



**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2017-UNAT-759



**Hassanin**



Counsel for Mr. Hassanin: Lennox S. Hinds

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8. On 30 December 2013, Mr. Yukio Takasu, the Under-Secretary-General for Management (USG/DM), sent a Note to the Chef de Cabinet, stating:

**Termination of appointments on abolition of posts – DGACM staff members**

1. I refer to the attached recommendation by the USG/DGACM for the Secretary-General to terminate the appointments of a number of staff members currently serving with DGACM. This recommendation follows General Assembly decision 68/6 (Sect. 2) that led to the abolition of posts effective 31 December 2013.

2. DGACM has reviewed and is continuing to review possibilities to absorb affected staff members; in line with staff rule 9.6(e) and (f). While it was possible to otherwise accommodate some staff members encumbering posts slated for abolition, and while others have found alternative employment in the Organization, the attached list concerns staff members where this was not possible at this time.

3. Given DGACM's confirmation that consultations efforts with staff representatives and affected staff members have been undertaken and that staff rules 9.6(e) and (f) have been taken into account and complied with, I support the recommendation that the Secretary-General consider the termination of the appointments of the staff members listed in the attachment. Once the Secretary-General has taken a decision, such decision will be conveyed to the staff members through their parent department. In case of termination, this will be a termination notice pursuant to staff rule 9.7. Should any of these staff members secure alternative employment in the Organization prior to any termination taking effect, such termination would be rendered moot.

4. Please note that the authority to terminate for abolition of posts or reduction of the staff has been retained by the Secretary-General pursuant to Annex I of ST/AI/234/Rev.1. We would appreciate [the Executive Office of the Secretary-General (EOSG)'s] assistance in securing the Secretary-General's decision on this matter at the earliest convenience. Given the required standards for delegation of authority, most recently under judgement *Bastet* (UNDT/2013/172), please also assist in ensuring the decision is endorsed by the Secretary-General, preferable in the form of a memorandum. For use of any communication conveying delegations or administrative decisions, the tribunal has indicated its expectation that the name of the signatory must be spelled out if the signature is not readable, and that any such communication must display the functional title of the decision-maker.

5. A draft decision for the Secretary-General's consideration is attached.

9. By memorandum dated 31 December 2013, the Secretary-General approved the termination of the appointments of staff members listed in the USG/DM's proposal dated 30 December 2013, "on the grounds of abolition of posts pursuant to staff regulation 9.3(a)(i) and staff rule 9.6(c)(i)". Attached to the Secretary-General's memorandum was a table of

34 staff members on permanent appointments, indicating for each staff member their level; entry on duty; date of birth; age; retirement age; visa status; and nationality.

10. By letter dated 31 December 2013, signed by the Executive Officer, DGACM, Mr. Hassanin was informed as follows:

On 27 December, the General Assembly approved the Secretary-General's proposed programme budget for the biennium 2014–2015, section 2 of which provides for the abolition of 59 posts in the Publishing Section of the Meetings and Publishing Division of the Department for General Assembly and Conference Management (DGACM).

I am writing to inform you that the post against which your contract is charged is one of the 59 posts that the General Assembly has abolished effective 1 January 2014 and that, as a result, the Secretary-General has decided to terminate your permanent appointment. The present letter, therefore, constitutes the formal notice of termination of your permanent appointment under staff rule 9.7.

You are strongly encouraged to apply for all available positions for which you believe you have the required competencies and skills. Should you submit an application, you are invited to so inform the DGACM Executive Office, which will support you in liaising with the Office of Human Resources Management with a view to giving priority consideration to your application.

In the event that you are not selected for a position, I regret to inform you that you will be sm.3.2.0701 1sOr38il8 TD-.w,wa76S(2i31ia)5.5(n8( ) ]TJ)6.9(i3)7.4 s



he pointed out that his termination date had only been extended by a few weeks and, consequently, the MEU decision could only be understood as a rejection of his request for management evaluation because the MEU had actually confirmed that his post was abolished

General Assembly Branch, DGACM, e-mailed Mr. Hassanin to inform him that, “based on the overall review of the applications received ... [his] application for this position [would] not be considered further”. The Dispute Tribunal noted that Mr. Hassanin was notified in less than 48 hours that his application for the position would not be considered further, and no other explanations or reasons were given.

