UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2018/058
Judgment No.: UNDT/2020/032
Date: 27 February 2020
Original: English

Before: Judge Francesco Buffa

Registry: Geneva

Registrar: René M. Vargas M.

NUGROHO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Bettina Gerber, LPAS, UNOG
Cornelius Fischer, LPAS, UNOG

Notice: This Judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. The Applicant contests the decision to terminate his continuing appointment, which entailed his separation from service on 6 August 2018.

Facts and procedure

2. The Applicant is a former Political Affairs Officer (P-4), and the former Head of the Implementation Support Unit ("ISU"), Convention on Certain Conventional Weapons ("CCW"). He joined the Organization in July 2002 and was granted a continuing appointment on 30 September 2014.

3. The ISU was established in 2009 following a decision of the CCW's High Contracting Parties ("HCPs") to provide support to the work of the CCW by *inter alia* preparing and organizing its regular meetings. The ISU was staffed with two posts, one of which was encumbered by the Applicant. As the ISU is hosted by the Geneva Branch of the United Nations Office for Disarmament Affairs ("UNODA"), both ISU staff members were staff members of UNODA administered by the Human Resources Management Service ("HRMS"), United Nations Office at Geneva ("UNOG").

4. The Applicant's post was funded by extra-budgetary contributions from HCPs and Observer States participating in the annual meeting of the CCW. The ISU budget is part of the cost estimates of the CCW meetings and is approved by the HCPs each year.

5. In 2017, some CCW meetings had to be cancelled due to some HCPs' failure to timely pay their respective assessed contribution.

6. On 15 September 2017, the Applicant was informed that ISU contracts would not be renewed beyond 31 December 2017. This was recalled in writing on 19 September 2017 by a memorandum from the Chief, HRMS, UNOG, to the Applicant entitled "Notice of termination of appointment" advising him that due to extra-budgetary funding issues his "continuing appointment may be terminated on 31 December 2017".

7. In October 2017, the Applicant applied for a temporary post of Political Affairs Officer (P-4), UNODA, in Geneva.

8. By Note Verbale dated 17 November 2017, UNODA informed the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland *inter alia* about the financial situation of the CCW. More specifically, this communication indicated that

> [d]ue to the lack of sufficient funds on the CCW account for 2018 planned activities, UNODA [was] not in a position to extend contracts for the UN contracted staff members currently serving in the CCW [ISU]" beyond 31 December 2017."

9. By email dated 29 December 2017, the Chief, HRMS, UNOG, informed the Applicant that extra-budgetary funding had been found to finance his post up to 31 January 2018, at which date his continuing appointment could be terminated.

10. By memorandum dated 18 January 2018 to the Applicant, the Chief, HRMS, UNOG, recalled her 29 December 2017 email and informed him that the Under Secretary-General for Management ("USG/DM") had approved the termination of his continuing appointment on 31 January 2018.

11. On 30 January 2018, the Applicant requested management evaluation of the termination decision and asked therein for the suspension of said decision. He supplemented his request on 31 January 2018.

12. On 1 February 2018, the Management Evaluation Unit ("MEU") responded that the contested decision would be suspended pending management evaluation, which was expected to be completed on 16 March 2018 at the latest. The MEU further advised the Applicant that in the absence of reply by 16 March 2018, the 90-day deadline to file an application before the Tribunal would start to run as of that date.

13. On 24 March 2018, the Applicant was informed that he had not been selected for the above-mentioned P-4 temporary Political Affairs Officer's post.

14. On 1 June 2018, the Applicant attended a meeting called by the Chief, HRMS, UNOG, during which he was informed about a possible P-4 position as a Political Affairs Officer in Mogadishu. On 4 June 2018, the Applicant indicated his willingness to consider a transfer to Mogadishu.

15. On 14 June 2018, the Applicant filed an application contesting the 18 January 2018 decision to terminate his continuing appointment.

