beyond one duty station in the Field rests with both the relevant Director and the Director of DHRM. In exceptional circumstances, where there is agreement between the Representative and/or the I-leads of Offices in one

country, both the relevant Director and the Director of DHRM: may approve one joint comparative review to be conducted for all relevant positions in the country.

Comparative Review Principles

4. Prior to undertaking a comparative review, the concerned office should verify that there are no staff members on temporary appointments or affiliate workforce undertaking similar functions to those of the discontinued position(s) and whose contract discontinuation would mitigate the need for a comparative review.[…]

6. All staff, appointed to the posts determined to be "suitable posts" and holding indefinite or fixed-term appointments, will be compared along with the incumbents of the abolished position.

7. The criteria set out below will be applied when conducting comparative reviews:

Competence is as reflected in the staff member's Performance Appraisal Reports (PARs-e-PAD) for the last five years and with at least two Managers or Reviewing Officers in order to ascertain trends. For periods of service for which PARs/e-PADs [abbreviation unknown] are incomplete or missing, the staff member's performance shall be considered on the average of all his or her performance appraisals over the five year period, unless otherwise reflected through official communications that have been introduced into the staff member's official personnel file. Where a missing PAR/ePAD is the result of non-compliance by the staff member, the staff member's performance during the period for which the PARs/e-PAD is incomplete or missing shall be considered as unsatisfactory/not achieved/not proficient. The relative factors to be considered should relate to the requirements of the position, primarily as reflected in the job description. When a more detailed comparison is required in order to distinguish candidates' competence, other requirements may also be considered as reflected in the staff member's fact-sheet (e.g. language proficiency). Integrity is the absence of a disciplinary measure within the five year period preceding the cut-off date for the comparative reviews. Length of service will include the period of service in the UN system and Service more particularly in UNHCR.

8. In case two or more staff members are determined to be substantially equally suitable in terms of the above criteria, staff members holding indefinite or continuing appointments shall be retained in preference to those staff holding fixed-term appointments. If a fixed term appointment holder demonstrated a higher level of competence and integrity than an indefinite/continuing appointment holder, then the fixed-term appointment holder should be retained in preference to the indefinite/continuing appointment holder.

Role of the Assignments Committee

9. The Assignments Committee (AC) responsible for the duty station where the comparative review is to take place shall undertake the comparative review.

11. The AC shall:

a) review data provided by the administration on the basis of which the list of staff members who fall within the scope of the comparative review has been established; and/or, confirm that, as determined by the Administration, no suitable positions are available for conducting a comparative review;

b) assess all cases of staff who remain unplaced after the most recent posting session and consider all options for their placement in accordance with the present policy;

c) proceed in accordance with the criteria set out above in conducting its review. The AC shall endeavor to agree on the ranking by consensus. Where no consensus can be achieved, the majority of votes shall decide, and in the event of a tie, the Chairperson would have a casting vote;

d) neither solicit nor accept the submission of recommendations from management or any source outside the established AC, whether before or during the AC deliberations. The AC may request facts from sources outside the AC to help it making an informed decision, but not opinions; and

e) submit its report to the Deputy High Commissioner (for posts at Headquarters in Geneva) or to the Representative/Head of Office (for posts outside Geneva).

12. The following documentation shall be reviewed by the AC for purposes of a comparative review:

a) List of staff members encumbering posts that are considered for abolition and those that have been determined as "suitable" for the purpose of comparative review, including information such as, the name, title and functions most recently performed, grade, entry on duty, contractual status and gender;

b) Up-to-date fact sheet of each of the above staff members, including the Performance Appraisal Reports (PARs-PADs);

c) Updated complete staff list for the duty station(s) concerned;

d) List of all vacant posts at the relevant duty station at the time of the comparative review;

e) Job descriptions on record of each of the discontinued and remaining "suitable" posts; and

f) List of discontinued posts and the effective date of discontinuation.

Termination

13. For posts outside Geneva, following the receipt of the AC's report by the Representative/Head of Office, the documentation related to the comparative review will be forwarded to the Director of DHRM, who will confirm that the comparative review was undertaken in accordance with the present policy.

14. The authority to terminate appointments following a comparative review rests with the Director of DHRM. Staff members who remain unplaced following a comparative review will be separated pursuant to Staff Regulation 9.3(a)(i) and paid termination indemnities in accordance with Staff Regulation 9.3 (c).

34. Relevant part of ST/AI/2016/1 (Staff selection and managed mobility system) are as follows (emphasis in original):

Section 1

Definitions

[…]

Individually classified job description: a classified job description for a particular position with a specific nature in terms of duties and responsibilities, work experience, education, technical skills, core values and core and managerial competencies;

Job families: occupations and sub-occupations grouped into a common field of work on the basis of the similarities in the functions;

Job networks: groupings of job families with common, related and interrelated field of work and functions;

[…]

Part III

Transitional Measures

Lateral Reassignment authority until 31 December 2017

24.1 Heads of departments and offices shall retain authority to laterally reassigning members within their respective departments or office, including to a different location or duty station in the case of staff in the Professional and higher categories and in the Field Service category, to suitable vacant positions at the same level without advertisement of a job opening or review by a senior or central review body during periods of surge, start-up or humanitarian emergency, in

instances of the abolition of posts, and the reduction of staff or to implement a restructuring by the General Assembly.

35. From the Convention on Termination of Employment, 1982 (No. 158) follows, in relevant parts:

Article 2

1. This Convention applies to all branches of economic activity and to all employed persons.

2. A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:

(a) workers engaged under a contract of employment for a specified period of time or a specified task;

(b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;

(c) workers engaged on a casual basis for a short period.

3. Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.

4. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.

5. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.

6. Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under

Article 22 of the Constitution of the International Labour Organisation any categories which may have been excluded in pursuance of paragraphs 4 and 5 of this Article, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice regarding the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

Article 3

For the purpose of this Convention the terms ***termination*** and ***termination of employment*** mean termination of employment at the initiative of the employer.

Article 4

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

[…]

Article 6

1. Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.

2. The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this Article shall be determined in accordance with the methods of implementation referred to in Article 1 of this Convention.

[…]

Article 13

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects

> of any terminations on the workers concerned such as finding alternative employment.
>
> 2. The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.
>
> 3. For the purposes of this Article the term the workers' representatives concerned means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.
>
> […]

Receivability framework

36. As established by the United Nations Appeals Tribunal, the Dispute Tribunal is competent to review *ex officio* its own competence or jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* (*Pellet* 2010-UNAT-073, *O'Neill* 2011-UNAT-182, *Gehr* 2013-UNAT-313 and *Christensen* 2013-UNAT-335). This competence can be exercised even if the parties do not raise the issue, because it constitutes a matter of law and the Statute of the Dispute Tribunal prevents it from considering cases that are not receivable.

37. The Dispute Tribunal's Statute and the Rules of Procedure clearly distinguish between the receivability requirements as follows:

> a. The application is receivable *ratione personae* if it is filed by a current or a former staff member of the United Nations, including the United Nations Secretariat or separately administered funds (arts. 3.1(a)–(b) and 8.1(b) of the Statute) or by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered funds and programmes (arts. 3.1(c) and 8.1(b) of the Statute);

b. The application is receivable *ratione materiae* if the applicant is contesting "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment" (art. 2.1 of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute);

c. The application is receivable *ratione temporis* if it was filed before the Tribunal within the deadlines established in art. 8.1(d)(i)–(iv) of the Statute and arts. 7.1–7.3 of the Rules of Procedure.

38. It results that, in order to be considered receivable by the Tribunal, an application must fulfil all the mandatory and cumulative requirements mentioned above.

Receivability ratione personae

39. The Applicant is a former staff member holding an indefinite appointment and therefore the application is receivable *ratione personae*.

Receivability ratione materiae

40. The Applicant is challenging the 16 September 2016 decision taken by the Administration "to not make good faith efforts to absorb her on to a new post after it decided to abolish her existing post" resulting in her separation (termination) from the UNCHR, which is an administrative decision(s) subject to a management evaluation request. The Applicant filed a management evaluation request before the MEU on 10 November 2016 within 60 days from the date of notification—16 September 2016 and therefore the application is receivable *ratione materiae*.

Receivability ratione temporis.

41. The Tribunal notes that the Applicant filed the present application on 17 January 2017, within 90 days from the date 9 December 2016, the date she received a response from the management evaluation unit thereby rendering the application receivable *ratione temporis*.

The impugned decision and the process of abolition

42. The Tribunal notes that the process of abolition of the Applicant's post started on 11 January 2016 when the Director of LONY informed the Applicant that it was proposed to discontinue the position she encumbered, and continued with the letter issued on 29 January 2016 when the Applicant was informed that her post will be effectively abolished on 1 August 2016. The process finalized on 16 September 2016. The termination decision was effectively implemented on 31 December 2016.

Reasons for separation from service

43. Under the staff regulations and rules, the Secretary-General may separate a staff member from service in accordance with her terms of his/her appointment or for any of the reasons specified in the staff regulations 9.1 to 9.3 and staff rules 9.1 to 9.6.

44. The reasons for separation from service can be organized into five categories:

Separation *ope legis*

45. There are certain types of separation from service that do not involve unilateral action from one of party (Organization or staff member) or the parties' consensus. These include:

a. expiration of the contract in accordance with the terms of appointment (staff rule 9.1(iii) and 9.4);

b. death of the staff member (staff rule 9.1(vi));

c. retirement (staff regulation 9.2 and staff rules 9.1(iv) and 9.5).

Separation by parties' agreement prior to the expiration of the contract (staff regulation 9.3(a)(vi) and staff rule 9.6(c)(vi))

46. According with the general principle of legal symmetry—*mutuus consensus, mutuus disensus*—the labor contract, which is a consensual contract, can be terminated by agreement between the parties.

47. All types of appointments (temporary, fixed-term or continuing/indefinite) can be terminated in the interest of the good administration of the Organization and in accordance with the standards of the Charter provided that this action is not contested by the staff member.

48. A termination based on this reason can only take place if the action is not contested by the staff member. In other words, such an action can only be legally implemented by the Secretary-General if the staff member agrees with it. The staff member's agreement is a conditional requirement for the application of this rule and the Secretary-General's initiative to terminate the contract is in this case an offer to the staff member. If the staff member accepts freely and unequivocally the offer then is an agreed termination and the parties can come to an agreement orally or in writing.

49. In *Jemiai* UNDT/2010/149, the Tribunal held that an agreed termination on terms negotiated free from any duress or misrepresentation is an essential feature of good employment relations and should be given effect and honored by the contracting parties.

Separation initiated by the staff member

50. There are two types of separation which may be initiated by a staff member:

a. Resignation (staff regulation 9.1 and staff rule 9.2); and

b. Abandonment of the post (staff rule 9.3).