19. On 9 April 2014, Mr. Hassanin filed another request for management evaluation, challenging the decision to terminate his appointment with effect from 20 April 2014. He then filed a motion before the UNDT for suspension of action of the decision pending the outcome of his request. By Order No. 69 (NY/2014), the UNDT rejected his motion, finding that there was no new contested decision on the basis of which he was raising a new cause of action. The UNDT noted that “[t]he Administration merely postponed the termination date of [Mr. Hassanin’s] appointment; it did not rescind it”.<sup>5</sup>

20. On 20 April 2014, the termination of Mr. Hassanin’s permanent appointment took effect, following which he went on early retirement.

21. The UNDT rendered its Judgment on 7 October 2016. The Dispute Tribunal found that Mr. Hassanin’s application was receivable *ratione materiae* as the notification of the decision to abolish Mr. Hassanin’s post and, as a result, to terminate his appointment was a final administrative decision subject to review in accordance with Article 2(1)(a) of the UNDT Statute. On the merits, the UNDT held that Mr. Hassanin’s termination was unlawful “because he did not receive proper consideration as a permanent appointee and as an elected high-level official of the Staff Union”.<sup>6</sup> The UNDT concluded, in particular, that the Organization had failed to accord Mr. Hassanin priority consideration for vacant positions as a permanent appointment holder and did not fully comply with the requirements set out in Staff Rules 9.6(e) and 13.1(d) and (e). The UNDT further found that the Administration “failed to give proper consideration to [Mr. Hassanin’s] status as a newly elected Vice President of the Staff Union”.<sup>7</sup> By way of remedy, the Dispute Tribunal ordered rescission of the decision to terminate Mr. Hassanin’s permanent contract or, as an alternative to rescission, an award of compensation in the amount of

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<sup>5</sup> *Hassanin v. Secretary-General of the United Nations*, Order No. 69 (NY/2014), para. 11.

<sup>6</sup> Impugned Judgment, para. 142.

<sup>7</sup> *Ibid.*, para. 141.





selection process. Had it been the intention to prohibit competitive consideration of staff members with permanent appointments, this would have been explicitly stated in the Staff Rules. In the selection process, preferential treatment is only given to permanent staff members if they are equally qualified as other applicants. Moreover, the burden is on the staff member to prove that the Administration had discretion to simply place him or her in a specific position. The UNDT, however, erroneously placed the onus on the Administration to prove that it could not make an exception to place Mr. Hassanin on a significantly higher level post for which he was normally not eligible to apply. The Staff Rules “do not provide for an absolute right for any staff member to be retained” and the Administration is thus not required to “create and tailor positions solely in order to retain” a staff member. In the present case, the Administration offered career training, extended Mr. Hassanin’s appointment and notified him of exclusive, suitable positions to which he could apply. In contrast, he did not make even minimal efforts to cooperate with the Administration. Instead, he only submitted applications after the (even extended) deadlines had passed, applied for positions for which he was not eligible and submitted incomplete applications.

25. The Secretary-General further argues that the UNDT erred in law by holding that the termination of Mr. Hassanin’s appointment was unlawful because he did not receive particular consideration as an elected high-level official of the Staff Union. None of the documents cited by the UNDT support the finding that the Administration may not terminate a staff member’s appointment if he or she is a staff representative or that such representatives are entitled to higher priority for retention than other staff members. Staff Regulation 9.3 and Staff Rules 9.6 and 13.1 do not require the Administration to give special consideration for retention purposes to a staff member’s capacity as staff representative.

26. With respect to the UNDT’s award of in-lieu compensation, the Secretary-General claims that the UNDT erred in finding a basis for rescission, let alone “aggravating, egregious or exceptional circumstances” justifying an award of more than two years’ net base salary as compensation. The UNDT also erred in awarding compensation for emotional distress because the UNDT may not solely rely on the staff member’s testimony without any corroborating evidence.

27. Based on the foregoing, the Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment, except with respect to its findings that (i) there was no breach of General Assembly resolution 54/249; (ii) the Secretary-General had the legal authority to

terminate Mr. Hassanin's appointment; and, (iii) Mr. Hassanin had failed to establish that his appointment was terminated because of his involvement in Staff Union activities.

**Mr. Hassanin's Answer**

28. Mr. Hassanin submits that the UNDT was correct in finding his application receivable. The Secretary-General was unable to point to any instance in which the Appeals Tribunal or the UNDT had found that a notice of termination was interlocutory and thus not a final administrative decision. The fact that Mr. Hassanin was given ninety-day notice prior to the termination did not detract from the finality of the decision as contained in the 31 December 2013 notice because the Administration was merely fulfilling its obligation under Staff Rule 9.7 and no evidence was presented that there was another "final" notice forthcoming.

