UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2021/057
Judgment No.: UNDT/2022/109
Date: 7 October 2022
Original: English

Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

SCHEIBNER MESAS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Julia Lee, OSLA

Counsel for the Respondent:
Nicole Wynn, AS/ALD/OHR, UN Secretariat
Maureen Munyolo, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a Senior Administrative Officer at the United Nations Mission in Darfur ("UNAMID") holding a continuing appointment at the P-5 level and based in El Fasher, challenges the decision to terminate his continuing appointment following the abolition of the post he encumbered.

Factual and procedural background

2. The Applicant has been in service of the United Nations since 3 April 2006.

3. On 30 September 2014, the Applicant was granted a continuing appointment. He is on the Senior Administrative Officer (P-5) and Chief Training Officer (P-5 and P-4 levels) rosters.

4. On 12 January 2021, the Applicant was informed that the Joint Special Representative ("JSR") of the Mission had approved the termination of his continuing appointment effective 31 May 2021 in line with staff regulation 9.3(a)(i) and staff rule 9.6(c)(i). UNAMID's mandate was set to end on 31 December 2020 and the Mission was expected to begin drawing down on staff from 1 January 2021.

5. The Applicant was encouraged to apply to suitable job openings in Inspira and to ensure that his profile was uploaded into the Horizon platform.

6. On 8 March 2021, the Applicant sought review, by the Management Evaluation Unit ("MEU"),of the decision to terminate his appointment. On 4 May 2021, MEU suspended implementation of the impugned decision.

7. On 19 July 2021, the Applicant filed an application with the United Nations Dispute Tribunal sitting in Nairobi to impugn the Administration's decision to terminate his continuing appointment following the abolition of the post he encumbered, "without making good faith efforts to absorb him on a new post or to assist him in finding an alternative position, which includes the numerous positions that he applied for since November 2020."

8. On 28 October 2021, the Organization offered the Applicant a P-4 Administrative Officer position with the United Nations Economic Commission for Latin America and the Caribbean ("ECLAC"). The Applicant accepted the offer on 24 November 2021.

9. The Respondent filed his reply on 18 November 2021.

10. On 3 August 2022, the Tribunal issued Order No. 108 (NBI/2022) to inform the parties of its decision to adjudicate this matter on the basis of their written submissions. To that end, the parties were invited to file their closing submissions simultaneously on 16 August 2022. The Applicant and Respondent filed their respective closing submissions as directed.

11. On 17 August 2022, the Applicant sought leave to file additional evidence pursuant to art. 18(1) of the Rules of Procedure governing the Dispute Tribunal. The Applicant submitted that the evidence in question spoke directly to the Respondent's bad faith in his dealing with the Applicant. It was material that was already in the Respondent's possession and would not cause any prejudice to him.

12. On 18 August 2022, the Respondent objected to the Applicant's motion on grounds that it was both untimely and irrelevant.

Parties' submissions

13. The Applicant submits that he has consistently applied for positions, from the P-4 to D-1 levels, since he received the notice of termination. The Applicant states:

> Since November 2020, the Applicant has applied to 52 positions, 32 at the P-5 level and 17 at the P-4 level. He is on the roster for the majority of the positions applied at the P-5 and P-4 levels. Despite being on the roster and holding a continuing appointment, the Applicant has been asked to take several tests and interviews for the positions that he applied for. The Applicant complied with the recruitment requests and consistently notified the MEU of his applications, who had taken the role of following up with the Applicant's applications with the various heads of entities.

14. As at the time of the filing of the reply, the impugned decision remained suspended pending management evaluation.

15. The Applicant takes issue with the bad faith consistently displayed by the Respondent in this case. The Applicant contends that the Respondent misrepresented the facts surrounding the recruitment to the post of Senior Administrative Officer (P-5), Job Opening ("JO") No. 14464. The submission that that post was not available for the Applicant because "the UNGSC decided not to recruit for the position because they are reclassifying the position upwards" is untrue. The recruitment for this post had been ongoing and was finalized on 8 January 2022; only five days after the Applicant was transferred to his current demoted P-4 Administrative Officer post at ECLAC.

16. Another example of the Administration's bad faith is in his conduct in respect of JO No. 159673. The Administration told the Applicant that recruitment to this post "would be cancelled." Not only was the selection exercise not cancelled, it was in fact concluded in favour of a staff member who was not rostered and had less experience than the Applicant.

