



Judgment No. 2017-UNAT-730



... By letter dated 31 March 2014, the State Secretary, Ministry of Foreign Affairs, Norway, thanked [Ms. El-Kholy] for her close cooperation and relentless commitment to strengthen the relevance of OGC. He also stressed that “thanks to [[Ms. El-Kholy]’s] efforts, [they] now have solid results and experiences to build on as UNDP and the Ministry of Foreign Affairs have renewed [their] commitment to continuing the partnership on the UNDP Oslo Governance Centre”.

... By letter of 31 March 2014, OHR/BOM informed [Ms. El-Kholy] that a fully funded temporary assignment had been identified for her as Senior Advisor to the Executive Coordinator and Deputy Executive Coordinator of the United Nations Volunteers (“UNV”) programme in Bonn. [Ms. El-Kholy] accepted that post, and took up the one-year temporary assignment on 3 April 2014. The letter noted that the assignment was for a defined period of one year, that it will start on 1 April 2014 and will expire on 31 March 2015 and there will be no possibility of extension. It further stated that “[i]n the event that [[Ms. El-Kholy]] [did] not find a regular assignment by the conclusion of the temporary assignment, i.e. by 31 March 2015, the options available to [her] as articulated in the letter from [OHR/BOM] of 20 February 2014, remain[ed] in effect”.

... By email of 10 April 2014, [Ms. El-Kholy] wrote to Ms. Helen Clark, the UNDP Administrator, summarizing her positive ac

... On 21 May 2014, [the Director, BOM] sent an email entitled “Structural Change: Notification to affected staff”, advising relevant staff, including [Ms. El-Kholy] that the posts they encumbered were within the scope of the change exercise and that they were therefore in principle affected by the structural change. He encouraged staff to talk to their managers and HR Business Partner to make sure they have all the information to fully apprehend the implications of the process on their positions. The email further stressed that “[s]taff who are unable to secure a position by the conclusion of the relevant structural change exercise will be separated in accordance with the provisions of the UN Staff Regulations and Rules and the UNDP People Realignment Policy and Processes which are applicable during this exercise”.

... On 8 June 2014, [Ms. El-Kholy] filed a complaint with the UNDP Office of Audit and Investigations (“OAI”) alleging harassment and abuse of authority on the

sought clarification as to whether her current status was related to the on-going structural changes.

... By email of 6 August 2014, entitled “RE: Participation on the structural change job fairs”, the Officer-in-Charge (“OIC”), Chief Integrated Talent Management, OHR, BOM, UNDP, informed [Ms. El-Kholy] that although she had decided not to take part in the first round of the D-1 job fair, “any positions not filled in the first round of the job fairs [would] be re-advertised in a second round and that [she would] remain eligible to apply at that time as well, should [she] so choose”.

... [The Director, BOM] responded to [Ms. El-Kholy]’s request for management evaluation on 27 August 2014, stressing that further to the restructuring exercise of OGC, her post had been abolished and it was anticipated that it would be replaced by a different function of Head of Research (D-1), and that the job description for that post was yet to be determined, pending approval of the OGC project document and funding commitments from Norway and other donors, and the classification process. Hence, no recruitment process had been initiated. He further noted that any management evaluation request with regard to the abolition of the post of Director, OGC, was time-barred.

... On 20 October 2014, [Ms. El-Kholy] was informed by OHR/BOM that it had been decided to give all permanent appointment holders an additional opportunity to

14. The Secretary-General requests that the UNDT Judgment be vacated with respect to its conclusion that the Administration failed to fulfill its obligations and, in the alternative, to reduce the compensation awarded.

Ms. El-Kholy's Answer

15. The UNDT made no error when concluding that the Administration failed to meet its obligations. The appeal misconstrues and omits salient facts, fails to demonstrate any reversible error and merely advances the same arguments. It is an abuse of the administration of justice.

16. The Secretary-General attempts to reopen factual issues under the guise of questioning the UNDT's legal reasoning and application to the facts of Ms. El-Kholy's case. He is essentially asking the Tribunal to depart from the longstanding interpretation that the Administration's efforts to find suitable alternative employment are to be conducted in good faith to avoid "to the greatest extent possible" dismissal and dislocation of a permanent staff member.

17. The suggestion that the Administration should be relieved of its statutory obligations due to the organization-wide restructuring is flawed. In any event, Ms. El-Kholy's post was abolished prior to UNDP's structural change, and abruptly so. The failure to afford her any consideration for the post that replaced hers was just one of other violations of its good faith obligations.

18. The attempt to shift responsibility to Ms. El-Kholy—that it was her obligation to apply for posts—contradicts the record and its claims amount

Considerations

21. As was the case before the UNDT, the sole and central question before the Appeals Tribunal is whether the Organization complied with its obligation vis-à-vis Ms. El Kholy, who held a permanent appointment, to find another suitable post, pursuant to Staff Rules 9.6(e), 9.6(g) and 13.1(d).

22. Staff Rule 9.6 provides, in part:⁵

(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.

(...)

(g) Staff members specifically recruited for service with the United Nations Secretariat or with any programme, fund or subsidiary organ of the United Nations that enjoys a special status in matters of appointment under a resolution of the General Assembly or as a result of an agreement entered by the Secretary-General have no entitlement under this rule for consideration for posts outside the organ for which they were recruited.

23. Staff Rule 13.1(d) provides:⁶

(d) If the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts for which their services can be effectively utilized, staff members with permanent appointments *shall be retained* in preference to

⁵ Emphasis added.

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Judgment

43. The appeal is partially granted, insofar as the amount of in-lieu compensation is reduced to 18 months' net base salary, interest having being stated in the UNDT's Judgment. All the other determinations in Judgment No. UNDT/2016/102 are affirmed, including its award of USD 2,000 as moral damages. Ms. El-Kholy's request for an award of costs is rejected.

Original and Authoritative Version: English

Dated this 31st day of March 2017 in Nairobi, Kenya.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Murphy

Entered in the Register on this 26th day of May 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar