UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2017/093
Judgment No.: UNDT/2019/092
Date: 23 May 2019
Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

LAMB

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Alan Gutman, AAS/ALD/OHR, UN Secretariat

Introduction

1. On 3 November 2017, the Applicant, a former staff member with the United Nations Assistance to the Khmer Rouge Trial ("UNAKRT"), filed an application with the Tribunal contesting the decision not to "provide her with an effective remedy" following the decision to grant her a permanent appointment.

Procedure before the Tribunal

2. On 7 December 2017, the Respondent filed his reply challenging the receivability of the application.

3. Upon the Tribunal's request, the Applicant filed, on 26 February 2019, additional information concerning the receivability of the application and her work as a consultant at UNAKRT.

4. On 13 March 2019, a case management discussion ("CMD") was conducted with the participation of the Applicant, her Counsel and Counsel for the Respondent. At the CMD, the parties agreed to a judgment being rendered on the papers, without an oral hearing.

5. After having been granted leave at the CMD to file additional submissions, the Applicant filed, on 22 March 2019, additional observations and the Respondent filed his comments on 27 March 2019.

Facts

6. The Applicant is a former Senior Legal Officer at the P-5 level with UNAKRT. She worked in UNAKRT from 18 January 2009 to 30 June 2013.

7. In 2001, the Cambodian authorities established the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), to try serious crimes committed during the Khmer Rouge regime in 1975-1979. UNAKRT is an international component of ECCC, created to assist in this endeavour pursuant to an agreement between the United Nations and the Government of Cambodia, that entered into force in 2005. UNAKRT was established as a technical assistance project administered by the

Capacity Development Office ("CDO"), Department of Economic and Social Affairs ("DESA").

8. In 2009, the Organization undertook a one-time Secretariat-wide comprehensive exercise, by which eligible staff members under the Staff Rules in force until 30 June 2009 would be considered for conversion of their contracts to permanent appointments. In this context, the Secretary-General's bulletin ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009) was promulgated on 23 June 2009.

9. On 29 January 2010, guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009 ("Guidelines") were further approved by the Assistant Secretary-General for Human Resources Management ("ASG/OHRM"). The Under-Secretary-General ("USG") for Management transmitted the Guidelines on 16 February 2010 to all "Heads of Department and Office" requesting them to conduct a review of individual staff members in their department or office, to make a preliminary determination on eligibility and, subsequently, to submit recommendations to the ASG/OHRM on the suitability for conversion of staff members found preliminarily eligible.

10. Having sought to be considered for conversion, the Applicant received, on 4 June 2010, a letter informing her that, for the purpose of the conversion exercise launched, "[u]pon preliminary review, it appear[ed] that [she] could be considered as having met the eligibility requirements".

11. Upon completion of the review and noting the recommendations "from the substantive Department and the respective Human Resources Office", as well as the fact "that UNAKRT was a downsizing entity", the Central Review Body ("CRB") recommended that, in the interest of the Organization and of the operational realities of UNAKRT, the Applicant not be deemed suitable for conversion and not be granted a permanent appointment.

12. On 31 January 2012, the Applicant received a letter from the Chief, Human Resources Management, DESA, advising her that:

> [F]ollowing the decision of the [ASG/OHRM] pursuant to ST/SGB/2009/10, you will not be granted a permanent appointment.
>
> This decision was taken after a review of your case, taking into account all the interests of the Organization and was based on the operational realities of the Organization, particularly that UNAKRT is a downsizing entity.

13. On 30 March 2012, the Applicant filed a request for management evaluation of the 31 January 2012 decision. On 14 May 2012, the Management Evaluation Unit ("MEU") informed the Applicant that the Secretary-General had decided to uphold the contested decision.

14. On 11 June 2012, the Applicant, along with seven other UNAKRT staff members who had also been denied conversion to permanent appointments in the same exercise, filed separate applications before the Tribunal.

15. By letter dated 30 May 2013, the Applicant informed the Administration that she "[would] not seek renewal of [her] […] fixed-term contract with [UNAKRT], which [was due to] expire on 30 June 2013". The Applicant was consequently separated from service effective 30 June 2013.

16. The Tribunal ruled upon the above-mentioned eight applications by Judgment *Tredici et al.* UNDT/2014/114 of 26 August 2014, whereby it "rescind[ed] the decision of the ASG/OHRM and remand[ed] the UNAKRT conversion exercise to the ASG/OHRM for retroactive consideration of the suitability of each applicant", and awarded the equivalent of EUR3,000 in non-pecuniary damages. Said Judgment, which was not appealed, noted that both parties had "accepted the *ratio decidendi*" of the decisions that the Appeals Tribunal had rendered shortly before with respect to staff of the International Criminal Tribunal for the former Yugoslavia ("ICTY")—having mentioned *Malmström et al.* 2013-UNAT-357 in particular—and stated that "[t]he pertinent facts and the legal issues in the present case [were] on all fours with the ICTY cases". Furthermore, in reaching the outcome quoted above, the Tribunal explicitly relied on "the guidelines set out by the Appeals Tribunal in the matter of *Malmström* 2013-UNAT-357".