17. As a continuing appointment holder facing abolition of his post at UNAMID, the Applicant should have received priority for JO No. 144164. The Administration violated its obligation to make good faith efforts to find him a suitable alternative post at the P-5 level contrary to the principles of order of retention. The Administration was obliged to consider the Applicant for all the positions that he had specifically applied to, whether at his level or at a lower level. The Administration must be held to his obligation towards continuing appointment holders.

18. The Administration was wrong to offer the Applicant a P-4 Administrative Officer position at ECLAC despite the availability of multiple suitable positions at the P-5 level which he had specifically applied for. The Administration offered no explanation for non-selection to the P-5 positions he applied for, and expressly notified the Applicant that failure to accept the P4- that he was being offered would result in termination and separation from service.

19. As a preliminary point, the Respondent argues that the application is not materially receivable before the Tribunal because the impugned decision was rescinded when the Applicant assumed his functions at ECLAC.

20. The jurisdictional issues aside, the application must be dismissed because the impugned decision was both regular and lawful. The Applicant has produced no evidence to show that the impugned decision was tainted by extraneous factors. The Organization fulfilled its obligations towards the Applicant lawfully and reasonably.

21. The Applicant was given priority consideration for the other positions he applied for but was found to be unsuitable for them. Priority consideration does not give him, or any staff member, the right to be selected for positions that they do not meet the requirements for.

22. The Organization is not under an obligation to give the Applicant priority consideration for positions that he applied for *after* his reassignment. The Organization's obligations under staff rule 9.6(e) is not open-ended and does not extend beyond the rescission of the termination decision.

Considerations

23. Staff rules 9.6(e)(i) and 13.1(d) ar relevant under the circumstances of this case.

24. In particular, staff rule 9.6(e) which governs "termination for abolition of posts and reduction of staff" provides:

> (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.
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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

25. In the UNDT's consistent case law interpretation, 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. In other terms, compliance with the recalled rule is relevant for the lawfulness of the termination decision (see *Nugroho* UNDT/2020/032, confirmed by the United Nations Appeals Tribunal ("UNAT"); *Nakhlawi* UNDT/2016/204, para. 96, not appealed; and *Fasanella* UNDT/2016/193, para. 76).

26. The said principles have been affirmed before in *Timothy* UNDT/2017/080, as confirmed by 2018-UNAT-847, specifically paras. 32-59, where UNAT made the following pronouncements:

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

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.

27. These principles are confirmed too 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.

28. 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)).

29. The former UNAdT further noted in Judgment No. 679, *Fagan* (1994), that the application of former staff rule 109.1(c) was:

> [V]ital 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.

30. ILOAT Judgment No. 3437 (2015), para. 6, is also instructive:

> The Tribunal's 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, Judgments 269, under 2, 1745, under 7, 2207, under 9, or 3238, under 10). As a result, when an organisation has to abolish a post held by a staff member who, like the complainant in the instant case, holds a contract for an indefinite period of time, it has a duty to do all that it can to reassign that person as a matter of priority to another post matching his or her abilities and grade. Furthermore, if the attempt to find such a post proves fruitless, it is up to the organisation, if the staff member concerned agrees, to try to place him or her in duties at a lower grade and to widen its search accordingly.

31. 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.

32. 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.

33. UNAT gave clear guidance for this in *Timothy* 2018-UNAT-847,

> 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.23 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.

34. Once the Organization calls the staff member to apply for a position, so finding it suitable, or otherwise identifies a suitable position, the attribution of the position has to be made outside of a competitive procedure.

35. 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.

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

> 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.

37. The Appeals Tribunal 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 (*El-Kholy* 2017-UNAT-730).

38. In applying the said principles to the case at hand, the Tribunal notes that the decision to terminate his appointment was communicated to the Applicant on 12 January 2021, only three weeks after the resolution requiring UNAMID to drawdown was issued. This timeline renders it very difficult, if not impossible, to imagine that genuine reasonable efforts to secure a suitable alternative post for the Applicant were made.

39. The record shows that the Applicant, who is on the rosters of Senior Administrative Officer (P-5) and Chief Training Officer (P-5 and P-4 levels), applied to 52 positions, 32 at P-5 and 17 at P-4, taking several tests and interviews for the positions, and he is under consideration for 33 positions at the different levels.

40. In particular, the Respondent contests that the Applicant was not found suitable for some positions which he applied to (such as JO 154958) , or did not apply for another for which he was simply on roster (JO 151907); as to JO 144164 in Brindisi, the Respondent says the Organization has no obligation to give the Applicant priority consideration because the position was advertised in Inspira before the Applicant received notice of termination of his appointment.