29. Mr. Hassanin further maintains that the UNDT did not exceed its jurisdiction when it considered evidence of the Administration's handling of Mr. Hassanin's applications following his request for management evaluation. It was the Secretary-General who initially introduced the evidence in his submissions before the UNDT in support of his claim that the Organization took measures to retain Mr. Hassanin in preference to staff members who did not serve on permanent appointments and that he was merely unsuccessful in his applications. The Secretary-General may not, on the one hand, introduce evidence before the UNDT and, on the other hand, claim that Mr. Hassanin's rebuttal to that evidence was inadmissible. The Secretary-General has failed to demonstrate that the UNDT erred in the valid exercise of its broad discretion under Article 18(1) of the UNDT Rules of Procedure. Consequently, the UNDT did not commit a reversible error when it considered and weighed that evidence in its Judgment.

30. Furthermore, the UNDT was correct in its material findings of law and it made no error of fact in finding that the Secretary-General failed to fully comply with Staff Rules 9.6 and 13.1. Contrary to the Secretary-General's assertion, it was unlawful under Staff Rules 9.6(e) and 13.1(d) for the Administration to shift the burden to identify suitable posts onto Mr. Hassanin's shoulders. The Administration failed to present evidence that Mr. Hassanin's permanent status and seniority were taken into account in the competitive selection process for posts he applied for and that distinctions were made between permanent and non-permanent staff. Even if the Appeals Tribunal concludes that the UNDT erred in law in finding that Mr. Hassanin could not lawfully be required to participate in a competitive process in the same pool as staff members with less priority, this error was not dispositive to the outcome of the UNDT's decision since, in



*Receivability*

35. The Secretary-General contends that Mr. Hassanin's application does not contest an administrative decision which is subject to judicial review because he might not have been terminated if he had been able to find another position before the expiration of the notice period. The Dispute Tribunal rejected this contention, stating:<sup>9</sup>

... The letter of termination stated in no uncertain terms that the post against which [Mr. Hassanin] had been placed was abolished by the General Assembly effective 1 January 2014, and "as a result, the Secretary-General has decided to terminate [his] permanent employment." The letter further stated that it constitute[d] the formal notice of termination of [Mr. Hassanin's] permanent appointment" and that, "[i]n the event [Mr. Hassanin] [is] not selected for a position, ... [he] will be separated from service not less than three months (90 days) of receipt of this notice". This letter, without any doubt, affected [Mr. Hassanin's] terms of employment, as it resulted in the termination of his employment by abolishment of the post he encumbered, with a three-month notice.

36. As the Appeals Tribunal has often reiterated, for purposes of judicial review under the Dispute Tribunal's Statute, the Dispute Tribunal is to aplettt

terms of appointment or contract of employment of the individual staff member.<sup>11</sup> Additionally, the Dispute Tribunal may consider “the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision”.<sup>12</sup>

38. At the time Mr. Hassanin’s application was pending before the Dispute Tribunal, the General Assembly had approved the Secretary-General’s proposed programme budget for the biennium 2014-2015, section 2 of which provided for the abolition of 59 posts in the Publishing Section of the Meetings and Publishing Division of DGACM, including the post against which Mr. Hassanin’s appointment was charged. The termination letter of 31 December 2013, resulting from the abolishment of Mr. Hassanin’s post, was a final decision of the Administration to terminate his permanent appointment with the Organization, as demonstrated by the language in the letter stating that “[t]he present letter ... constitutes the formal notice of termination of your permanent appointment under staff rule 9.7”. The mere fact that Mr. Hassanin’s separation from service would not occur if he were selected for another position does not diminish the fact that the decision to terminate his permanent employment had been made. Thus, the termination letter of 31 December 2013 was a challengeable administrative decision.<sup>13</sup>

39. Considering these factors, we find that the Dispute Tribunal correctly determined that

*Merits*

*(i) Evidence Post-Management Evaluation*

40. The role of the Dispute Tribunal in characterizing the claims a staff member raises in an application necessarily encompasses the scope of the parties' contentions:<sup>14</sup>

... The duties of [the Dispute Tribunal] prior to taking a decision include adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task. ...

... Thus, the authority to render a judgment gives the [Dispute Tribunal] an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review.

