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4. Due to the extensive detail of facts and issues, this Judgment contains a table of contents as an *aide mémoire*.

**Brief procedural history**

5. Due to the large number of applicants who filed similar applications in March 2014 and the issues involved, this case and related cases have a long procedural history that need not be detailed in full. In the period of March 2014 to April 2016, the Tribunal issued more than thirty case management orders in relation to this case as well as the related cases. All orders and case management discussions are part of the record in this case.

6. On 29 and 30 March 2016, the Tribunal held a two-day hearing in the present case and related six cases.

7. Due to the logistics of securing the attendance of all the applicants and witnesses at the appropriate times, the Tribunal, with the consent of the parties, did not follow the normal order of calling witnesses, and in some instances even recalled witnesses. In this instance, the Applicant and the following witnesses testified *viva voce* before the Tribunal:

- a. Mr. Narendra Nandoe, Chief, Meeting Support Section, DGACM;
- b. Ms. Janet Beswick, Deputy Executive Officer, DGACM;
- c. Ms. Christine Asokumar, Chief a.i., Headquarters Staffing Section, Staffing Services, Strategic Planning Division, Office of Human Resources Management (“OHRM”).

8. The three witnesses listed above were called on behalf of the Respondent, and provided the relevant testimony in so far as it related to each of the Applicants concerned.

9. On 15 April 2016, the parties filed their consolidated closing submissions in relation to this case and related six cases.

## **Facts**

### *Employment with the Organization*

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

11. 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)*

12.

*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. ...

I.108 The Advisory Committee recommends the approval of the proposed abolishment of 99 posts in the Department.

*General Assembly resolution 68/246*

14. On 27 December 2013, the General Assembly approved the Secretary-General's proposed programme budget for the biennium 2014–2016, section 2 of which provided for the abolition of 59 posts in the Publishing Section of the Meetings and Publishing Division of DGACM.

*Note of 30 December 2013*

15. 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

communication must display the functional title of the decision-maker.

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

*Secretary-General's approval of termination of appointments*

16. 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.

*Termination letter of 31 December 2013*

17. By letter dated 31 December 2013, signed by the Executive Officer, DGACM, the Applicant 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



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 separated from service not less than three months (90 days) of receipt of this notice, as per staff rule 9.7. However, you will be entitled to a termination indemnity in accordance with staff regulation 9.3(c).

My office will assist you in every possible way during this difficult time, and I sincerely wish you success with your applications.

*Request for management evaluation*

18. 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.

*24 February 2014 email*

19. 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. Gettu [Under-Secretary-General, DGACM] expresses his gratitude to all who attended the meeting held last Wednesday on the 19th, and has asked that we reiterate two important points which were shared at the meeting for the benefit of colleagues who might not have attended:

First, that in light of the fact that the termination notices were given out over a period of several weeks in January, that the decision has been taken to separate all permanent staff as of 90 days from the date of the latest letter delivered which was 20 January. For all staff with permanent contracts who do not have an appointment, their separation date will be 20 April.

Because that day falls on a Sunday, and the preceding Friday is the Good Friday holiday, any staff separating as of that date will be cleared by the Executive Office on Thursday, 17 April (last work day).

Second, that the deadline for the application to the temporary digitization posts has been extended, once again, until 28 February. Staff need to apply to a job opening in order to be considered for posts.

*26 February 2014 contract extension*

20. By letter dated 28 February 2014, the Applicant was notified by the Management Evaluation Unit (“MEU”) that two days earlier they had been advised by the Administration of the extension of the Applicant’s appointment until 20 April 2014. The letter further stated that, since the extension of his appointment superseded the contested decision, it effectively rendered his request for management evaluation moot, and his management evaluation file would therefore be closed.

*Filing of an application before the Tribunal*

21. On 21 March 2014, the Applicant filed the present application.

*Subsequent job search*

22. The Applicant applied for four available posts—Editorial and Desktop Publishing Assistant (Chinese), G-7 level; Administrative Assistant, G-7 level; Staff Assistant, G-6 level; Meetings Services Assistant, G-6 level. He was not retained for any of these posts. With respect to the Editorial and Desktop Publishing Assistant (Chinese) post, the Applicant did not speak Chinese, which was required for the position. With respect to the other three posts, he was not selected because he did not answer “yes” to the required number of pre-screening questions.