Separation initiated by the Secretary-General

51. There are five sub-categories in the types of separation which may be initiated by the Secretary-General:

a. Termination for reasons (grounds) not related to the staff member: abolition of posts or reduction of staff (regulation 9.3(a)(i) and staff rule 9.6(c)(i) and 9.6(e));

b. Termination for reasons (grounds) related to the staff member:

i. If the staff member is, for reasons of health, incapacitated for further service (staff regulation 9.3(a)(iii) and staff rule 9.6(c)(iii));

ii. If the services of the staff member prove unsatisfactory (staff regulation 9.3(a)(ii) and staff rule 9.6(c)(ii));

iii. If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light and, if they had been known at the time of his/her appointment, should under the standards established in the Charter of United Nations have precluded his or her appointment (staff regulation 9.3(a)(v) and staff rule 9.6(c)(v));

iv. If the conduct of the staff member does not meet the highest standards of integrity required by art. 101, para. 3, of the Charter of the United Nations (staff regulation 9.3(a)(iv));

v. Disciplinary reasons in accordance with staff rule 10.2(a)(viii)–(ix) (rule 9.6(c)(iv). Rule 10.2(a) states that disciplinary measures can take only one or more of the following forms:

(i) Written censure;

(ii) Loss of one or more steps in grade;

(iii) Deferment, for a specified period, of eligibility for salary increment;

(iv) Suspension without pay for a specified period;

(v) Fine;

(vi) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;

(vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;

(viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;

(ix) Dismissal.

c. Termination in the interest of good administration of the Organization (staff regulation 9.3(b) and staff rule 9.6(d)):

i. In addition to the reasons given in the letter of appointment and from staff regulation 9.3(a) "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".

ii. This additional reason for termination is distinct from the ones presented above and can be understood as being:

(a) Applicable only to a staff member who holds a continuing appointment;

(b) A termination without the consent of the staff member;

(c) A direct result of the Secretary-General's unilateral opinion that the termination is in the interest of the good administration of the Organization; the Secretary-General's authority to determine the interest of good administration of the Organization and his discretionary power to terminate a staff member's contract are provided for by the Staff Regulations and Staff Rules.

d. This termination is to be interpreted principally as a change or termination of a mandate.

e. The written notice is three months.

52. Staff regulation 9.3(b) and staff rule 9.6(d) are applicable when the Secretary-General's action is taken without the consent of the staff member in cases other than the ones mentioned expressly in staff regulation 9.3(a) and staff rule 9.6(c) respectively when the General Assembly decides not to extend the mandate of a mission or there are no funds available. According to the text, this reason itself can be interpreted in two ways, either, a change of the mandate or a termination of the mandate. No ambiguity about this reason for termination is possible since the plain reading of the rule is clear in this sense and this reason cannot be assimilated or compared with any other because it is related directly to the extension of the United Nations mandate and/or the availability of funds.

Was staff rule 9.6(e)(i) respected in the Applicant's case?

53. The Tribunal notes that in the present case the Applicant's indefinite appointment was terminated for the abolishment of her post and will further analyze if the termination decision was issued in accordance with the mandatory legal

provisions. The Tribunal notes that according with staff rule 13.2(a) and rule 9.6(i) is applicable both to indefinite and continuing appointments.

54. Staff rule 9.6 (e)-(f) states as follows:

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

55. Pursuant to the staff rule 9.6(e)(i), subject to availability of suitable posts the Applicant had the right ("shall") to be retained in service and UNHCR had the correlative obligation to retain her in service in any of the available suitable posts in which her services could have been effectively utilized with due regard to her relative competence, integrity and length in service.

56. The Tribunal notes that the Applicant was a General Service staff member with an indefinite appointment at the date of abolition of her post, and according to her uncontested statement prior to the implementation of the contested decision she also pasted the exam for Professional category.

57. The Tribunal underlines that staff rule 9.6 (e)(i), does not include any express reference for the staff member(s) to be retained in the order of preference exclusively to available suitable post(s) at the same level with the one occupied at the date of abolition of the post(s), and therefore considers that the text is to interpreted as referring to all the available suitable posts, at the same level and/or at an inferior level which must be taken into consideration for the legal mandate requirement to be respected.

58. Furthermore, the Tribunal considers that according with staff rule 9.6(f), this requirement covers the suitable posts within the parent organization exclusively at their duty station only for staff member(s) in the General Service and related categories. It results that, *a contrario*, for the staff members at the Professional level and above, the requirement to consider them for available suitable posts covers the entire parent organization, including but not limited to their duty station.

59. The Tribunal considers that a staff member who is to be retained in the order of preference established in staff rule 9.6(e) is not required, according to this provision, to be fully competent for the alternative post where s/he is to retained, but to have a *relative* competence for the new suitable post, as clearly specified in staff rule 9.6. A staff member holding a continuous/indefinite appointment is to be presumed that s/he has at least a relative competence for any similar or inferior positions available [in the job family(s) and /or job network(s) to which the one(s) occupied prior the abolition of her/his post belonged (if applicable)], competence which can be later completed during a reasonable period through training /retraining courses, if necessary.

60. Furthermore a staff member holding a continuing/indefinite appointment has the highest level of legal protection from being terminated. S/he has the right to be retained either in any suitable positions vacant at the date of abolition or reduction of staff, or in any suitable positions occupied at the date of abolition, or reduction of staff, by staff members recruited through competitive examination for a career appointment serving on a two year fixed-term appointment, by staff members holding fixed-term appointments and by staff members with temporary appointments.

61. Staff member(s) recruited through competitive examination for a career appointment serving on a two year fixed-term appointment have a lower level of protection than the staff members with continuing/indefinite appointments, and s/he has the right to be retained in any suitable positions vacant at the date of abolition or reduction of staff, or any suitable positions occupied at the date of abolition or reduction of staff, by staff members holding fixed-term appointments and temporary appointments.