17. By letter dated 24 November 2014, the Applicant was informed that, after reconsideration, the Officer-in-Charge, ASG/OHRM, had decided not to grant her retroactive conversion of her fixed-term appointment to a permanent one. The letter stated that the Applicant fulfilled three out of the four required criteria and that she did not meet the fourth criterion, namely, that the granting of a permanent appointment be in accordance with the interest of the Organization. The letter indicated the reasons why the last criterion was not considered to be met, namely:

> I have also considered that through you may have transferable skills, your appointment was limited to service with the DESA/UNAKRT, according to the terms of your employment contract with DESA/UNAKRT. Under the legal framework for the selection of staff members, I have no authority to place you in a position in another entity outside of this legal framework. As mandated by the Charter, the resolutions of the General Assembly, and the Organization's administrative issuances, staff selection is a competitive process to be undertaken in accordance with established procedures. All staff members have to apply and compete with other staff members and external applicants in order to be selected for available positions with the Organization. Given the finite nature of UNAKRT's mandate, and the limitation of your appointment to service with DESA/UNAKRT, the granting of a permanent appointment in your case would not be in accordance with the interests or the operational realities of the Organization. Therefore, you have not satisfied the fourth criterion.

18. The above-mentioned letter also noted that the Applicant had separated from DESA/UNAKRT on 30 June 2013, and that she had since pursued an academic career outside the UN system.

19. On 18 December 2014, the Applicant requested management evaluation of the 24 November 2014 decision, which was upheld by the USG for Management on 23 February 2015. On 4 March 2015, the Applicant, along with six other UNAKRT staff members who had also been denied conversion to permanent appointments after the reconsideration, filed separate applications before the Tribunal.

20. The Tribunal ruled upon the seven applications by Judgment *Gueben et al.* UNDT/2016/026 of 29 March 2016. The Tribunal held that the contested decisions denying each of the *Gueben et al.* applicants –including the Applicant– a conversion

of their fixed-term appointments to permanent ones were unlawful, primarily because they had not been given proper and individual consideration in light of their proficiencies, qualifications, competencies, conduct and transferrable skills, and those decisions were "based on the finite mandate of UNAKRT alone, to the exclusion of all other relevant factors".

21. The Tribunal considered that the Administration had failed to abide by its Judgment *Tredici et al.* and the Appeals Tribunal's instructions in *Malmström et al.* 2013-UNAT-357. The Tribunal rescinded the contested decisions and remanded the matter to the ASG/OHRM for "retroactive individualised consideration of the [Gueben *et al.*'s applicants] suitability for conversion of their appointments to a permanent one" in conformity with the instructions given in Judgment *Malmström et al.,* among others. The Tribunal further awarded moral damages in the sum of EUR3,000 to each of *Gueben et al.* applicants. Judgment *Gueben et al.* UNDT/2016/026 was appealed before the Appeals Tribunal.

22. In its Judgment *Gueben et al.* 2016-UNAT-692 dated 28 October 2016, the Appeals Tribunal affirmed judgment UNDT/2016/026 except for the award of moral damages, which was vacated.

23. By letter dated 17 March 2017 from the Acting Assistant Secretary-General for Human Resources Management ("AASG/OHRM"), the Applicant was informed that "upon reconsideration, the conversion of [her] appointment from fixed-term to permanent [had] been approved". The letter provides, in its relevant part, as follows:

> You are hereby offered a permanent appointment limited to service with the UNAKRT, effective retroactively to 30 June 2009, subject to the provisions of the Staff Regulations and Staff Rules, together with such amendments as may from time to time be made to such Staff Regulations and such Staff Rules.
>
> Please note that in January 2012 your appointment was limited to service with the UNAKRT and your permanent appointment will have the same limitation. While this condition may be lifted in certain circumstances, taking into account all relevant circumstances and issues, lifting this limitation was not justified in January 2012. As such, for you to be transferred to a position in the Secretariat outside the UNAKRT, it is necessary for you to apply through a

> regular selection process and be selected following a selection exercise approved by a Central Review Body.

24. By email dated 30 April 2017, the Applicant responded to the Chief, Human Resources Management Service ("HRMS"), UNAKRT, who had transmitted her the 17 March 2017 letter. In her email, the Applicant indicated her acceptance of the offer of appointment, her availability to work and requested advice as to the next steps, specifically when she should report for duty.