16. On 18 July 2018, the Respondent submitted his reply to the application.

17. On 2 August 2018, the Chef de Cabinet, Executive Office of the Secretary-General, informed the Applicant that the USG/DM's decision to terminate his continuing appointment had been upheld.

18. On 6 August 2018, the Applicant was separated from service.

19. On 17 August 2018, pursuant to leave granted by the Tribunal, the Respondent filed an additional submission in view of events occurred after the filing of his reply. The Respondent highlighted additional efforts undertaken by the Strategic Planning and Staffing Division ("SPSD"), Office of Human Resources Management ("OHRM") as well as by the MEU to avoid the termination of the Applicant's continuing appointment, namely the following: the Applicant was proposed for consideration for TJO 96317, Political Affairs Officer, P-3, in the Department of Political Affairs in New York, but he was not selected as he did not meet the desirable criteria of the TJO; the Applicant was considered for a position with the United Nations Assistance Mission in Somalia ("UNSOM"), but was found to be not suitable due to a lack of experience in mediation, reconciliation, and conflict resolution.

20. On 1 December 2019, the case was reassigned to the undersigned Judge.

21. By Order No. 109 (GVA/2019) of 4 December 2019, the Tribunal requested the parties' views concerning the case being decided on the papers without a hearing. By individual submissions on 6 December 2019, the Respondent agreed that no oral hearing was necessary, and the Applicant requested an oral hearing as

well as the disclosure of additional documents and of annex 12 to the Respondent's reply, which had been filed *ex parte*.

22. By Order No. 112 (GVA/2019) of 10 December 2019, the Tribunal found that neither a hearing nor additional disclosure of documents was needed to adjudicate the case at hand. The Tribunal ordered that a redacted version of annex 12 to the Respondent's reply be shared with the Applicant and that the parties submit their respective closing submission by 17 December 2019, which they did.

Parties' submissions

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

a. The decision to separate the only two staff members of the ISU implies a decision to discontinue ISU activities or the assistance to be provided to the annual conferences and expert meetings of the CCW using regular budget resources, which is contrary to the General Assembly Resolution mandating the activities of the CCW;

b. As there has been no termination or change to the mandate of the CCW, circumstances justifying appointment termination do not exist;

c. Proper termination notice has not been provided because the 19 September 2017 memorandum indicated only the *possibility* of a future decision to terminate the Applicant's continuing appointment effective 31 December 2017. There was no termination on that date and the Applicant's employment continued through January 2018. Moreover, the memorandum of 18 January 2018 made no reference to payment in lieu of notice, thus failing to comply with notice requirements; and

d. Requirements to maintain the Applicant's services against a suitable alternative post in accordance with staff rule 9.6(e) have not been complied with. This provision requires the Organization to retain the Applicant's services against suitable alternative posts. Furthermore, the UNDT has ruled that simply advertising a post and requiring the concerned staff member to

apply and compete for it does not discharge the Organization of this obligation.

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

a. The Applicant's continuing appointment was lawfully terminated in accordance with the Staff Rules. Contrary to the Applicant's view, the decision not to staff the ISU represents a reason for termination in accordance with staff rule 9.6(c) that provides for "abolition of posts or reduction of staff" as reasons for termination. The CCW HCCs agreed to prioritize meetings and related activities of the convention over staff costs, and this led to the decision to no longer staff both posts within the ISU due to lack of funding;

b. The budgetary issues behind the decision were shared with the Applicant long before the decision was taken and, furthermore, the Organization informed him of the termination of the contract with due notice; and

c. The Organization undertook considerable efforts to find a suitable alternative post for the Applicant and supported his efforts to be selected for alternative positions. Unfortunately, the Applicant was found not suitable for the vacant positions identified.

Consideration

25. It has to be preliminary recalled that in *Timothy* 2018-UNAT-847, the Appeals Tribunal endorsed the Dispute Tribunal's finding that "a staff member holding a continuing or indefinite appointment has the highest level of legal protection from being terminated".