23. Mr. Nandoe testified that, on several occasions, he asked the Applicant to apply for available posts, which the Applicant refused to do because, being a staff representative, he did not want to take away job opportunities from his colleagues.

*Termination of permanent appointment*

24. The Applicant's permanent appointment was terminated on 20 April 2014 and, consequently, he elected to accept early retirement.

**Applicant's submissions**

25. The Applicant's principal contentions may be summarized as follows:
- a. The decision to abolish the Applicant's post and to terminate his permanent appointment was contrary to General Assembly resolution 54/249, adopted on 23 December 1999, which emphasized that "the introduction of new technology should lead neither to the involuntary separation of staff nor necessarily to a reduction of staff". The ACABQ approved the budget for 2014–2015 and proposed abolishment of posts in the Publishing Section based upon the assurances that DGACM was acting proactively to address the matter consistent with resolution 54/249. The Administration has failed to show that the General Assembly has rescinded its mandate as reflected in General Assembly resolution 54/249;
  - b. The Secretary-General lacked the authority to terminate the Applicant's permanent appointment. Pursuant to staff rule 13.1(a), the Applicant retained his permanent appointment until his separation from the Organization, and therefore the Secretary-General could not

terminate that appointment (i.e., initiate the separation from service) under staff regulation 9.3(a)(i) as read with staff rules 9.6(a) and 9.6(b);

c. The procedures adopted in the implementation of the reduction of staff, including for the Applicant, breached the obligations of good faith and fair dealing. The written and oral evidence in this case demonstrates that the Organization's policy to require staff on abolished posts to apply and be considered for vacancies misplaced and shifted the responsibility for searching out and finding suitable positions onto the shoulders of the affected staff. This was contrary to the requirements of staff rules 13.1(d) and (e).

### **Respondent's submissions**

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

a. The termination of the Applicant's permanent appointment was lawful. The General Assembly abolished 59 posts in the Publishing Section when it adopted the programme budget for the 2014–2015 biennium by resolution 68/246 of 27 December 2013. General

c. The Organization complied with its obligations under staff rule 13.1(d) and (e). Starting 2013, well in advance, the Organization made substantial good faith efforts to find available and suitable positions at Headquarters. DGACM consulted with the staff representatives to ensure that the Organization made good faith efforts to assist permanent staff. The Organization provided training and career support to the affected staff. The Organization took active steps to identify available and suitable positions for affected staff members, including: (i) DGACM implemented a hiring freeze on external recruitment in the General Service category from 2012; (ii) the Executive Office, with the assistance of OHRM, notified staff directly of vacancies (in the Secretariat and other agencies) in New York; (iii) in February 2013, the ASG/OHRM approved a measure whereby the OHRM initially released to Hiring Managers only the profiles of eligible and qualified internal candidates in the Publishing Section in order for Hiring Managers to give them priority consideration for positions advertised in Inspira; (iv) in October 2011, the Organization allowed on an exceptional basis the recruitment of staff members on a temporary basis.

temporary job openings) in the General Service category for printing and distribution operations in the Meetings and Publishing Division.

h. The new positions created in DGACM in 2014 were filled through a transparent and competitive selection process. In the alternative restructuring proposal submitted to the Secretary-General in May 2013, a staff representative for DGACM proposed that “[s]election of the staff would be carried out in accordance with the staff regulations and rules, and in full transparency and consultation with the staff, with priority given to the permanent and long-serving fixed-term staff”. This is exactly what happened. In accordance with the staff selection system, staff members were required to apply for the positions that they considered themselves suitable for and compete for those positions.