41. The Tribunal finds this objection without merit because the relevant moment is not related to the advertisement of the position but to the existence of an opening position at the moment of termination. Therefore, as to JO 144164 in Brindisi, the

position being open at the moment of termination of the Applicant's appointment, the obligation of the Administration to make efforts to find suitable alternative position remains.

42. As to JO 144164 in Brindisi, the Applicant was rostered for the post, was also interviewed (when he had been already served with a termination letter and his profile had been uploaded into HORIZON), but the Administration kept the post vacant for more than a year although the Applicant was ready and available to join even with COVID-19 restrictions.

43. The Applicant refers to the additional facts and submissions laid out in his response to the Respondent's reply, which revealed that the Respondent misrepresented to this Tribunal by stating that the post of Senior Administrative Officer (P-5), JO No. 144164, was not available for the Applicant because "the UNGSC decided not to recruit for the position because they are reclassifying the position upwards."

44. The Tribunal finds that this fact was not proved in Court. The Tribunal also finds that there was clear misrepresentation by the Administration because the recruitment for this post had been on-going all along and its recruitment was finalized on 8 January 2022 only five days after the Applicant was transferred to his current P-4 Administrative Officer post at ECLAC.

45. The Tribunal further notes that the Applicant holds roster memberships for various D-1 posts. Roster membership means that he meets the requirements or possesses the specific qualifications for the related job opening, it does obviate the requirement to express interest in the available position, but not necessarily applying to them but also responding favourably to offerings by the Administration.

46. The Tribunal is aware that, out of the 80 positions that the Applicant alleges to have not received priority consideration for, he has only formally contested one selection exercise, but this does not mean that the Administration fulfilled its burden to find reassignment (once the positions are available, and the staff member expressed his interest). Indeed, there is no need to challenge specific decisions related to JOs, nor to specifically contest their outcome, in order to demonstrate the

failure by the Administration to make *bona fide* efforts to find a reassignment to a staff member losing his/her job.

47. The Applicant informed the Tribunal that, following receipt of Order No. 101 (NBI/2022), the Applicant learned that another post that he had applied to on 31 July 2021 while on HORIZON (the post of Chief of Learning Management and Leadership Development (P-5), JO No. 159673) was given to another staff member who did not have the same level of experience as him. The selected candidate was not on the roster for this post, unlike the Applicant. For this post, the Applicant was told by the Administration that the recruitment would be cancelled. The Applicant followed up with the Administration on the status of this recruitment process and filed a management evaluation request to contest this non-selection on 4 August 2022.

48. The Applicant's motion to file new documents, as related to the said position and being dated after the application, is granted.

49. These documents are relevant for determination of the case to the extent they are connected with the alleged violation by the Administration of the general obligation to make effort to find a post alternative to that one suppressed, set aside any impact on the specific recruitment procedure.

50. A final issue raised by the Administration is about the relevance of the Applicant's acceptance of the other post offered to him.

51. The Respondent moves to dismiss the application as moot, alleging that the Organization rescinded the decision to terminate the Applicant's appointment and reassigned him to a suitable position P-4 level, which the Applicant accepted on 24 November 2021.

52. The Respondent says that the Applicant has no right to a post of the same level and that he unconditionally accepted the offer.

53. The acceptance by the Applicant of the post is not absolutely irrelevant in the Tribunal's view because the Organization is not under an obligation to give the

Applicant priority consideration for positions that he applied for after his reassignment to the suitable alternative position in ECLAC.

54. The Organization's obligations under staff rule 9.6(e) is not indefinite, as the Appeals Tribunal held in *El-Kholy*, the obligation is limited to assisting the affected staff member with finding alternative suitable positions "at the time of the events". After his acceptance of the ECLAC offer, the Applicant is no longer a downsized staff member. Therefore, he cannot make reference to a position that became available after that moment.

55. But it is not the case for the positions the Applicant refers to in these proceedings, as he recalled only the positions for which he had applied at the moment of the application.

56. Moreover, the Applicant emphasizes that he still sustains an injury for which the Tribunal can award relief.

57. The Tribunal is aware that the Dispute Tribunal lacks jurisdiction to examine the merits of a substantive decision that has been superseded by subsequent actions of the Organization.[1]

58. The Tribunal notes, however, that the Organization did not rescind the decision to terminate the Applicant's appointment but simply reassigned him to a different position (see annex R16).

59. In any case, the matter of the dispute did not end in the case, nor did the Applicant lose his legal interest in the dispute, as there are remaining effects of the challenged decision.