26. In the present case, the 18 January 2018 separation decision by the Administration is not supported by the facts.

27. Although from the evidence offered by the Parties it results that for quite some time the CCW and the ISU have been facing a continuing financial crisis, it has to be noted that in November 2017 the CCW HCPs approved the 2018 operational

budget for Amended Protocol II and Protocol V, which expressly provided for a P-4 post within ISU. That budget also shows the breakdown of the costs of said post. In fact, a cost provision of USD267,000 as "direct staff costs of one P[-]4 for 12 months" was included therein (see para. 2 of CCW/MSP/2017/3, Estimated Costs, 2018 Meeting of the High Contracting Parties to the Convention).

28. In particular, the 29 November 2017 Report on the HCPs meeting held in Geneva from 22 to 24 November 2017 (see annex 9 to the Respondent's reply), clearly indicates on this matter that the cost of the meetings shall comprise the cost of the Secretariat's activities to be performed by the ISU and that the Meeting adopted an operational budget for 2018 and a preliminary budget for 2019. The Tribunal considers that with the content of this document the Applicant's burden of proof is met thus rendering not necessary to grant his request for additional evidence.

29. The approval of an operational budget is particularly relevant because it was taken on 22-24 November 2017, namely after UNODA expressed its view about the difficulties to have the ISU staffed for 2018 (see para. 8 above).

30. The Tribunal is aware that one thing is a budgetary provision, although assessed as operational, and that another thing is the concrete ed effective availability of the funds to be used to cover staff costs. In this case, however, the Respondent, who bears on this issue the burden to prove the specific and concrete financial situation, gave no evidence about the alleged cash problems or inconsistency of the budget.

31. In particular, no evidence was adduced in support of the claim that, despite the payment of arrears by one Member State, the funds would not suffice to both ensure meetings of the CCW and the payment of the staff costs of the ISU in the year 2018. There is also no evidence about the contentions that in their meeting on 25 November 2017 the Member States decided to hold meetings of the CCW over the payment of staff costs or that the enduring work relationship of the Applicant would not have been financially feasible.

32. It has to be added too that the decision to separate a staff member holding a continuing appointment for alleged financial reasons is contradicted by the advertisement at the same time, as it results unequivocally from the Applicant's submission (annex 7 to the application), of a temporary job opening for a P-4 position at the Geneva Branch of UNODA, which confirms the need of working activities related to the same tasks performed by the Applicant.

33. The decision by the Organization to terminate the Applicant's continuing appointment is therefore not justified and unlawful. Furthermore, the decision was not preceded by the due notice provided under staff rule 9.7.

34. The Organization in good faith provided the Applicant with the information contained in its memorandum of 19 September 2017 concerning a situation *foreseeable* at that time and specifically related to the end of the year; such communication was in line with good managerial practices to give a staff member as much time as possible to prepare for a possible outcome, but it cannot be considered to be a notice of termination because the termination decision was taken later. This was clear to the Organization, which in fact gave a new notice on 18 January 2018, a mere two weeks before the Applicant's initial separation date.

35. The failure to provide due and timely notice is in general relevant for the compensation to be given to a staff member lawfully dismissed (but without notice), and it is not relevant in the present case, where the decision by the Organization to separate the Applicant was unlawful.

36. Although the above written reasons are sufficient to rule in favour of the Applicant, it is worth also to recall that in this case the Organization did not act in compliance with staff rules 9.6(e)(i) and 13.1(d), which require it to retain the Applicant's services against suitable alternative posts.

37. In particular, staff rule 9.6(e) provides as follows regarding "Termination for abolition of posts and reduction of staff":

> 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:
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> (i) Staff members holding continuing appointments;
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> (ii) Staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment;
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> (iii) Staff members holding fixed-term appointments.
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> 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.

38. Staff rule 13.1(d) states in its relevant part:

> 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.

39. These rules imply that the Organization shall 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/her alternative employment.