### **Applicable law**

#### *Applicable law on termination of permanent appointments*

27. Staff regulation 1.2(c) provides:

#### **General rights and obligations**

(c) Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them;

28. Staff regulation 9.3(a)(i) states:

#### **Regulation 9.3**

(a) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment or for any of the following reasons:

(i) If the necessities of service require abolition of the post or reduction of the staff;

29. Staff rule 9.6 states in relevant parts:

**Rule 9.6**

**Termination**

**Definitions**

(a) A termination within the meaning of the Staff Regulations and Staff Rules is a separation from service initiated by the Secretary-General.

...

**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.

...

(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.



30. Staff rule 13.1 states in relevant parts (emphasis added):

**Rule 13.1**

**Permanent appointment**

the United Nations as an organisation involved in setting norms and standards and advocating for the rule of law, has a special duty to offer its staff timely, effective and fair justice. It must therefore ‘practice what it preaches’ with respect to the treatment and management of its own personnel. The Secretary-General believes that staff are entitled to a system of justice that fully complies with the applicable international human rights standards.

32. The General Assembly in adopting the statutes setting up the Tribunals by resolution 63/253 established the new “system of administration of justice consistent with the relevant rules of international law and the principles of rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike”.

33. It has been noted that while the United Nations Organization “does not deal with labour matters as such, and recognizes the ILO [International Labour Organisation] as the specialized agency responsible for taking appropriate action for the accomplishment of the purposes set out in [the ILO] Constitution, some UN instruments of more general scope have also covered labour matters”.<sup>1</sup> For example, some provisions concerning employment or labour matters are contained in the 1948 Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights, and also in the International Covenant on Economic, Social and Cultural Rights. It has been observed that the Covenants, because of their comprehensive nature, are drafted in general terms, and the various rights relating to labour are dealt with in a less precise and detailed way than ILO standards.<sup>2</sup>

34. There are international norms and standards regarding the termination of employment of work due to economic, technological or structural change, and the rights of retrenched workers and of staff representatives.

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<sup>1</sup> Nicolas Valticos and Geraldo W. von Potobsky, *International Labour Law* (Kluwer Law and Taxation Publishers, 1995), pp. 70–71.

<sup>2</sup> *Id.*





processes to lend to a more efficient and effective operation of its departments.” However, there is a long line of authorities regarding the Respondent’s duties towards staff members on abolished posts. In one of the earliest Dispute Tribunal cases on the subject matter—*Dumornay* UNDT/2010/004 (case concerning the United Nations Children’s Fund (“UNICEF”), affirmed on appeal)—the Tribunal examined in paras. 30–34 whether there were reasonable efforts by the Administration to find alternative employment for the applicant who was a permanent staff member on an abolished post. The Tribunal found that the applicant failed to show that UNICEF did not fulfil its obligations.

40. In *Dumornay* 2010-UNAT-097, the Appeals Tribunal affirmed *Dumornay* UNDT/2010/004, referring in para. 21 to “reasonable efforts ... to try to find [the Applicant] a suitable post”:

... *Dumornay* [permanent staff member] was given a three-month temporary appointment after her post was abolished and reasonable efforts were made by the Administration to try to find her [the Applicant—a permanent staff member] a suitable post ...

41. In *Bye* UNDT/2009/083 (case concerning the United Nations Office of the High Commissioner for Human Rights; no appeal), the Tribunal observed that it was unclear whether the requirement of good faith efforts to find alternative employment applied to staff on non-permanent appointments other than permanent staff on abolished posts. However, the Tribunal noted that the former United Nations Administrative Tribunal (“UNAdT”) held the view that the requirement of good faith in the search for alternative employment extended to other, non-permanent categories of staff. The Tribunal therefore considered and found that the Administration made *bona fide* efforts to find alternative employment for the applicant, the holder of a fixed-term appointment, although those efforts were unsuccessful.

42. In *Shashaa* UNDT/2009/034 (case concerning the United Nations Development Programme (“UNDP”); no appeal), paras. 25–27 and 39, the Dispute Tribunal referred to some of UNAdT pronouncements on good faith efforts in finding alternative employment for displaced permanent staff, noting that “the employer can expect reasonable cooperation” from the affected staff member.