60. Moreover, the acceptance by the Applicant of the offered lower level post does not make his application moot, as the Applicant maintained an interest in

[1] See also *Guetgemann* 2022-UNAT-1201, para. 23; *Cherneva* 2018-UNAT-870, paras. 33-38; *Rehman* 2017-UNAT-795, para. 21; *Kallon* 2017-UNAT-742, paras. 44-45; *Crotty* 2017-UNAT-763, paras. 15-16; *Gebremariam* 2015-UNAT-584, paras. 18-20; *Masylkanova* 2014-UNAT-412, paras. 14-16; *Gehr* 2013-UNAT-328, paras. 20-21 *Mboob* 2022-UNAT-1215, para. 33; *Alsado* 2017-UNAT-766, para. 16; *Finniss* 2016-UNAT-708, para. 24; *Wilson* 2016-UNAT-707, paras. 25-26.; See *Crotty* 2017-UNAT-763, paras. 15-17).

occupying a higher level position if available, in conformity to his right. Instead, accepting the offered post, the Applicant shows his capability to mitigate the damage occasioned by the Administration's failure to fulfil the obligation to offer available positions at the same level of the abolished post.

61. In *Azar* 2021-UNAT-1104, citing *Kallon* 2017-UNAT-742, the Appeals Tribunal emphasised on the non-absolute nature of mootness of cases where the Applicant still sustains an injury for which the Tribunal can award relief. At paragraph 45, UNAT in *Kallon* wrote:

> … Since a finding of mootness results in the drastic action of dismissal of the case, the doctrine should be applied with caution. The defendant or respondent may seek to "moot out" a case against him, as in this case, by temporarily or expediently discontinuing or formalistically reversing the practice or conduct alleged to be illegal. And a court should be astute to reject a claim of mootness in order to ensure effective judicial review, where it is warranted, particularly if the challenged conduct has continuing collateral consequences. It is of valid judicial concern in the determination of mootness that injurious consequences may continue to flow from wrongful, unfair or unreasonable conduct. […]
>
> In cases where the Administration rescinds the contested decision during the proceedings, the applicant's allegations may be moot. This is normally the case if the alleged unlawfulness is eliminated and, unless the applicant can prove that he or she still sustains an injury for which the Tribunal can award relief, the case should be considered moot.
>
> That is the position Mr. Azar finds himself in. While he has been paid his termination entitlements and his pension payments have commenced, his complaint (submitted first to management evaluation and then to the UNDT) was that the Respondent wrongfully withheld these benefits, withheld an excessive amount of them and wrongly continued to withhold them for an improperly long period as a result of which illegalities, he suffered loss and damage. Although he may not have sought these remedies expressly and initially in the UNDT, they were the consequence of the assertions he made and, after his primary claims were resolved, these remained. His proceeding before the UNDT was not moot.

62. Like the *Azar* case, the Applicant has sustained and continues to sustain a relevant loss of salary because the Administration failed to make good faith efforts to place him in one of the positions that he applied to at the P-5 level, positions for

which he was duly qualified and in relation to which the Administration failed to meet its obligation to reassign the Applicant as a matter or priority to another post matching his abilities and grade.

63. Therefore, the fact that the Applicant accepted the P-4 Administrative Officer position at ECLAC does not resolve the controversy in this case. Had the Administration complied with its obligation to make good faith efforts to place the Applicant at any of the suitable and available P-5 posts that he had applied for (such as JO No. 14464 and JO No. 159673), the Applicant would have remained at P-5 step 10. Instead, he was forced to accept the P-4 post at step 13, resulting in a significant decrease in his salary.

64. Allowing the Administration to bypass its obligation towards continuing appointment holders facing abolition of posts by offering any available post at a lower level without considering their pending applications at their level would be absurd and contrary to the Appeals Tribunal's intention in *Timothy*, given that reassignment is not a means to demote a staff member losing his/her position.

65. The Applicant submits that the Administration's offer and acceptance of the P-4 Administrative Officer position at ECLAC was not made in the context of any settlement agreement between the parties. At no point did the Applicant waive his right to pursue his claims under these proceedings nor did he ever agree to withdraw his application in this case in accepting the demotion to his current P-4 post despite the availability of many positions at his P-5 level for which he was suitable.

66. Facing termination, the Applicant accepted the P-4 Administrative Officer position at ECLAC to mitigate his losses but has suffered major financial loss (as the Applicant's current salary is less than his salary at the P-5 step 10 level at UNAMID, which also decreased his pensionable remuneration), reputational damage resulting from the embarrassment and emotional distress of having to accept a career setback of over 10 years that he built in almost 16 years of service at the United Nations.