25. By email dated 3 May 2017, the Chief, HRMS, UNAKRT, responded to the Applicant noting that she had opted to separate from UNAKRT in 2013. He stated that, upon separation, a reappointment was possible only through applying for a vacant position and being selected through established procedures and, accordingly, she could return to UNAKRT only if she applied and was selected for a position.

26. On 30 June 2017, the Applicant requested management evaluation of the decision "not to provide her with an effective remedy" following the decision to grant her a permanent appointment.

27. By letter dated 10 August 2017, the USG for Management replied to the Applicant's request for management evaluation. The contested decision was upheld.

Parties' submissions

28. The Applicant's principal contentions are:

a. The Administration's failure to provide the Applicant with an effective remedy represents a reviewable decision even if it has not been explicitly communicated to her;

b. At the time of her decision to resign from UNAKRT, that court was in an extremely uncertain financial situation. Faced with stark job insecurity, her apparently imminent separation without indemnity and the need to forge a career after more than 14 years of UN service in order to provide for her family and ageing parents, the Applicant felt compelled to resign. She instead

took up an academic position which paid approximately USD3,000 per month, about one third of her UN salary;

c. Her decision to assist as a consultant was purely to ensure that her institutional memory was sustained at a critical time in the case she worked on and while her replacement developed a full understanding of the case;

d. Her resignation and subsequent employment with reduced remuneration were a direct result of the failure of the Administration to grant her a permanent appointment. That refusal was unlawful. The decision of 17 March 2017 confirms that she should have been granted a permanent appointment on 31 January 2012;

e. A timely decision that the Applicant was suitable for a permanent appointment would have provided her with the job security required to allow her to continue working in her post;

f. The decision to grant her a permanent appointment retroactively confirms that the Applicant has suffered pecuniary loss resulting from the unlawful decision;

g. By neither offering the Applicant employment on the appointment retroactively granted, nor termination indemnity, the Administration has refused to provide her with an effective remedy for the breach of the terms of her appointment;

h. The Administration has a positive obligation to provide an effective remedy or it should be considered, in the alternative, that her appointment has been terminated; and

i. The Applicant requests to be given employment against the permanent appointment granted to her on 17 March 2017. In the alternative, she seeks compensation equivalent to the termination indemnity that would have been granted to her had her appointment been terminated on the date of her separation.

29. The Respondent's principal contentions are:

a. The application is not receivable. First, the decision to grant the Applicant a permanent appointment did not adversely affect her terms of appointment. Second, the principle of *res judicata* bars the Applicant from bringing this case. She has previously litigated her claim for compensation and received a final judgment. Third, the Applicant cannot claim compensation for the circumstances surrounding her decision to resign from her fixed-term appointment effective 30 June 2013;

b. The application has no merit. The Organization correctly reconsidered the Applicant's request for a permanent appointment and, as a result, it granted her a permanent appointment retroactively;

c. The Applicant's claim for additional remedies are without merit. She has not identified any material violation of her rights under the terms of her appointment, or of the judgment of the Dispute and Appeals Tribunal, which prejudiced the outcome of her reconsideration for permanent appointment. Indeed, the outcome of the reconsideration was a decision in her favour;

d. The Applicant does not provide evidence to support her claim that she decided to resign from service because she was on a fixed-term appointment, rather than a permanent appointment. Her notice of resignation gave no indication that her decision was motivated by concerns over the nature of her appointment;

e. On the contrary, contemporaneous personnel records establish that the Applicant had the opportunity to continue to serve the Organization, but decided to resign for personal reasons. Although UNAKRT was facing financial pressure at the time of her decision, the post encumbered by the Applicant was not subsequently abolished or reclassified downwards. She could have continued to serve in that position, regardless of the nature of her appointment. Her replacement continues to serve in that position;

f. The 17 March 2017 letter granting the Applicant a permanent appointment was a retroactive conversion of her appointment effective

30 June 2009. Nothing in that letter reversed the Applicant's resignation from service on 30 June 2013, or served as an offer to reinstate her under staff rule 4.18. There is therefore no basis for the Respondent to employ the Applicant, as she requests; and

g. The Applicant's appointment was not terminated. Termination indemnity is only payable under staff regulation 9.3 when a staff member's appointment has been terminated. She resigned. Staff rule 9.6(b) expressly provides that separation from service because of resignation is not termination. Termination indemnity is therefore not payable to the Applicant.

Consideration

Receivability

30. As a preliminary issue, the Tribunal will identify the contested decision and address the receivability of the application.

What is the contested decision?

31. Art. 2.1(a) of the Dispute Tribunal's Statute states that the Tribunal is competent to "hear and pass judgment on an application … against the Secretary-General as the Chief Administrative Officer of the United Nations … [t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment".