40. In other terms, the compliance with the recalled rule is relevant for the lawfulness of the termination decision.

41. As assessed in *Fasanella* UNDT/2016/193 (para. 76):

> [I]t follows from the language of staff rule 13.1(a), 13.1(d), and staff regulation 9.3(a)(i) that contracts of permanent staff may be terminated by the Secretary-General, provided that it is lawfully done, i.e., that relevant conditions concerning preferential retention are satisfied.

42. The present case is to be distinguished from the one adjudicated in *Mahmood* UNDT/2019/175, where an abolition of post was not examined but only looked into a recruitment procedure for a new post and in particular its compliance with UNICEF rules (which provided for candidates on abolished posts like the Applicant Mahmood, who was a fixed-term appointee, only a prioritizing consideration, that is the right to be shortlisted for the requested position as an internal candidate).

43. The present case is instead similar to the one decided in *Timothy* UNDT/2017/080. In that case, the Applicant, who held an indefinite appointment, was matched only against suitable available posts at the same level and duty station with her abolished post, and she was not matched against all the lower available suitable posts. In that case, the Applicant was not considered and retained for any of the available suitable posts on a non-competitive basis, but she had to apply for such posts. Further, she was among two candidates considered for a position, but instead of being preferred and retained for this available post on a non-competitive basis, the Applicant was subject to a full competitive selection process.

44. The case was examined also by the United Nations Appeal Tribunal and in its Judgment *Timothy* 2018-UNAT-847, specially paras. 32-59, it affirmed the following principles:

a. The Administration is bound to demonstrate that all reasonable efforts have been made to consider the staff member concerned for available suitable posts;

b. The Administration is bound to consider the redundant staff members only for suitable posts that are vacant or likely to become vacant in the future;

c. While efforts to find a suitable post for the displaced staff member rest with the Administration, the person concerned is required to cooperate fully in these efforts, showing an interest in a new position by timely and completely applying for the position;

d. Simply advertising posts and requiring the concerned staff member to apply and compete for the same does not discharge the burden of the Administration;

e. The Administration is bound to assign the affected staff members holding continuing or indefinite appointments on a preferred basis in the order of preference prescribed in Staff Rule 9.6;

f. If the redundant staff member is not fully competent to perform the core functions and responsibilities of a position, the Administration has no duty to consider him or her for this position;

g. The term "suitable posts" must be interpreted not only 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, but also all the lower available suitable posts in the same duty station, for which the staff member had expressed interest by way of application thereto. For the Professional level staff members, "suitable posts" are also available suitable posts covering the entire parent organization, including but not limited to the duty station of assignment (on this matter, see also Judgment *Naklhawi* UNDT/2016/204, not appealed, at para. 95).

45. These principles are confirmed by jurisprudence of the former United Nations Administrative Tribunal ("UNAdT") and of the International Labour Organization Administrative Tribunal ("ILOAT") in relation to the same issue.

46. 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" (UNAdT Judgment No. 1409, *Hussain* (2008)).

47. The former UNAdT further noted in its Judgment No. 679, *Fagan* (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.

48. The ILOAT stated in Judgment No. 3437 (2015), para. 6, that its

> case law has consistently upheld the principle that an international organisation 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).

49. In Judgment No. 3238 (2013), the ILOAT decided that advertising a post and inviting reassigned staff members to apply to it would not be sufficient to comply with the duty to give them priority consideration.

50. In this context, some difficulties can concern the assessment of a staff member's "suitability" for the available posts and the criteria that the Organization has to follow in this assessment. The recalled UNAT *Timothy* Judgment gives a clear guidance for that.

51. Particularly on this point, the said judgment specifies also in para. 47 that:

> 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 (footnote omitted). 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.