Remedies

67. The Applicant seeks the following reliefs:

> a. The rescission of the contested decision and to order the Administration to make reasonable efforts to place the Applicant on the P-5 positions that the Applicant had applied to prior to accepting his current P-4 post, for which he still under consideration as a rostered candidate.
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> b. Should the Applicant not be placed on any of the P-5 posts for which the recruitment process is still ongoing, the Applicant requests the Tribunal to award him adequate compensation of up to two-years' net base salary for the material and economic loss resulting from the difference in his salary and the difference of the Organization's pensionable contribution between P-5 step 10 and P-4 step 13, as well as moral damages resulting from the embarrassment and emotional distress of having to accept a career setback of over 10 years that he built in almost 16 years of service at the United Nations, which contributes to the traumatic stress that he has been suffering since the last downsizing exercise in 2019.

68. The Tribunal is of the view that the challenged decision must be rescinded, and that the Applicant must be placed in a position - among those he applied to (for instance, Brindisi above mentioned) - of the same level to that one he had at the time of the abolition of the post.

69. As a consequence of the unlawful decision, the Applicant suffered economic loss, in the measure equal to the difference between the salary at P-5 level step10 and that one, if any, paid from the moment of termination to the moment of execution of the present decision.

70. In the said situation the Applicant also suffered a loss of chance for promotion to D-1 level positions. The Applicant, however, did not ask for damages on this ground.

71. The Applicant has not adduced any evidence to support his claim for moral damages (*See also Mihai* 2017-UNAT-724, para. 21, *citing Diatta* 2016-UNAT-640). His claim for damages under this head is dismissed.

72. Pursuant to art. 10.5 of the Dispute Tribunal's Statute, the Tribunal must set an amount which the Respondent can elect to pay as an alternative to the rescission of the contested administrative decision and the reinstatement of the Applicant. The jurisprudence on art. 10.5(a) of the Dispute Tribunal's Statute, as consistently interpreted by UNAT, clearly states that compensation *in lieu* is not compensatory damages based on economic loss, but only the amount the Administration may decide to pay as an alternative to rescinding the challenged decision or execution of the ordered performance (see, for instance, *Eissa* 2014-UNAT-469).

73. As to the amount of the compensation *in lieu,* the above recalled article of the Dispute Tribunal's Statute sets a general framework for its determination, stating that, apart from exceptional circumstances, it "shall normally not exceed the equivalent of two years' net base salary of the applicant".

74. The Appeals Tribunal in *Ashour* 2019-UNAT-899 found that "the amount of in lieu compensation will essentially depend on the circumstances of the case" and that "due deference shall be given to the trial judge in exercising his or her discretion in a reasonable way following a principled approach".

75. This Tribunal finds that the determination of the compensation *in lieu* between the minimum and the maximum provided in its Statute must take into account - so graduating the amount accordingly - the specific circumstances of the case, and in particular the type and duration of the contract held by the staff member, the length of his/her service, and the issues at the base of the dispute. The compensation *in lieu* is not related to the economic loss suffered and to the salary of the staff member, the latter being the parameter of the outcome of the decision on compensation and not also the precondition of the compensation. In other words, we can have compensation *in lieu* even in cases where no economic damage has been suffered. More specifically, it seems reasonable - for instance - to grant the largest compensation in cases of termination of permanent appointments of senior

staff members, and to limit the compensation in cases of non-renewal of FTAs for recently appointed staff members (where there is not a security of tenure, but only a chance of renewal).

76. In the present case, having in mind the above-mentioned criteria and applying them to the specific case at hand (and so having considered the seniority of the Applicant, the type of contract held, and the chance of being offered other equivalent positions), and in particular taking into account that the Applicant has benefited from a new position after 12 months from termination, and also considered that the related salary is lower, and that will have an impact also on pension), the Tribunal sets the amount of the compensation *in lieu* at 18 months' net-base salary at the P-5, step X level as per the salary scale in effect at the time of the Applicant's separation from service.

Conclusion

77. In light of the foregoing, the Tribunal decides:

a. The challenged decision is rescinded.

b. The Applicant must be placed in a position - among those he applied to - of the same level to that one he had at the time of the abolition of the post;

c. The Respondent is to pay to the Applicant the difference between the wage at P-5 level step10 and that one, if any, paid from the moment of termination to the moment of execution of the previous line's order;

d. The Respondent is to pay to the Applicant the compensation *in lieu* at 18 months' net-base salary at the P-5, step X level as per the salary scale in effect at the time of the Applicant's separation from service;

e. The aforementioned compensations shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensations. 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 7th day of October 2022

Entered in the Register on this 7th day of October 2022

(*Signed*)
Abena Kwakye-Berko, Registrar, Nairobi