32. The Appeals Tribunal held in *Massabni* 2012-UNAT-238 that the duties of a Judge prior to taking a decision include "adequate interpretation and comprehension of the applications submitted by the parties", and that the authority to render a judgment gives the Judge "an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and subject to judicial review, which could lead to grant, or not to grant, the requested judgment".

33. The Respondent claims that the application is not receivable since the Applicant has not identified an administrative decision that has adversely affected her terms of appointment. On this issue, the Tribunal notes that, by email dated

30 April 2017, the Applicant accepted the permanent appointment and requested advice as to when she should report to duty. It also notes that the Applicant identified the decision as the email dated 3 May 2017 from the Chief, HRMS, UNAKRT informing her that it was not possible to be reappointed to UNAKRT without going through the established selection process.

34. Therefore, the Tribunal finds that the Applicant does not contest the decision to grant her a permanent appointment, as argued by the Respondent. Rather, the Applicant indeed contests the decision not to "provide her with an effective remedy" after having been granted a permanent appointment with retroactive effect to 30 June 2009, namely not being given employment against the permanent appointment or, in the alternative, not being granted compensation equivalent to the termination indemnity as will be further explained below.

Receivability: does the principle of "*res judicata*" apply?

35. The Respondent submits that the application is not receivable under the principle of *res judicata*. He argues that the Applicant has previously litigated her claim for compensation and cannot raise the same claim again.

36. The principle of *res judicata* applies to an issue that has been definitely settled by a judicial decision. In the United Nations' internal justice system, once the Appeals Tribunal issues a judgment settling an issue, it is *res judicata*, which means that "it [is] no longer subject to appeal and [can]not be raised again, either in the Dispute Tribunal or in the Appeals Tribunal" (*Chaaban* 2015-UNAT-554). The Appeals Tribunal has also held that "[t]here must be an end to litigation and the stability of the judicial process requires that final judgments by an appellate court be set aside only on limited grounds and for the gravest of reasons" (*Shanks* 2010-UNAT-026bis).

37. In her previous application, registered as Case No. UNDT/GVA/2015/107, the Applicant contested the decision to deny to her the conversion of her fixed-term appointment into a permanent appointment. She requested as remedies, *inter alia*, rescission of the contested decision, retroactive grant of the permanent appointment and compensation equal to termination indemnity at the time of her separation.

38. By Judgment *Gueben et al.* UNDT/2016/026 in which the Applicant's claim was considered, the Tribunal rescinded the contested decision and remanded the matter to the ASG/OHRM for "retroactive individualized consideration of the [*Gueben et al.* applicants'] suitability for conversion of their appointments to a permanent one". The Tribunal also awarded moral damages; all other claims were rejected. In its Judgment *Gueben et al.* 2016-UNAT-692, the Appeals Tribunal affirmed the first instance judgment except for the award of moral damages that was vacated.

39. Contrary to the Respondent's argument, the Tribunal finds that the Applicant's claim for compensation in her previous case, as indicated above, was in relation to the decision to deny her conversion of her fixed-term appointment into a permanent appointment which is not the contested decision in the present application. She has been granted a permanent appointment. In the present case, she requests to be given employment against the permanent appointment or, in the alternative, to be granted compensation equivalent to the termination indemnity that would have been paid to her had her appointment been terminated on the date of her separation. This issue has never been reviewed by the Tribunal. Therefore, the principle of *res judicata* does not apply. Whether or not the Applicant is entitled to any compensation in relation to the decision not to "provide her with an effective remedy" following the decision to grant her a permanent appointment is yet to be determined.

40. Lastly, the Respondent submits that the Applicant cannot claim compensation for the circumstances surrounding her decision to resign effective 30 June 2013 and that any matter related to her resignation is time-barred under art. 8(4) of the Tribunal's Statute. On this issue, the Tribunal considers that the Applicant is not seeking compensation related to her resignation but instead for lack of an effective remedy, as explained above, following the offer of a permanent appointment made by the Organization.

41. The Tribunal therefore finds that the application is receivable.

Merits

42. To determine whether the Applicant should be provided with any "effective remedy" following the decision to grant her a permanent appointment and, if so, what remedy would be appropriate, the Tribunal finds it useful to recall the sequence of facts.

43. On 31 January 2012, the Applicant was informed of the decision not to grant her a permanent appointment. On 11 June 2012, the Applicant contested this decision before the Tribunal. However, before the Tribunal issued a ruling on her application, she separated from service on 30 June 2013.

44. On 17 March 2017, after reconsideration, the Organization granted the Applicant a permanent appointment effective retroactively to 30 June 2009. The implementation of such decision is the core issue in the present case.