43. In *Mistral Al-Kidwa* UNDT/2011/199 (case concerning UNICEF; no appeal), paras. 50–74, the Tribunal addressed UNICEF’s rules for staff on abolished posts, including additional obligations of the Administration with respect to search for alternative employment.

44. In *Tolstopiatov* UNDT/2010/147 (case concerning UNICEF; no appeal), the Tribunal addressed UNICEF’s rules for staff on abolished posts, including additional obligations of the Administration with respect to search for alternative employment. In para. 45, the Tribunal stated in essence that the obligation of “good faith effort” is implicitly part of staff rule 9.6(e) in respect of the preference given to staff members in cases of abolishment of posts. The Tribunal found that the burden of proving that the Organization made a diligent search rests with the Organization.

45. In *Abdalla* UNDT/2010/140 (case concerning the UN Secretariat, affirmed in *Abdalla* 2011-UNAT-138), the applicant was a temporary staff member outside the scope of preference stated in staff rule 9.6(e). The Tribunal stated in paras. 27–28:

... The Tribunal also noted the jurisprudence of the former United Nations Administrative Tribunal applicable to cases of abolishment of post to assess whether the Organization was obliged to find alternative employment for the applicant, as a staff member of a downsizing Organization before his reassignment to UNAMI, and after that, as a staff member of



49. In *El-Kholy* UNDT/2016/102 (judgment concerning UNDP; presently under appeal), the Tribunal provided a detailed examination of the relevant case law and made a number of significant legal pronouncements of general application. The Tribunal stated:

52. It is clear from staff rule 9.6(a), (c) and (e) that a termination as a result of the abolition of a post is lawful provided that the provisions of the Staff Rules are complied with in a proper manner. It is also abundantly clear from this rule, read together with staff rule 13.1(d), that there is an obligation on the Administration to give proper and priority consideration to permanent staff members whose posts have been abolished. As such, a decision to abolish a post triggers the mechanism and procedures intended to protect the rights of a staff member under the Staff Rules to proper, reasonable and good faith efforts to find an alternative post for the staff member who will otherwise be without a job. Failure to accord to the displaced staff members the rights conferred under the Staff Rules will constitute a material irregularity.

...

55. Staff rules 9.6(e) and 13.1(d) clearly set out the duty and obligation on the Administration with an unequivocal commitment to give priority consideration to retaining the services of staff members holding a permanent appointment subject to the following conditions or requirements: relative competence, integrity, length of service and the availability of a suitable post in which the staff members services can be effectively utilized.

...

67. The fact that the Staff Rules provide that in assessing the suitability of staff members for available positions, due consideration has to be given to the relative competence, integrity and length of service, does not imply that the Organization can make such assessment only if and when a staff member has applied for a particular vacancy. Nothing in staff rules 9.6(e) and 13.1(d) indicates that the suitability for available posts of a staff member affected by the abolition can only be assessed if that staff member had applied for the post.



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 arbn(8(ic stha29 slaNgum)85.8( such ))JTJ-13.02 Twk1.0979

which the suitability of the Applicant, by way of placement or lateral move, could have been considered before the termination of her appointment took effect.

...

89. ... [T]he Administration failed to fulfil its obligations under staff rules 9.6(e) and 13.1(d). It also failed in this duty when it did not at least make an assessment of her suitability for other available posts. It follows that the decision to terminate the employment of the Applicant by reason of an organisational restructuring was not in compliance with the duty on the Respondent under staff rule 9.6(e) read together with staff rule 13.1(d). The termination in these circumstances was unlawful.

50. In *Hassanin* UNDT/2016/181—which concerned the same post abolition process that is discussed in the present case—the Tribunal found that the Administration failed to fully honour the material provisions of staff rule 13.1 with respect to the Applicant, a G-4 level staff member of DGACM. The Tribunal found, *inter alia*, that the Organization committed material irregularities and failed to act fully in compliance with the requirements of staff rule 13.1(d) and (e). The Tribunal found that the onus was on the Administration to carry out a matching exercise and find a suitable post for the applicant, who was a permanent staff member, prior to opening the vacancy to others.