41. The Secretary-General submits that the UNDT erred in law and exceeded its jurisdiction by considering matters beyond the scope of Mr. Hassanin's request for management evaluation and the MEU's response. There is no merit to this complaint for several reasons. First, as quoted above, the UNDT has discretion to interpret the application broadly in light of numerous factors. It is the role of the





him as a staff representative. Consequently, there was no administrative decision to remove Mr. Hassanin from his duties as a staff representative but merely to terminate his appointment due to the abolition of his post.

46. The Administration may terminate the appointment of a staff member on a number of grounds, including abolition of posts or reduction of staff (Staff Rule 9.6(c)(i)). In such cases, the Organization must follow the requirements set out in the Staff Rules and Regulations.<sup>19</sup>

47. Staff Rules 9.6(e) and (f) read as follows:

**Termination for abolition of posts and reduction of staff**

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

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

When the suitable posts available are subject to the principle of geographical distribution, due regard shall also be given to nationality in the case of staff members with less than five years of service and in the case of staff members who have changed their nationality within the preceding five years.

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

48. Staff Rule 13.1 provides, in relevant part, as follows:

**Permanent appointment**

...

- (d) If the necessities of service require abolition of a post or reduction of the staff

effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments, provided that due regard shall be given in all cases to relative competence, integrity and length of service. Due regard shall also be given to nationality in the case of staff members with no more than five years of service and in the case of staff members who have changed their nationality within the preceding five years when the suitable posts available are subject to the principle of geographical distribution.

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

49. During the restructuring process at DGACM, the Administration engaged in a variety of activities to assist permanent staff and thus managed to secure alternative positions for the majority of the affected staff members. It is lawful and reasonable of the Administration to expect affected permanent staff members, including Mr. Hassanin, to cooperate fully in the process. If the Administration informs the staff members that they are expected to apply for suitable available positions, they are obliged to fully cooperate and make a good faith effort in order for their applications to succeed. This includes a duty to apply within the deadlines and to respect the formal requirements.<sup>20</sup>

50. The evidence before us shows that Mr. Hassanin did not make a good faith effort to secure another position.

51. His applications for two positions of Publishing Production Assistant at the G-4 and G-5 level were rejected as they had been submitted after the deadline despite two time extensions, and the interview process was already underway. The Administration did not have the duty to consider Mr. Hassanin for any of these positions under Staff Rules 9.6 and 13.1 as he had not fully cooperated in the process by failing to hand in his applications on time.

52. Another application for a position of Publishing Assistant at the G-6 level was rejected because the position was two levels higher than Mr. Hassanin's grade. We find that the UNDT erred in law when stating that positions more than one level higher than the concerned staff member's grade are suitable positions and trigger the obligations of the

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<sup>20</sup> See also *Haimour and Al Mohammad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-688.

Administration under the aforementioned provisions. The UNDT's finding is not in accord with our jurisprudence<sup>21</sup> and Section 6.1 of Administrative Instruction ST/AI/2010/3 (Staff selection system) and Section 5.1 of Administrative Instruction ST/AI/2010/4 (Administration of temporary appointments). Those provisions indicate that a position more than one level higher than the staff member's current grade level cannot be considered "suitable", let alone for purposes of Staff Rules 9.6 and 13.1. Consequently, the Administration had no duty to consider Mr. Hassanin for this position.

53. Finally, his application for a position as Meeting Services Assistant at the G-5 level was rejected because Mr. Hassanin had left the "work experience" section of his application blank. As we stated above, a good faith effort of the staff member requires him or her to respect the formal requirements of an application.

54. The UNDT also erred in holding that the termination of Mr. Hassanin's appointment was unlawful on the grounds that he did not receive particular consideration as an elected high-level official (First Vice President) of the Staff Union. Elected high-level staff representatives do not enjoy special protection from termination or enjoy higher priority for retention than other staff members. Neither in Staff Rules 9.6 and 13.1 nor in other legal provisions can we find such a requirement. This being so, it would cast doubt on the legality of the Administration's actions had they favoured Mr. Hassanin in comparison to other permanent staff members.

55. As the termination of Mr. Hassanin's permanent appointment was lawful, the UNDT erred in law when rescinding it and setting in-lieu compensation. For the same reason, the UNDT also erred in law when it awarde

**Judgment**

56. The appeal is granted and Judgment No. UNDT/2016/181 is vacated.

Original and Authoritative Version: English

Dated this 14<sup>th</sup> day of July 2017 in Vienna, Austria.

*(Signed)*

Judge Knierim, Presiding

*(Signed)*

Judge Chapman

*(Signed)*

Judge Raikos

Entered in the Register on this 5<sup>th</sup> day of September 2017 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar