
APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Judgment No

Smith
(Respondent/Applicant)

v.

Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge Rosalyn Chapman Judge Dimitrios Raikos
Case No.:	2016-1046
Date:	14 July 2017
Registrar:	Weicheng Lin

JUDGE SABINE KNIERIM , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/194, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 19 October 2016, in the case of *Smith v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 19 December 2016, and Mr. Alex Smith filed his answer on 13 March 2017.

Facts and Procedure

2. The following facts are taken from the UNDT Judgment: ¹

... The Applicant, a former staff member in the Publishing Section, Meeting and Publishing Division of the Department for General Assembly and Conference Management (“DGACM”), filed an application contesting the decision to abolish his post and, as a result, to terminate his permanent appointment.

... The Applicant was one of fourteen former and current staff members who, in March 2014, filed applications [before the UNDT] relating to the decision to terminate their permanent appointments following the abolition of a number of posts in DGACM. Several of the applicants subsequently withdrew their applications. This case was set down for a hearing [before the UNDT] along with five other cases on 29 and 30 March 2016.

...

Employment with the Organization

... The Applicant commenced employment with the United Nations in or around 1976. He received a permanent appointment effective 1 April 1981.

... Until 20 April 2014, the Applicant had the functional title of Supervisor at the Publishing Section at the G-6 level, step 11. After 38 years and 8 months of service at the United Nations, and the reception of several long service recognition awards, the Applicant’s permanent appointment was terminated on 20 April 2014, when he took earlier retirement.

15 August 2013 report of the ACABQ (A/68/7)

... On 15 August 2013, the Advisory Committee on Administrative and Budgetary Questions (“ACABQ”) published report A/68/7 (First report on the proposed programme budget for the biennium 2014–2015), in which it included

... At para. I.107, the report recorded the ACABQ's enquiry as to the potential impact of post abolition on staff in the Publishing Section who might lose employment if the budget was approved. The report noted that the Department was "actively engaged" with [the Office of Human Resources Management (OHRM)] and other offices to "address the matter proactively":

Abolishments

I.106 A total of 99 posts are proposed for abolishment, including 4 General Service (Principal level), 56 General Service (Other level) and 39 Trades and Crafts posts, at Headquarters under subprogrammes 3 and 4, as follows:

...

(c) The abolishment of 39 Trades and Crafts posts and 22 General Service (Other level) posts in the Reproduction Unit and the Distribution Unit, reflecting the completion of the shift to an entirely digital printing operation ... ;

...

I.107 The Advisory Committee enquired as to the potential impact of post abolishment on staff and was informed that the staff in the Publishing Section who might lose employment would be affected if the proposed budget were approved. In anticipation of this possibility, the Department had been actively engaged, together with the Office of Human Resources Management and other relevant offices, to address the matter proactively. ...

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 consultation 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.

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Request for management evaluation

... On 31 January 2014, the Applicant filed a request for management evaluation of the decision to abolish his post and to terminate his permanent appointment.

[On 7 February 2014, temporary job openings for Publishing Production Assistant positions (digital scanning) at the G-4, G-5 and G-6 level were issued. The vacancies were only open to DGACM staff in order to prioritize them, particularly those, whose posts had been abolished. On 10 February 2014, the Executive Officer, DGACM, sent an e-mail to those staff, including Mr. Smith, to emphasize that the deadline to apply was 15 February 2014. Subsequently, the deadline was extended to 28 February 2014, and then extended again to 7 March 2014. The DGACM staff, including Mr. Smith, were notified each time there was an extension.]