62. Staff members holding fixed-term appointments have the right to be retained in any suitable positions vacant at the date of abolition or reduction of staff, or occupied at the date of abolition or reduction of staff by staff members with temporary appointments.

63. The Tribunal underlines in order for Administration to fully respect its obligation pursuant to staff rule 9.6(e), it firstly has the duty to timely provide staff member(s) affected by abolition of posts or reduction of staff with a list of: (a) all posts, at the staff member's duty station, occupied at the date of abolition by staff members with a lower level of protection than the one of the staff member(s) affected, if any; and (b) all the vacant suitable positions at the same level or at a lower level, if any. Secondly, the Administration has to provide a formal offer, together with the list or as soon as possible period after the notification of the list in order for the staff member(s) to be able to evaluate all the options and to timely express his/her interest accordingly after consultations between the parties and the staff union, if

necessary (in accordance with the mandatory provisions of art. 13.1 of the International Labour Organization ("ILO") Convention on Termination).

64. Further, the Tribunal underlines that staff member(s) affected by abolition of post or reduction of staff has the right to be considered and retained for any of the available suitable positions as detailed above on a preferred or non–competitive basis in the mandatory order established by staff rule 9.6 (e). Therefore, the staff member(s) is entitled to be retained without having to go through a competitive selection process for the available suitable post(s), including without applying for vacant job opening(s) since such a step represents the beginning of any competitive selection process based on the staff member(s) relative competence, integrity, length in service and where required to the his/her nationality and gender.

65. The Tribunal considers that a competitive review process may be justified only when two or more identical posts are to be restructured and because there are no sufficient similar available suitable posts for all staff members at the same level affected by the abolition and at least two of them insist to be retained on the same post. In this case, it may be necessary to give due regard to the staff members relative competencies for new posts, integrity and length in service and therefore to compare them in order to decide who is to be retained in the highest position(s) available.

66. Moreover the Tribunal considers that the provisions of staff rule 9.6 (e) refers to all staff members, internationally or locally recruited, since the text makes no specific reference to any of these categories.

67. The Tribunal notes that the Respondent invoked the provisions included in the *Comparative Review Policy for Locally Recruited Staff Members*, according to which UNHCR interpreted the relevant staff rules as follows:

> 5. A comparative review process is the means by which staff members encumbering positions which are to be abolished, and who hold indefinite or fixed-term appointments not expiring on or before the effective date of the abolition of the relevant position, will be matched

> against suitable posts according to a set of criteria relating to the staff members' suitability for such posts. The "suitable posts" are interpreted, for the purpose of the comparative review, as posts at the staff member's duty station and at the staff member's grade level and within the same functional group as per the position title (Annex I lists the different functional groups and for the purposes of this policy, groupings under Level Three shall apply)? In the absence of suitable positions against which a comparative review may take place, upon confirmation by the Assignments Committee (AC), the incumbent of the abolished position will be separated as per applicable procedures.

68. The Tribunal underlines that according with the general principle "*ubi lex non distinguit, nec nos distinguere debemus*", where the law does not distinguish, the interpreter of the law is not allowed to distinguish.

69. The Tribunal underlines, as stated in *Villamoran* UNDT/2011/126, (confirmed at 2011-UNAT-160) and in *Korotina* UNDT/2012/178, that at the top of the hierarchy of the Organization's internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General's bulletins, and administrative instructions (see *Hastings* UNDT/2009/030, affirmed in *Hastings* 2011-UNAT-109; *Amar* UNDT/2011/040). Information circulars, office guidelines, manuals, and memoranda are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

70. The Tribunal considers that the interpretation given by UNHCR in a document inferior to the staff rule limited the scope and the area of application of staff rule 9.6 (e) only to the available suitable posts at the staff members' duty station and only at the same level with the abolished post, which is not correct as results from the above and is therefore incorrect and unlawful.

71. The Tribunal further considers that the decision to separate the Applicant as a-result of abolition of her post at the G-7 step 10 level is unlawful for the following reasons:

a. Prior to taking the comparative review, UNHCR in New York did not verify that there were no staff members on fixed-term and/or temporary appointments undertaking similar functions to those of the Applicant's position (which was to be abolished) and whose contract discontinuation would have ensured position(s) for the Applicant and would have prevented the Applicant's separation;

b. During the comparative review process the Applicant, who held an indefinite appointment, was matched only against suitable available posts at the same level with her abolished post at the G-7 level, step 10, in New York, and she was not matched against all the lower available suitable posts in New York;

c. The Applicant was not considered and retained for any of the available suitable posts on a non-competitive basis, but she had to apply fro such posts. Further, she was among two candidates considered for a GS-5 level post within LONY, but instead of being preferred and retained for this available post on a non-competitive base, the Applicant was subject to a full selection competitive selection process and the selected candidate was a staff member with a fixed-term appointment, instead of the Applicant (who was owed a mandatory preference in accordance with staff rule 9.6 (e)(i)). Further the Applicant was not considered on a non-competitive base for the other 17 vacant positions in the parent organization that she applied for;

d. There is no evidence that any UNHCR staff members holding indefinite appointments at the GS-7 level were affected by the restructuring process and therefore were to be considered for available posts before or simultaneously with the Applicant;

e. The complete list of available suitable post(s) was not timely provided to her and there was no formal offer issued by the Administration before, during or even after the comparative review to retain the Applicant by

> assigning her to one of the available suitable positions in General Service, either occupied by non-permanent staff members or vacant (at the same level or lower) in LONY or at the Professional level either occupied by non-permanent staff members or vacant (at the same level or lower) in the parent organization, according with the mandatory order of preference established by staff rule 9.6(e)(i).