51. In *Tiefenbacher* UNDT/2016/183, the Applicant, a former D-1 level permanent staff member of the United Nations Development Programme (“UNDP”), challenged the decision not to “award [him]” a D-1 level position. The Tribunal found that the Applicant was not afforded proper priority consideration for the contested post under the framework established by staff rules 9.6(e) and 13.1(d). The Tribunal found that a proper matching exercise under staff rule 13.1(d) was distinct from a full-scale competitive selection process open to external candidates. The Tribunal found that staff rule 13.1(d) envisaged a matching exercise that would take into account various relevant

factors, such as the affected staff member's contract status, suitability, and length of service.

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”.

55. In Judgment No. 910, *Soares* (1998) (concerning a former staff member of UNDP), the UNAdT reiterated that a good faith effort must be made by the Organization to find alternative posts for permanent appointment staff members whose posts are abolished. The Respondent must show that the staff member was considered for available posts and was not found suitable for any of them prior to termination. The Tribunal has held in the past that where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given (see also Judgment No. 447, *Abbas* (1989); Judgment No. 1128, *Banerjee* (2003)).

56.

Administrative Tribunal of the International Labour Organization

57. In *El-Kholy* UNDT/2016/102, the Dispute Tribunal included a number of relevant pronouncements of the Administrative Tribunal of the International Labour Organization (“ILOAT”).

58. In Judgment No. 1782 (1998), at para. 11, the ILOAT stated:

What [staff rule 110.02(a) of the United Nations Industrial Development Organization] entitles staff members with permanent appointments to is preference to “suitable posts in which their services can be effectively utilized”, and that means posts not just at the same grade but even at a lower one. In a case in which a similar provision was material (Judgment 346: *in re* Savioli) the Tribunal held that if a staff member was willing to accept a post at a lower grade the organisation must look for posts at that grade as well.

59. In Judgment No. 3238 (2013), the ILOAT decided that the advertising of a post inviting reassigned staff members to apply would not be sufficient to comply with the duty to give them priority consideration. The ILOAT stated at para. 12:

At all events, in law the publication of an invitation for applications does not equate with a formal proposal to assign the complainants to a new position, issued specifically in order to comply with the duty to give priority to reassigning staff members holding a contract for an indefinite period of time.

60. In Judgment No. 3437 (2015), at para. 6, the ILOAT stated:

The Tribunal’s case law has consistently upheld the principle that an international organization 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,



64. Several years prior to Secretary-General Hammarskjöld's Oxford lecture, the UNAdT expressed similar sentiments in one of its earlier judgments, remarking that permanent appointments have "been used from the inception of the Secretariat to ensure the stability of the international civil service and to create a genuine body of international civil servants freely



62. *Emphasizes* that the introduction of new technology should lead neither to the involuntary separation of staff nor necessarily to a reduction in staff;

67. The Applicant submits that, subsequently, on 27 December 2013, the General Assembly adopted resolution 68/246 based upon the recommendation of the ACABQ (see ACABQ report A/68/7) which relied on the assurances provided by DGACM to address the matter proactively in view of the explicit mandate of the General Assembly that the abolishment of posts in the Publishing Section should not lead to involuntary separation of staff.

68. General Assembly adopted resolution 68/246 stated:

*The General Assembly,*

...

18. *Also endorses*, subject to the provisions of the present resolution and without establishing a precedent, the recommendations of the Advisory Committee concerning posts and non-post resources as contained in chapter II of its first report on the proposed programme budget for the biennium 2014–2015.