45. To this effect, the Tribunal has to consider the specific circumstances of the case, i.e., the Applicant's separation from service, the alleged job insecurity and the alleged delay of the Administration in granting her a permanent appointment.

What was the modality for the Applicant's separation from service?

46. The evidence shows that by letter dated 30 May 2013, the Applicant informed the Administration, *inter alia*, that she "[would] not seek renewal of [her] … fixed-term contract with [UNAKRT], which [was due to] expire on 30 June 2013". In an email of the same date, transmitting her letter to the Administration, she indicated that "[she] attach[ed] [her] official resignation from [UNAKRT], effective 30 June 2013, in order to permit UNAKRT to commence the process of [her] separation".

47. While in her application, the Applicant characterised the mechanism by which she separated from service as resignation, in her last submission she claims that, in fact, she was separated from service by the expiration of her fixed-term appointment because she chose not to accept the offered renewal. The Applicant claims that she fulfilled her contractual obligations under her fixed-term appointment and did not unilaterally bring it to an end. She argues that the distinction in the modality for her separation is important because the expiration of

a fixed-term appointment is not a mechanism by which a permanent appointment might be brought to an end.

48. Staff rule 9.1, as applicable in 2013, provides that any of the following shall constitute separation from service:

a. Resignation;

b. Abandonment of post;

c. Expiration of appointment;

d. Retirement;

e. Termination of appointment; and

f. Death.

49. Staff rule 9.2(a), as applicable in 2013, provides that "[a] resignation, within the meaning of the Staff Regulations and Staff Rules, is a *separation initiated by a staff member*" (emphasis added).

50. Staff rule 9.4, as applicable in 2013, provides that "[a] temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment".

51. The evidence in the present case shows that the Applicant was not separated from service due to the expiration of her fixed-term appointment and subsequent non-renewal, but rather due to her own decision to resign. Since the Applicant initiated her separation from service, she cannot claim that her intention in 2013 was not to resign from her fixed-term appointment. The principle of *venire contra factum proprium* applies, i.e., no one may set himself in contradiction to his own previous conduct.

52. Furthermore, the evidence shows that regardless of the financial constraints in UNAKRT, the position that the Applicant encumbered at the time of her resignation was not abolished and that, at least at the time of her application before

the Tribunal, it still existed. The Tribunal thus finds that the Applicant was separated from service by way of her resignation.

Was the Applicant compelled to resign because of the alleged job insecurity?

53. The Applicant argues that at the time of her decision to resign from UNAKRT, her employing entity was in an extremely uncertain financial situation. She states that faced with stark job insecurity, she felt compelled to resign. She claims that her resignation and subsequent employment with reduced remuneration were a direct result of the failure of the Administration to grant her a permanent appointment in January 2012.

54. While the Tribunal understands the influence that job insecurity may have had on her decision-making in 2013, there is no evidence to support her claim that she was compelled to resign or that she decided to resign from service because the Administration failed to grant her a permanent appointment in 2012. The Tribunal notes that nothing in the Applicant's letter and email dated 30 May 2013 indicates that the reason for her decision was related to the denial of conversion of her appointment to a permanent one, as notified to her in January 2012.

55. The evidence shows that the Applicant chose to resign to explore other professional options and this decision is only imputable to her. Indeed, she could have continued working in her position regardless of the nature of her appointment.

56. Concerning the alleged pecuniary loss, the Tribunal notes that this matter has already been considered in para. 98 of judgment UNDT/2016/026, which reads as follows:

> As to the losses in terms of salary and household costs alleged by Applicant Lamb, they are not directly linked or reasonably attributable to the contested decision as such. Indeed, this financial impairment was not the necessary result of the denial of the contractual conversion itself, but arose from a number of distinct and posterior professional choices imputable exclusively to Applicant Lamb. While bearing in mind the influence that job security may have had on her decision-making, the causal link with the material loss described is far too hypothetical and tenuous to trigger compensation.

57. The Tribunal does not see any reason to depart from the above-reasoning.

What is the effect of the delay in granting the Applicant a permanent appointment?

58. The Applicant claims that a timely decision on her suitability for a permanent appointment would have provided her with the job security required to allow her to continue working in her post.

59. The Tribunal notes that the Applicant was informed of the decision not to grant her a permanent appointment on 31 January 2012. She contested that decision in the formal system of administration of justice starting with her request for management evaluation on 30 March 2012. However, she did not wait for the judicial outcome prior to her resignation in June 2013. Arguably, had she wanted to preserve her rights, pending litigation, the Applicant would have remained in the service of the Organization until the matter was determined. Furthermore, the Tribunal cannot speculate on what would have happened if the Applicant had been granted a permanent appointment in January 2012.