24 February 2014 email

... On 24 February 2014, the Executive Officer of DGACM sent an email to the affected staff members, including the Applicant, stating (emphasis in original):

Colleagues,

Mr. Gett[(Colllg, sta1yt)-29()-6eagllg, sta1yte ame

superseded the contested decision, it effectively rendered his request for management evaluation moot, and his management evaluation file would therefore be closed. [In addition, the letter stated that this was without prejudice to future requests

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6. Most importantly, the UNDT erred in law in finding that the Secretary-General failed to fully comply with Staff Rules 9.6 and 13.1. Staff Regulation 1.2(c) allowing for the lateral reassignment of staff affected by abolition of post outside the normal selection process does not create a right to such placement. In addition, the Administration is not precluded by the established regulatory framework from assessing a permanent staff member's candidacy for a particular position in the context of a competitive selection exercise. On the contrary, the established jurisprudence supports the conclusion that an open, transparent process provides an appropriate means by which the Administration may evaluate a staff member's suitability, as expressly required by Staff Rules 9.6 and 13.1. Moreover, contrary to the UNDT's holding, the Administration cannot be faulted for not considering Mr. Smith for a position for which he did not even apply. If the Administration were precluded from evaluating the suitability of a staff member for a position through competitive process, this would constitute a significant exception from the principle articulated in Article 101 of the United Nations Charter to secure the highest standards of efficiency, competence and integrity among staff. In the present case, the Administration offered career training and directly notified Mr. Smith of vacancies some of which were restricted to the affected DGACM staff members and repeatedly extended the deadlines to apply for such positions. It also extended Mr. Smith's appointment beyond the three-month notice period to afford him additional opportunities to apply for vacant positions. By contrast, Mr. Smith did not make even minimal efforts to cooperate with the Administration, namely to apply, within the application deadline, to positions for which he was eligible and that were accessible in view of his grade level, skills and competencies. Mr. Smith applied to only four positions, none of which were suitable for him.

7. With respect to the UNDT's award of in-lieu compensation, the Secretary-General claims that the UNDT erred in finding that Mr. Smith's rights had been violated and in awarding

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that he was in fact not considered. In particular, there were digital scanning posts which matched his experience but the Administration did not consider Mr. Smith for them, competitively or otherwise. The evidence supports the UNDT's finding that the Administration failed to make good faith efforts to place Mr. Smith. It placed other staff members on posts during the restructuring of DGACM through lateral transfer, but it

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Merits

(i) Evidence Post-Management Evaluation

21. The role of the Dispute Tribunal in characterizing the claims a staff member raises in an application necessarily encompasses the scope of the parties' contentions¹

... 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

24. Third, due to the unusual circumstances of the case, wherein the notice of termination was given months in advance of Mr. Smith's actual termination from service, it would have been inappropriate for the UNDT to refuse to admit evidence of events after the issuance of the notice of termination. Subsequent events could have, *inter alia*, rendered Mr. Smith's claims moot or affected the amount of damages he sought. For all these reasons, there is no merit to the Secretary-General's claim that the UNDT exceeded its jurisdiction or competence in allowing evidence from Mr. Smith of events subsequent to the Management's response to his request for management evaluation.

(ii) Termination

25. The Dispute Tribunal committed an error of law in finding that the decision to terminate Mr. Smith's permanent appointment was unlawful because he did not receive proper consideration as a permanent appointee, and that the Organization committed material irregularities and failed to act fully in compliance with the relevant legal provisions.

26. The Administration has broad discretion to reorganize its operations and departments to meet changing needs and economic realities.¹² According to the Appeals Tribunal's well-settled jurisprudence, "an international organization necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff".¹³ This Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff.¹⁴ Even in a restructuring exercise, like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members.¹⁵ In the present case, however, as the General Assembly abolished a number of DGACM posts before the notice of termination was sent to Mr. Smith, there can be no doubt that the retrenchment exercise was genuine and not improperly directed at him or any other specific staff member. Mr. Smith does not suggest otherwise.

¹² *Masri v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-626, para. 30; *Islam v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-115, para. 30; see also *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

¹³ *Matadi et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-592, para. 16, citing *Bali v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-450, para. 21 and citations therein.

¹⁴ *Matadi et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-592, para. 16.

¹⁵ *Ibid.*, citing *Hersh v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-433/Corr.1, para. 17.

27. 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.¹⁶

28. 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;

The Administration had no duty to consider Mr. Smith for these positions under Staff Rules 9.6 and 13.1 as he was not qualified.

35. As the termination of Mr. Smith'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 awarded compensation for emotional distress.

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