72. The Tribunal notes the following recent relevant jurisprudence of the Dispute and Appeals Tribunals concerning abolition of a post of a staff member holding a continuing/permanent contract under staff rule 9.6(e)(i). In *El-Kholy* UNDT/2016/102 (concerning a former staff member of UNDP), the Dispute Tribunal stated as follows as follows (footnotes omitted):

> 58. The question for decision is whether the Respondent complied with the obligation of good faith in carrying out his responsibilities under staff rules 9.6(e), 9.6(g) and 13.1(d).
>
> 59. A review of the case law indicates that there has to date been a very limited opportunity for UNAT to rule on the proper interpretation to be given to the obligation upon the Administration to use good faith efforts to find displaced staff members alternative employment particularly, those on permanent appointments, under current staff rules 9.6(e) and 13.1(d) in case of abolition of their post. In *Dumornay* UNDT/2010/004, this Tribunal found that the Applicant was shortlisted and considered for twenty-nine posts, including a number of posts for which she did not even apply. Her permanent appointment was ultimately terminated, since, despite these efforts by the Administration, the Applicant had not been found suitable for any of those posts. The Tribunal found in that case that the Organization had met its obligation of good faith under former staff rule 109.1(c)(i)1. The Appeals Tribunal ruled that reasonable efforts were made by the Administration to find suitable alternative employment given the factual findings (*Dumornay* 2010-UNAT-097).
>
> 60. In the absence of specific authority from the United Nations Appeals Tribunal regarding the proper meaning and effect of staff rules 9.6(e) and 13.1(d), the Tribunal considers that the jurisprudence of the former former United Nations Administrative Tribunal ("UNAdT") and of the International Labour Organization

Administrative Tribunal ("ILOAT") in relation to the same issue may be regarded as persuasive.

61. The UNAdT held that the obligation of the Administration under former staff rule 109.1(c) meant that "once a bona fide decision to abolish a post has been made and communicated to a staff member, the Administration is bound—again, in good faith and in a non-discriminatory, transparent manner—to demonstrate that all reasonable efforts had been made to consider the staff member concerned for available and suitable posts" (Hussain Judgment No. 1409 (2008)). The former UNAdT further noted in Fagan Judgment No. 679 (1994) that the application of former staff rule 109.1(c) was vital to the security of staff who, having acquired permanent status, must be presumed to meet the Organization's requirements regarding qualifications. In this connection, while efforts to find alternative employment cannot be unduly prolonged and the person concerned is required to cooperate fully in these efforts, staff rule 109.1(c) requires that such efforts be conducted in good faith with a view to avoiding, to the greatest extent possible, a situation in which a staff member who has made a career within the Organization for a substantial period of his or her professional life is dismissed and forced to undergo belated and uncertain professional relocation.

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

…

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

73. These determinations were upheld by the Appeals Tribunal in *El-Kholy* 2017-UNAT-730 in which it held that:

31. It is for the Administration to prove that the staff member holding a permanent appointment was afforded due and fair consideration as required by Staff Rules 9.6(e), 9.6(g) and 13.1(d). Moreover, the use of the words "shall be retained" in Staff Rule 9.6(e) creates an obligation on the Administration, which has not discharged its burden in this case in light of the existing suitable posts at the time of the events. In other words, the Job Fairs alone do not fulfill the Administration's obligation under the Staff Rules and does not satisfy Ms. El-Kholy's individual entitlement to be duly and fairly considered for any suitable and vacant post within UNDP, around the time that her temporary assignment was due to end.

32. To that effect, and in response to an order during the proceedings before the UNDT, the Administration revealed that several posts at the P-5 and D-1 level were filled outside the scope of the Job Fairs by way of a lateral move or placement of an unassigned staff member holding a permanent appointment, which means that those staff members were considered without having applied for them. Why did Ms. El-Kholy not have the same treatment and was instead supposed to apply for those posts whose existence she could only have known about from public announcements?

33. Furthermore, the new post of Director of the OGC itself, previously occupied by Ms. El-Kholy, was subject to external recruitment after the announcement of November 2014. It is true that Ms. El-Kholy did not apply for it. Nevertheless, to consider that Ms. El-Kholy was supposed to apply for suitable and advertised posts, concurring with the same conditions as external candidates, would render moot her right of preference deriving from Staff Rules 9.6(e), 9.6(g) and 13.1(d). Therefore, more important than the great similarity of the job descriptions between the previous and the new post, as mentioned by the UNDT, is the fact that the Administration failed in its obligation to consider Ms. El Kholy's suitability for the new post; particularly so, when we consider that her performance evaluations during her 16 years of career exceeded expectations and were considered outstanding.

34. In view of the foregoing, there is no doubt that Ms. El-Kholy was informed that she was affected by the structural change and about the risk of separation from service due to the abolition of her post. However, the real question is whether she was offered suitable available posts with UNDP during the search period, in light of the preference established by Staff Rules 9.6(e), 9.6(g) and 13.1(d). As previously mentioned, the answer is "no". Not all reasonable and bona fide efforts had been made to consider Ms. El-Kholy for available and

> suitable posts, as an alternative to the abolished one, with a view to avoiding to the greatest extent possible the separation of the staff member holding a permanent appointment.

74. Further, in *Fasanella* 2017-UNAT-765, the Appeals Tribunal reaffirmed *El-Kholy* and stated as follows:

> 31. The Appeals Tribunal agrees that Mr. Fasanella's termination was unlawful, albeit without fully agreeing with the reasoning of the Dispute Tribunal. Initially, the Administration has the burden of showing that it complied with the Staff Rules in terminating Mr. Fasanella. As the UNDT found, the Administration did not meet its burden. Mr. Fasanella – and any permanent staff member facing termination due to abolition of his or her post – must show an interest in a new position by timely and completely applying for the position; otherwise, the Administration would be engaged in a fruitless exercise, attempting to pair a permanent staff member with a position that would not be accepted. Mr. Fasanella did apply for two positions, and the Administration does not claim that he was not qualified for these posts.
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> 32. Once the application process is completed, however, the Appeals Tribunal is of the view that the Administration is required by Staff Rule 13.1(d) to consider the permanent staff member on a preferred or non-competitive basis for the position, in an effort to retain the permanent staff member. This requires determining the suitability of the staff member for the post, considering the staff member's competence, integrity and length of service, as well as other factors such as nationality and gender. Only if there is no permanent staff member who is suitable may the Administration then consider the other, non-permanent staff members who applied for the post. As this was not done for Mr. Fasanella, the UNDT properly concluded that the decision to terminate Mr. Fasanella was unlawful.
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> …

75. The Tribunal considers that the Administration's obligation for staff members holding a continuing or an indefinite appointment, as indicated in staff rules 9.6(e) and 13.2(a), exists and is applicable to all staff members affected by the abolition of posts in the mandatory order of preference set out in secs. (i), (ii) and (iii) of staff rule 9.6(e), including to the Applicant's indefinite appointment.

76. Consequently, the Tribunal concludes that the Administration did not respect its obligation pursuant to staff rule 9.6(e)(i) and 9.6(f) to retain the Applicant and the Applicant's correlative right to be retained in any available suitable post at her level (G-7, step 10) or at a lower level in UNHCR in New York.

77. The Tribunal notes that the Applicant stated that before her termination she passed the exam for the Professional level and this statement was not contested by the Respondent. In this situation, the Administration had the obligation to retain the Applicant, not only on any available suitable posts at the G-7 level or at a lower level available in UNHCR in New York, but also on any available suitable posts at the Applicant's professional ("P") level in the entire parent organization, both at the Headquarters and in the field, including New York. Further, the Tribunal concludes that the termination decision is also unlawful because the Applicant was not retained on any suitable available posts at her P-level or lower within the parent organization, including but not limited to the New York office.

78. In conclusion, in the light of the above considerations, the unlawful decision to terminate the Applicant's contract for abolition of post and to separate her from the Organization is to be rescinded.

Relief

The Applicant's requests for relief

79. In the application, regarding relief, the Application submitted that:

> … Having shown that the Administration failed in its obligation to make a good faith effort to secure her an alternative post after deciding to abolish her existing one, Ms Timothy respectfully requests that the Administration rescind its decision to separate her from service without absorbing her onto a new post.
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> … In the alternative of rescinding the decision separating her from service, Ms Timothy seeks that the Tribunal award her, at a minimum, two years net-based salary in compensation for the Administration's

failure to follow its obligations to the Applicant, together with the appropriate level of compensation for moral damages.

Rescission and pecuniary compensation

80. As results from the above considerations, the contested decision to terminate the Applicant's contract is unlawful and, pursuant to art. 10.5(a) of the Statute, to be rescinded. The Tribunal considers that the rescission of an unlawful termination decision has the ope legis effect of the parties being retroactively placed in the same contractual relationship that existed before the issuance of the rescinded decision. In line herewith, as the basis of any form of compensation, the Appeals Tribunal stated in Warren 2010-UNAT-059 (para. 10) that "the very purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations".

81. It results that, in case a termination decision is rescinded, the separated staff member is, in principle, to be retroactively reinstated in her/his former position and s/he is to receive his/her salary and other entitlements from the date when s/he was separated until her/his likely date of separation, as determined by the Dispute Tribunal. However, when a party or both parties expressly indicate that, due to the particular circumstances of a case the effective reinstatement no longer constitutes a possible option, the remedy can consist solely of compensation.

82. The Tribunal considers that, *mutadis mutandi*, in the present case, as an *ope legis* effect of the rescission of the termination decision, given that, the Applicant cannot be reinstated in her previous abolished post, she is to be retained with retroactive effect from 31 December 2016 in any current suitable available post(s):

a. Occupied by a non-permanent/non-indefinite staff member, or vacant at the General Service level either at GS-7 level or lower at UNHCR in New York (her duty station), as identified in the job family(s) and/or job network(s) to which the one(s) the Applicant occupied prior to the abolition of

her post, if applicable to UNHCR respecting her relative competence for such post(s) integrity and length of service as described in para. 60 above; *or*

b. Occupied by a non-permanent/non-indefinite staff member, or vacant either at the at her Professional ("P) level or lower in the parent Organization (UNHCR) as identified in the job family(s) and/or job network(s) to which the Applicant's position belonged prior to the abolition of her post, if applicable to UNHCR, respecting her relative competence for such post(s) integrity and length of service as describe in paragraph 60 above.

83. The decision to retroactively retain the Applicant on a specific post as accepted by the Applicant is to be issued by UNHCR within two months from the date of publication of the present judgment. The Tribunal trusts that UNHCR will act as an exemplar employer by correcting the previous errors and ensuring a continuing career to a devoted, experienced and long-serving staff member, taking into consideration that it has 470 field offices within 128 countries and the increasing role of UNHCR.