60. While it is unfortunate that it took five years for the Administration to grant the Applicant a permanent appointment, by resigning in June 2013—that is before a final decision on her claim was made—she put herself in a situation in which the implementation of the March 2017 decision to grant her a permanent appointment effective retroactively to 30 June 2009 is complex. Her case is, in this regard, exceptional.

What is an "effective remedy" in the Applicant's situation?

61. The Applicant claims that when the Administration fails to follow its own rules, it is obliged to provide an effective remedy. She argues that such remedy would be that she be granted employment against the permanent appointment offered to her on 17 March 2017. In this regard, she argues that since she accepted the permanent appointment, she was in a contractual relationship with the Organization and that, if the Administration did not consider that such relationship existed, it meant that the appointment had been terminated by the Administration and, therefore, that an indemnity must be paid.

62. The Respondent argues that the 17 March 2017 letter granting the Applicant a permanent appointment was a retroactive conversion of her appointment effective 30 June 2009. He further claims that nothing in that letter reversed the Applicant's resignation from service on 30 June 2013, or served as an offer to reinstate her. He thus considers that there is no basis to employ the Applicant.

63. The Tribunal refers to the Appeals Tribunal jurisprudence in *Gabaldon* 2011-UNAT-120, which provides that (emphasis added):

> 22. In that regard, this Court recalls that an employment contract of a staff member subject to the internal laws of the United Nations is not the same as a contract between private parties (*James*, Judgment No. 2010-UNAT-009). The aforementioned provisions confer upon the Secretary-General the power to engage the Organization in this matter. These provisions stipulate that the legal act by which the Organization legally undertakes to employ a person as a staff member is a letter of appointment signed by the Secretary-General or an official acting on his behalf. The issuance of a letter of appointment cannot be regarded as a mere formality (*El Khatib*, Judgment No. 2010-UNAT-029).
>
> 23. However, this does not mean that an offer of employment never produces any legal effects. Unconditional acceptance by a candidate of the conditions of an offer of employment before the issuance of the letter of appointment can form a valid contract, provided the candidate has satisfied all of the conditions. The conditions of an offer are understood as those mentioned in the offer itself, those arising from the relevant rules of law for the appointment of staff members of the Organization, as recalled in article 2, paragraph 2 (a) of the UNDT Statute, and those necessarily associated with constraints in the implementation of public policies entrusted to the Organization.

64. It is clear that by letter dated 17 March 2017, the Administration offered the Applicant a permanent appointment. This letter provides as follows:

> You are hereby offered a permanent appointment limited to service with UNAKRT, effective retroactively to 30 June 2009, subject to the provisions of the Staff Regulations and Staff Rules, together with such amendments as may from time to time be made to such Staff Regulations and such Staff Rules.
>
> Please note that in January 2012 your appointment was limited to service with the UNAKRT and your permanent appointment will have the same limitations. While this condition may be lifted in

> certain circumstances, taking into account all relevant circumstances and issues, lifting this limitation, was not justified in January 2012. As such, for you to be transferred to a position in the Secretariat outside the UNAKRT, it is necessary for you to apply through a regular selection process and be selected following a selection exercise approved by a Central Review Body.

65. On 28 April 2017, the Applicant accepted the offer of employment. The acceptance letter provides as follows:

> With reference to your letter dated 17 March 2017, I hereby accept the appointment described in this letter, subject to the conditions therein specified and to those laid down in the Staff Regulations and in the Staff Rules governing permanent appointments, effective 30 June 2009.
>
> I understand that my permanent appointment is limited to service with the [UNAKRT].

66. On 30 April 2017, the Applicant transmitted her acceptance letter to the Chief, HRMS, UNAKRT, indicating her readiness to return to work and asking when she should report for duty.

67. The Tribunal finds that since the Applicant accepted unconditionally the offer of a permanent appointment made to her in March 2017, she has a valid contract with UNAKRT. Regardless of her resignation in 2013, a new contractual relationship was created by her acceptance of the offer of a permanent appointment in 2017. To decide otherwise would void of any meaning the decision to grant her a permanent appointment. The Tribunal notes that apart from limiting the permanent appointment to service with UNAKRT, there was no other condition in the March 2017 offer made to the Applicant.

68. The Applicant's case is exceptional for the following reasons: first, she is the holder of a permanent appointment effective retroactively to 30 June 2009, which she accepted after her 2013 separation of service; second, her permanent appointment is limited to UNAKRT; third, she does no longer have a position at UNAKRT because she was separated from service in 2013; and fourth, UNAKRT is a downsizing entity. Therefore, unless the Applicant's options to be retained in UNAKRT service are explored, the decision to grant her a permanent appointment

cannot be implemented and would have no practical effect. It is unfortunate that the Administration failed to consider the proper implementation of the decision to grant her a permanent appointment. This is particularly important since at the time that the Administration offered the Applicant a permanent appointment, that is in March 2017, they knew or should have known that the Applicant had been separated from UNAKRT service in June 2013.