52. As assessed in *Fasanella* UNDT/2016/193

> 79. It is trite law that it is management's prerogative to downsize or retrench workers for sound, valid, lawful, and good faith reasons. That such prerogative is not unfettered is also trite law. With regard to permanent appointees, the law is clearly set out in the aforementioned jurisprudence, including *El-Kholy* UNDT/2016/102 and *Hassanin* UNDT/2016/181. Termination as a result of the abolition of a post is lawful provided the provisions of the Staff Rules are complied with in a proper manner. The Administration must give proper consideration, on a priority basis, with the view to retaining those permanent staff members whose posts have been abolished. Even though in assessing the suitability of staff members, due consideration must be given to relative competence, integrity and length of service, nothing in the Staff Rules states that such suitability can only be assessed if that staff member has applied for a post and competed for it against staff on other types of contracts. Rather, under the framework envisaged by staff rules 9.6 and 13.1, it is incumbent upon the Organization to review all possible suitable posts vacant or likely to be vacant in the future, and to assign affected permanent staff members on a priority basis.
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> …
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> 82. The Applicant's applied for vacant posts at the G-5 and/or G-6 level but his job applications were rejected. Mr. N. testified that the Applicant could have applied to the digital scanning posts, as those would have matched his experience, but he did not do so. The evidence in this case demonstrates that the Applicant was required to compete competitively for available posts, including against non-

> permanent staff members. Mr. N. testified that the Administration had made a decision to carry out a competitive process, and, therefore, it could not match permanent staff on abolished posts against suitable vacant posts. This was consistent with Ms. A. evidence, who testified that, to the best of her knowledge, this was not a matching exercise based on considerations of permanency, length of service, etc., but a competitive process with competency-based interviews. Her evidence was that, if after such a competitive process, one of the remaining suitable candidates would be a permanent staff member, she or he would have priority consideration only at that late stage of the process.
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> …
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> 85. Unlike in *El-Kholy*, where the applicant was offered posts which she declined, the Applicant in this case was not offered any positions prior to the abolishment of his post, or subsequent thereto. The Respondent in this case placed not an iota of evidence before the Tribunal to show that the required criteria were applied or considered, such as the Applicant's contract status, suitability for vacant posts, special skills, length of service, competence and integrity, nationality, etc., with a view to positioning him or offering him a position. There was no evidence of him being placed in a redeployment pool or of any effort to match his special skills, experience, taking into account other material criteria with a view to matching him with any vacant, new, or opening positions. The documentary evidence in this case, as well as the oral testimony of Mr. N., Ms. A. and the Applicant, illustrates that the main method of retention of staff was through a competitive process, without consideration of priority criteria such as contract type or seniority.

53. Firstly, according to these principles, the obligation of the Organization to find suitable alternative position to a redundant staff member does not imply that any position available should be offered to the staff member, given that in any case the position to be offered must be suitable for the employee in accordance with his/her professional profile. As UNAT recalled, the redundant staff member must be fully competent to perform the core functions and responsibilities of the available position.

54. However, the Organization has the obligation to assess the staff member's suitability for the available post considering only the specific criteria set up in the above mentioned rules, which are, as well as the features of the position (as to its

functions and responsibilities), the staff member's competence, integrity and length of service, as well as other factors such as nationality and gender.

55. Secondly, being this assessment based on objective criteria, it does not involve a discretionary evaluation and it is reviewable in court; therefore, the Tribunal can verify its lawfulness.

56. Thirdly, once the Organization calls the staff member to apply for a position, so founding it suitable, or otherwise identifies a suitable position, the attribution of the position has to be made outside of a competitive procedure.

57. This is so for at least two reasons: firstly, because the Organization cannot call a competition to appoint new people if it has the problem of redundant personnel; secondly, because the provision of a specific effort by the Organization to find a suitable alternative position is a specific obligation, to which the staff member has a specific right that must differentiate his/her position from that of other candidates. To allow the Applicant to apply for new positions and have him take part in a competitive selection does not fulfil the obligation of the Organization set up in the recalled rules.

58. In *El-Kholy* UNDT/2016/102, the Tribunal stated:

> 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.

59. The UN Appeals Tribunal, in dismissing the appeal towards said UNDT Judgment in *El-Kholy* 2017-UNAT-730, confirmed these principles and the need to cover the posts by way of a lateral move or placement of unassigned staff members holding a permanent appointment, and not only after a specific application following a knowledge from public announcements.