84. The Tribunal notes that, as results from the extensive documentation presented by the Respondent, in February 2017 and in April 2017, three P-2 level posts were identified as available in the New York Office, and several other positions in the UNHCR field offices. Expressing her interest to continue working for UNHCR, the Applicant applied before her separation for posts in the field, either in the New York Office or in another duty stations. Therefore, the Tribunal considers that, in the present case, there are real premises for the Respondent to retain the Applicant according to the specific performance mentioned above.

85. However, in case the issuance of the decision to retroactively retain the Applicant from 31 December 2016 will no longer be possible at the date of the publication of the present judgment due to unforeseen circumstances, which are to be fully disclosed to the Applicant, pursuant to art. 10.5(a) of the Statute, as an alternative to the rescission of the decision and to the specific performance ordered

by the Tribunal, the Respondent may elect to pay compensation to the Applicant. Taking into consideration that the Applicant's indefinite contract was unlawfully terminated on 31 December 2016 and that despite her continuous efforts she is currently unemployed, the Tribunal will award the Applicant 12 months' net-base salary. In addition, the Applicant shall receive compensation in the amount equal to the contributions (hers and that of the Organization) that would have been paid to the United Nations Joint Staff Pension Fund for this period.

Moral damages

86. The Tribunal notes that art. 10.5(b) of the Dispute Tribunal's Statute was amended by the General Assembly in December 2014 and that the text introduced, as a mandatory new requirement, that the Dispute Tribunal may only award compensation "for harm, supported by evidence". This requirement is both substantive, because the compensation can only be awarded for harm, and procedural, because the harm must be supported by evidence.

87. In Black's Law Dictionary, 6th Ed. (1990), the word "harm" is defined as "[a] loss or detriment in fact of any kind to a person resulting from any cause" (see p. 718).

88. It results that, since art. 10.5(b) of the Dispute Tribunal's Statute makes no distinction between physical, material or moral harm, the provision is applicable to any types of harm and that the harm must be supported in all cases by evidence.

89. In *Benfield-Laporte* 2015-UNAT-505, the Appeals Tribunal held that (see para. 41, footnote omitted):

> … […] [W]hile not every violation of due process rights will necessarily lead to an award of compensation, damage, in the form of neglect and emotional stress, is entitled to be compensated. The award of compensation for non-pecuniary damage does not amount to an award of punitive or exemplary damages designed to punish the Organization and deter future wrongdoing.

90. Further in *Kallon* 2017-UNAT-742, the majority of the full bench of the Appeals Tribunal decided (footnotes omitted) that :

> 62. The authority conferred by the [Dispute Tribunal ("UNDT")] Statute to award compensation for harm thus contemplates the possibility of recompense for non-economic harm or moral injury. But, by the same token, Article 10(7) of the UNDT Statute prohibits the UNDT from awarding exemplary or punitive damages. The dividing line between moral and exemplary damages is not very distinct. And for that reason, a proper evidentiary basis must be laid supporting the existence of moral harm before it is compensated. This prudent requirement is at the heart of the amendment of Article 10(5)(*b*) of the UNDT Statute by General Assembly resolution 69/203. For a breach or infringement to give rise to moral damages, especially in a contractual setting (including the contract of employment), where normally a pecuniary satisfaction for a patrimonial injury is regarded as sufficient to compensate a complainant for actual loss as well as the vexation or inconvenience caused by the breach, then, either the contract or the infringing conduct must be attended by peculiar features, or must occur in a context of peculiar circumstances. Whether damages can be recovered depends therefore on evidence of the purpose and ambit of the contract, the nature of the breach, and the special circumstances surrounding the contract, the breach and its positive or negative performance.
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> 63. Generally speaking, the presence of certain circumstances may lead to the presumption of moral injury – *res ipsa loquitur*. The matter may speak for itself and the harm be established by the operation of the evidentiary presumption of law. However, when the circumstances of a certain case do not permit the application of the evidentiary presumption that such damages will normally follow as a consequence to an average person being placed in the same situation of the applicant, evidence must be produced and the lack of it may lead to the denial of compensation. Much will necessarily depend on the evidence before the UNDT.
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> 64. Conscious of the amendment and its purpose, the UNDT in this case thoughtfully deliberated upon the nature of the harm caused by the injury and the evidence before it supporting a finding of harm. In reaching its conclusion, the UNDT was guided by the principles pronounced by this Tribunal in *Asariotis* [2013-UNAT-309] prior to the amendment of Article 10(5)(*b*) by General Assembly resolution 69/203. In that case this Tribunal said:

> … To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:
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> (i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may *of itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.
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> (ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.
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> … We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the Dispute Tribunal.

65. The distinction drawn between the two categories of moral injury or non-patrimonial damages in *Asariotis* [Judgment No. 2013-UNAT-309] has two dimensions. On the one hand, it speaks to the kinds of moral damage ordinarily at issue and, on the other, mentions the kind of evidence necessary to prove each kind of moral damage.

66. The first kind of moral injury acknowledged in *Asariotis* takes the form of a fundamental breach of contract resulting in harm of an unascertainable patrimonial nature. Awards of moral damages in contractual suits by their nature are directed at compensating the harm