69. In that context, the Tribunal finds it relevant to review the legal framework applicable to permanent appointments.

70. Chapter XIII (Transitional measures) of the then applicable Staff Rules provides under staff rule 13.1 with respect to permanent appointments that (emphasis added):

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

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

71. With respect to termination for abolition of posts, staff rule 9.6 relevantly provides:

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

72. With respect to the obligations of the Administration, the Appeals Tribunal has held in *El-Kholy* 2017-UNAT-730 para. 25 that (emphasis added):

> 25. In the present case, like the UNDT, we hold that the Administration failed in its obligation to demonstrate that *all reasonable and good faith efforts had been made to consider the staff member concerned for available and suitable posts* within UNDP under Staff Rule 9.6 (g), before taking the decision to terminate her permanent appointment.

73. It is evident from the above, that staff members who have been granted a permanent appointment shall be retained in preference to those on other types of appointments in case of abolition of a post or reduction of staff, and that the Administration shall make all reasonable and good faith efforts to consider the staff

member concerned for available and suitable posts. However, it is also noted that the staff members affected by an abolishment of post are not entitled to be considered for posts outside of the organ for which they were recruited.

74. Having found that there is a contractual relationship between the parties and considering the exceptional circumstances of the case as mentioned in para. 68 above, the Tribunal considers that to implement the decision to grant the Applicant a permanent appointment, her case should be assimilated to a situation of an abolishment of post. However, this finding is *per se* exceptional as the Tribunal is faced with a special situation following the Applicant's acceptance after her 2013 separation from service of the 17 March 2017 offer to grant her a permanent appointment with retroactive effect to 30 June 2009.

75. As per staff rule 13.1(d), "staff members with permanent appointments shall be retained in preference to those on all other types of appointments". The purpose of staff rule 9.6(e) is to mitigate the effects of a retrenchment on staff members holding non-temporary appointments, insofar as suitable posts are available "in which their services can be effectively utilized, provided that due regard … be given in all cases to relative competence, integrity and length of service". Therefore, the Tribunal considers that in the present case, the Administration should make all reasonable and good faith efforts to consider the Applicant for available and suitable posts (*El-Kholy* 2017-UNAT-730). However, the extent of that obligation is limited to UNAKRT as her permanent appointment is limited to that entity.

76. The Tribunal finds that the Administration is bound to consider the Applicant for suitable posts that are vacant or likely to become vacant in the future and to recruit her on a preferred basis in accordance with staff rule 9.6(e) and 13.1(d) (*Timothy* 2018-UNAT-847).

77. Having said the above, the Tribunal notes that the Appeals Tribunal has recently relevantly held in *Timothy* 2018-UNAT-847 that (emphasis added):

> 45. We agree with the Secretary-general that it is lawful and reasonable for the Administration to expect affected indefinite appointment holders to cooperate fully in the process.

> 46. Based on these considerations, we find erroneous the UNDT's holding that staff members are entitled to be retained without having to apply for vacant job opening(s) since such a step represents the beginning of any competitive selection process based on the staff members' relative competence, integrity, length in service and where required, nationality and gender.
>
> 47. Once the application process is completed, however, the Administration is required by Staff Rule 9.6(e) and (f) and the Comparative Review Policy to consider the continuing or indefinite appointment holder *on a preferred or non-competitive basis for the position, in an effort to retain him or her*. 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.

78. In line with the above-mentioned jurisprudence, the Applicant is required to apply for advertised job openings. However, once the application process is completed, the Administration should consider her application "on a preferred or non-competitive" basis for the position. The Tribunal considers that such approach does not require the Applicant to pass a competitive recruitment process but rather to express her interest in a position by applying to it.

79. In this connection, the Tribunal recalls the email dated 3 May 2017 from the Chief, HRMS, UNAKRT, to the Applicant indicating to her that "[o]nce a staff member separates from service, a reappointment /recruitment may only take place provided the candidate applies to and is selected for a vacant position through established procedures. Hence you may only return to UNAKRT provided you apply and you are selected for a position". No further information was provided to the Applicant.

80. From a plain reading of this text, it seems that the Applicant was required to apply for a position and be selected following a competitive recruitment process to be appointed at UNAKRT. This information is inaccurate because it completely disregards any preferential consideration for the Applicant resulting from her holding a permanent appointment.