60. In the present case, the efforts made to secure the Applicant a suitable alternative post were limited to marking the Applicant as affected by downsizing in the Inspira system and encouraging him to apply and inform HRMS of any applications.

61. The Respondent gave no specific evidence to show that the required criteria under the recalled staff rules were applied or considered, such as the Applicant's contract status, suitability for vacant posts, special skills, length of service, competence and integrity, nationality, etc., with a view to positioning him or offering him a position. There was no evidence of him being placed in a redeployment pool or of any effort to match his special skills, experience, taking into account other material criteria with a view to matching him with any vacant, new, or opening positions. The documentary evidence in this case illustrates that the main method of retention of staff was through a competitive process, without consideration of priority criteria such as contract type or seniority.

62. It also results from the file that in the present case no attempt was made by the Organization to identify a suitable alternative post by lateral transfer, without any reference to a competitive process.

63. In particular, the Organization considered the Applicant for many positions (so implicitly considering the positions suitable with his personal profile); however, the Organization examined always the Applicant's position within a competitive process and eventually didn't offer the position.

64. This happened also for the temporary position as Political Affair Officer, P-4, in the Geneva Branch of UNODA, that is the same Office where the Applicant used to work, and this was also for the same level position at UNSOM. In these cases, no consideration was given to the Applicant's lateral transfer to the post and he was not selected.

65. In other terms, the obligation of the Organization to find a suitable position to a redundant staff member entails the right of the latter to a lateral move to a position suitable in relation of the above mentioned criteria and to the profile of the staff member, while it excludes that the assignment to the new position could be subjected to a new competitive evaluation or to a new assessment of the skills of the staff member.

Remedies

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

> As part of its judgement, the Dispute Tribunal may only order one or both of the following:
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> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific

> performance ordered, subject to subparagraph (b) of the present paragraph;
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> (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

67. Consequently, the Applicant requested that the Tribunal order the rescission of the contested decision and his reinstatement to his post. The Tribunal considers it appropriate to order the rescission of the decision to separate the Applicant from service.

68. In accordance with art. 10.5(a) of its Statute, the Tribunal will set an amount of compensation that the Respondent may elect to pay as an alternative to rescission of the decision.

69. Considering the length of the Applicant's service, the short notice for termination given to him, and the budget provision contained in the respective Report for the whole year of 2018, and at a provisional level for 2019, and the fact that despite the existence of a suitable vacant post at the Applicant's duty station in his department no consideration was given to maintaining his services by lateral transfer, the Tribunal sets the amount of compensation at two years' net base salary.

70. The Applicant also seeks moral damages alleging that he has suffered physical symptoms of stress (in particular, sleeplessness and periods during the day with high heart rate) resulting from the contested decision. He filed a medical certificate by his Doctor, from which it results that he had psychological and physical consequences from work-related stress.

71. Given that the results from the medical certificate filed by the Applicant are generic and that the Applicant did not provide evidence of the moral damage suffered with the specificity required by the UNAT case law (see *Ross* 2019-UNAT-926 (para. 57), *Langue* 2018-UNAT-858 (para. 20), *Timothy* 2018-UNAT-847 (para. 69), *Auda* 2017-UNAT-787 (para. 64), *Zachariah* 2017-UNAT-764 (para. 37) and *Kallon* 2017-UNAT-742), the claim for compensation for moral damage is dismissed.

Conclusion

72. In view of the foregoing, the Tribunal DECIDES that the application is granted as follows:

a. The decision to separate the Applicant from service is rescinded;

b. As an alternative to the rescission of the decision the Respondent may elect to pay the Applicant compensation equivalent to two years' net base salary; and

c. The aforementioned compensation shall bear interest at the United States of America's 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 States prime rate 60 days from the date this Judgment becomes executable.

(*Signed*)
Judge Francesco Buffa
Dated this 27th day of February 2020

Entered in the Register on this 27th day of February 2020
(*Signed*)
René M. Vargas M., Registrar, Geneva