> arising from violations of personality rights which are not sufficiently remedied by awards of damages for actual patrimonial loss. The harm experienced by a blatant act of procedural unfairness may constitute an infringement of *dignitas*, not in all but especially in severe cases. Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings. Human beings are entitled to be treated as worthy of respect and concern. The purpose of an award for infringement of the fundamental right to dignity is to assuage wounded feelings and to vindicate the complainant's claim that his personality has been illegitimately assailed by unacceptable conduct, especially by those who have abused administrative power in relation to him or her by acting illegally, unfairly or unreasonably.
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> …
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> 68. The evidence to prove moral injury of the first kind may take different forms. The harm to *dignitas* or to reputation and career potential may thus be established on the totality of the evidence; or it may consist of the applicant's own testimony or that of others, experts or otherwise, recounting the applicant's experience and the observed effects of the insult to dignity. And, as stated above, the facts may also presumptively speak for themselves to a sufficient degree that it is permissible as a matter of evidence to infer logically and legitimately from the factual matrix, including the nature of the breach, the manner of treatment and the violation of the obligation under the contract to act fairly and reasonably, that harm to personality deserving of compensation has been sufficiently proved and is thus supported by the evidence as appropriately required by Article 10(5)(b) of the UNDT Statute. And in this regard, it should be kept in mind, a court may deem prima facie evidence to be conclusive, and to be sufficient to discharge the overall onus of proof, where the other party has failed to meet an evidentiary burden shifted to it during the course of trial in accordance with the rules of trial and principles of evidence.

91. The Tribunal notes that, in her application, the Applicant requested as an alternative to rescinding the decision separating her from service, at minimum two years' net base salary in compensation for the Administration's failure to follow its obligations to her, together with the appropriate level of compensation for moral damages. In the closing submissions, the Applicant clearly indicated also that she requested two years net base salary in compensation, together with moral damages for "the Administration's failure to follow its obligations towards her". It results that

the Applicant's request for moral damages relates to the first category of moral damages identified in *Asariotis*.

92. The Applicant did not claim any mental distress and/or anxiety produced by the contested decision. As results from para. 70 from *Kallon*, additional evidence is required in case of mental distress or anxiety allegedly produced by the contested decision, evidence which can consist in applicant's testimony and/or medical or psychological reports/evidence to prove that the harm can be directly linked or is reasonable attributable to the breach of violation. Therefore no such additional evidence was required in the present case.

93. This Tribunal agrees with the majority decision taken in *Kallon* and considers that, in the present case, the Applicant suffered moral harm as a result of the unlawful termination decision, which breached her right to be retained according with the mandatory provisions of art. 9.6(e)(i) and 9.6(f) and the harm caused to her by the unlawful discontinuation of her indefinite contract with UNHCR; a contract which was expected to continue until her retirement results from the totality of evidence according with the standard of prove established by the Appeals Tribunal in *Kallon*, "[t]he evidence to prove moral injury of the first kind may take different forms. The harm to *dignitas* or to reputation and career potential may thus be established on the totality of the evidence". Since the Applicant did not indicate that she suffered mental distress and/or anxiety, the Tribunal considers that all factual elements together with the nature of the breach constitutes sufficient evidence in the present case to conclude that harm was caused to the Applicant's dignity and to her career potential.

94. The Tribunal considers that the present judgment together with an amount of three months net-base salary represents a reasonable and sufficient compensation for the moral harm caused to the Applicant and her request for moral damages is therefore to be granted in part.

Conclusion

95. In the light of the foregoing, the Tribunal DECIDES:

a. The Application is granted in part;

b. The contested decision is rescinded and the Respondent is to retain the Applicant with retroactive effect from 31 December 2016 in any current suitable available post(s): (a) occupied by a non-permanent/non-indefinite staff member, or vacant either at the General Service level (at the GS-7 level or lower) at UNHCR in New York (her duty station), as identified in the job family(s) and/or job network(s) to which the Applicant belonged prior to the abolition of her post, if applicable to UNHCR; *or* (b) occupied by a non-permanent/non-indefinite staff member, or vacant either at the at her Professional ("P") level or lower in the parent Organization (UNHCR), as identified in the job family(s) and/or job network(s) to which the Applicant belonged prior to the abolition of her post, if applicable to UNHCR;

c. In case the issuance of the decision to retroactively retain the Applicant from 31 December 2016 will no longer not possible within the deadline established by the Tribunal due to unforeseen circumstances, which are to be fully disclosed to the Applicant, pursuant to art. 10.5 (a) of the Statute, as an alternative to the rescission of the decision and to the specific performance ordered by the Tribunal, the Respondent may elect to pay to the Applicant a compensation of 12 months net-base salary. In addition, the Applicant shall receive compensation in the amount equal to the contributions (hers and that of the Organization) that would have been paid to the United Nations Joint Staff Pension Fund for this period;

d. The Respondent is to pay the Applicant a compensation of three months of net base salary as moral damages;

e. The awards of compensation shall bear interest at the U.S. Prime Rate with effect from the date this judgment is executable until payment of said awards. An additional five per cent shall be applied to the U.S. Prime Rate 60 days from the date this judgment becomes executable.

(*Signed*)

Judge Alessandra Greceanu

Dated this 29th day of September 2017

Entered in the Register on this 29th day of September 2017

(*Signed*)

Morten Albert Michelsen, Registrar, New York, Officer-in-Charge

Observation

96. The Tribunal observes that there are currently no legal provisions included in staff regulation 9.3(a)(i) or staff rule 9.6 (e) defining separation initiated by the Organization for termination of contract(s) for reasons not related to the staff member in respect of abolition of post and reduction of staff and the procedure to be followed.

97. Taking into consideration the importance, both for the Organization and for the staff members, of having legal, fair and transparent restructuring processes, the Tribunal recommends additional legal provisions to be adopted, on an urgent basis, in order to clearly define legal notions of abolition of post and reduction of staff, together with the procedure to be applied in each case, in accordance with the

international standards, and to fully implement the mandatory requirements of art. 13.1 of ILO Convention on Termination No. 158/1982 (emphasis added).

> ***Article 13***
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> 1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:
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> **(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out**;
>
> (b) give, […], the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.
>
> […]