69. The Tribunal notes that the General Assembly resolution 54/249 predated the events in question by approximately 14 years, and was obviously issued in the context of a different biennial cycle. The General Assembly's



72. The Tribunal therefore finds that there was no breach of General Assembly resolution 54/249.

*Authority to terminate the Applicant's contract*

73. The Applicant submits that the Secretary-General lacked the authority to terminate his permanent appointment. The Applicant refers to staff regulation 9.3(a)(i) and staff rule 9.6. He also relies to staff rule 13.1(a), which states:

(a) A staff member holding a permanent appointment as at 30 June 2009 or who is granted a permanent appointment under staff rules 13.3(e) or 13.4(b) shall retain the appointment until he or she separates from the Organization. Effective 1 July 2009, all permanent appointments shall be governed by the terms and conditions applicable to continuing appointments under the Staff Regulations and the Staff Rules, except as provided under the present rule.

74. In his closing submission, the Applicant presented the following argumentation in support of his contention that the Secretary-General lacked the authority to terminate his permanent appointment:

15. ... [S]ince a staff member holding a permanent appointment as of 30 June 2009 shall retain the appointment until he separates from the Organization, the Secretary-General may not terminate that appointment (i.e., initiate the separation from service) under [staff regulation] 9.3(a)(i). This is an exception to the rule pursuant to which all permanent appointments shall be governed by the terms and conditions applicable to continuing appointments.

...

17. The evidence established that [the Applicant] was granted a permanent appointment prior to 30 June 2009 and has been holding such appointment since then. Therefore, pursuant to Staff [Regulation] 13.1(a), [the Applicant] had retained his permanent appointment until he separated from the Organization. The separation of [the Applicant] cannot be



*Compliance with the requirements of staff rule 13.1*

80. The Applicant submits that the Organization breached its obligations of good faith and fair dealing by failing to respect the protections enjoyed by the Applicant as a permanent staff member. The Applicant submits that the Administration misplaced and shifted the responsibility for searching out and finding suitable positions unto the shoulders of the Applicant, contrary to the established jurisprudence and rule 13.1(d), which place the onus on the employer to be protective of the permanent staff members.

81. 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

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.

83. This paragraph demonstrates that, from the outset of the process, the Administration considered, contrary to staff rule 13.1(d) and the extensive jurisprudence hereinbefore cited, that the primary responsibility for finding alternative employment rested with the Applicant, who was to “apply for all available positions” that he felt matched his competencies and skills. This set the overall tone for the subsequent efforts to find an alternative post for the Applicant.

84. The Applicant applied to four vacancies and was not selected. The evidence in this case demonstrates that the Applicant was required to compete competitively for available posts, including against non-permanent staff members. Mr. Nandoe 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. Asokumar’s 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.

85. The Administration was required to make good faith efforts to find suitable and available posts against which the Applicant could have been placed (*El-Kholy* UNDT/2016/102; *Hassanin* UNDT/2016/181; *Tiefenbacher*



other material criteria with a view to



90. No evidence has been introduced that, in the event no posts were available at the Applicant's level, the Organization considered placing him against a lower level post so as to secure his employment. As noted in *El-Kholy*,

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).

91. The Tribunal finds the Respondent failed to meet the requirements of staff rule 13.1 to reassign the Applicant as a matter of priority to another post matching his abilities and grade, and if this proved fruitless, to at least offer him duties at a lower grade and widen its search accordingly (ILOAT Judgment No. 3437 (2015)).

92. The Tribunal therefore concludes that the Organization committed material irregularities and failed to act fully in compliance with the framework

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;

(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.

94. The purpose of compensation is to place the staff member in the same position he or she would have been in, had the Organization complied with its



**Orders**

100. The application succeeds.

101. The decision to terminate the Applicant's permanent contract is rescinded.

102. As an alternative to rescission, the Respondent may elect to pay the Applicant compensation in the amount of two years' net base salary, minus any termination indemnity paid to him upon his separation.

103. The Applicant is awarded the sum of USD7,000 as compensation for emotional distress.

104. The aforementioned amounts shall bear interest at the U.S. Prime Rate with effect from the date this Judgment becomes executable until date of payment. An additional five per cent shall be applied to the U.S. Prime Rate 60 days from the date this Judgment becomes executable.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 19<sup>th</sup> day of October 2016

Entered in the Register on this 19<sup>th</sup> day of October 2016

*(Signed)*

Hafida Lahiouel, Registrar, New York