81. Had the Administration had the intention to condition the appointment of the Applicant to her competitive selection for a position in UNAKRT, it should have

mentioned it in the initial offer, this was not done. The Administration only indicated that if the Applicant wished to be transferred to a position in the Secretariat, it would be necessary for her "to apply through a regular selection process and be selected following a selection exercise approved by a Central Review Body". There is no mention of a similar condition to be appointed in UNAKRT.

82. In relation to the level of the positions for which the Applicant should be considered, the Tribunal finds that the Applicant should be considered not only for suitable positons at her grade level but also for lower grade available positions in UNAKRT for which she may express her interest by way of application thereto. This reasoning is in line with the Appeals Tribunal's findings in *Timothy* 2018-UNAT-847, which provides that:

> 57. However, with the exception of said mandatory requirements established by Staff Rule 9.6(e) and (f) and the jurisprudence of the Appeals Tribunal, i.e. that "suitable posts" be available within their parent organization at their duty station and belong in the same category to that encumbered by the redundant staff member, nothing in the language of Staff Rule 9.6(e) and (f) indicates that the (right and at the same time) obligation of the Administration to consider the redundant staff member for suitable posts, vacant or likely to be vacant in the future, is limited to the staff member's grade level. On the contrary, by applying the general principle of interpretation *ubi lex non distinguit, nec nos distinguere debemus*, i.e. where the law does not distinguish, neither should we distinguish, the Administration is under an obligation to make proper, reasonable and good faith efforts to find an alternative post for the displaced staff member at his or her grade level or even at a lower grade, if, in the latter case, the staff member concerned has expressed an interest.

83. The above being said, it remains that the Tribunal has no power to order the Administration to automatically give the Applicant employment against her permanent appointment. The Tribunal can only order the Administration, as specific performance, to give the Applicant preferential consideration as outlined above. The Tribunal notes that as an alternative to be given employment, the Applicant requests to be granted compensation equivalent to the termination indemnity that would have been granted to her had her appointment been terminated on the date of her separation.

Is the Applicant entitled to termination indemnity?

84. In accordance with staff rule 9.6, termination is defined as follows:

> (a) A termination within the meaning of the Staff Regulations and Rules is a separation from service initiated by the Secretary-General.
>
> (b) Separation as a result of resignation, abandonment of post, expiration of appointment, retirement or death shall not be regarded as a termination within the meaning of the Staff Rules.

85. Concerning the payment of a termination indemnity, staff regulation 9.3(c) relevantly provides as follows:

> 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 Rules.

86. As mentioned in para. 52 above, the evidence in the present case shows that the Applicant was separated from service in June 2013 due to her own resignation. Her appointment was not terminated by the Secretary-General as per staff rule 9.6(a) and, as a consequence, she is not entitled to the payment of a termination indemnity within the meaning of staff regulation 9.3(c).

Compensation in lieu of specific performance

87. In accordance with Art. 10.5(a) of the its Statute, the Tribunal may order (emphasis added):

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

88. Pursuant to art. 10.5(a) of its Statute, the Tribunal must set an amount that the Organization may elect to pay in lieu of specific performance when the contested decision concerns appointment. In the particular circumstances of this case, the implementation of the decision to grant the Applicant a permanent appointment effective retroactively to 30 June 2009 concerns appointment. The Tribunal has

ruled on the specific performance (see para. 83 above), which is a matter concerning appointment. It follows that the Tribunal must also set an amount of compensation that the Administration may elect to pay in lieu of specific performance.

89. In calculating the quantum, the Appeals Tribunal has stressed that the determination of the "compensation in lieu" must be done on a case-by-case basis and carries a certain degree of empiricism (see *Mwamsaku* 2011-UNAT-265). In the present case, it is difficult to assess the chances that the Applicant may have to be selected and appointed for a position at UNAKRT since it depends on the available and suitable positions for which the Applicant may apply. In such circumstances and also taking into account that UNAKRT is a downsizing entity, the Tribunal considers that an amount equivalent to three months' net base salary at the Applicant's grade level at the time of her separation from service is a reasonable compensation in lieu of specific performance.

Conclusion

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

a. The application is partially granted;

b. The Administration shall consider the Applicant on a preferred or non-competitive basis for position(s) to which she may apply within UNAKRT;

c. Should the Respondent elect to pay financial compensation in lieu of specific performance, he shall pay the Applicant an amount equivalent to three months' net base salary, being the gross salary less staff assessment, at the time of the Applicant's separation;

d. The aforementioned compensation in lieu of specific performance shall bear interest at the United Nations prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United Nations prime rate 60 days from the date this Judgment becomes executable; and

e. All other claims are rejected.

(*Signed*)
Judge Teresa Bravo
Dated this 23rd day of May 2019

Entered in the Register on this 23rd day of May 2019
(*Signed*)
René M. Vargas M., Registrar, Geneva