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.

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 (t). 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

> 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 to five vacancies and was interviewed for two. Since 20 April 2014, the Applicant has been employed as a Publishing Production Assistant (General Service level).

Continued employment

23. The Applicant's permanent appointment was not terminated as he secured further employment.

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

25. The Respondent's principal conten

and G-6 levels. As an exceptional measure, these job openings were limited to DGACM staff only;

f. The Applicant shared the responsibility for searching and finding a position. It was not unreasonable to expect that he would demonstrate his interest in positions by applying for the positions in a timely manner for which he considered himself suitable. This is a fundamental requirement of the staff selection system. A job application in the form of a personal history profile ("PHP") form, combined with a job interview, are commonly and generally accepted as the most efficient method of assessing whether a staff member is suitable for a position. Nor is it unduly burdensome to require a staff member to express his or her interest before engaging in the task of considering him or her for a job opening. The overwhelming majority of affected staff members were able to apply for positions for which they considered themselves suitable and were successful in their applications;

g. The Applicant has not adduced any persuasive evidence to demonstrate that he was not afforded due consideration in the assessment of his relative competence;

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 represen

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

26. 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;

27. 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;

28. 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.

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

> **Rule 13.1**
>
> **Permanent appointment**
>
> (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.
>
> …

Consideration

Receivability

35. The Respondent submitted that the present application was not receivable because the Applicant's permanent appointment was not terminated and he continued to be employed. Therefore, his retention renders his application moot and not receivable. The Respondent submitted that the Applicant should be precluded from bringing additional claims, such as his subsequent retention against a different post, which were not identified as contested decisions in his request for management evaluation. The Respondent submitted that consideration of such additional claims would be a back-door way of bringing new appeals without following the mandatory step of requesting management evaluation and filing an application on the merits before the Tribunal with regard to these separate claims.

36. The letter of termination dated 31 December 2013 stated in no uncertain terms that the post against which the Applicant 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 [the Applicant's] permanent appointment" and that, "[i]n the event [the Applicant is] not selected for a position, … [he] will be separated from service not less than three months (90 days) of receipt of this notice".

37. The Applicant's termination never took effect as he was retained against a different post. However, the Applicant states that, although his permanent appointment was not terminated, the decision dated 31 December 2013 was unlawful and caused him harm because he unlawfully lost his post and had to look for alternative employment and, in the process, suffered emotional distress.

38. The Tribunal finds that, pursuant to art. 2.1 of the Tribunal's Statute, the present application is receivable. The Tribunal will now examine whether the termination of the Applicant's employment by abolishment of post was lawful.

Overview of relevant case law

United Nations Dispute and Appeals Tribunals

39. As noted by the United Nations Appeals Tribunal in *Masri* 2016-UNAT-626 (para. 30), "it is within the remit of management to organize its 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

47. In *Pacheco* UNDT/2012/008 (case concerning the Office for the Coordination of Humanitarian Affairs ("OCHA"); affirmed on appeal), the Tribunal dismissed the applicant's claim that OCHA was obliged to make a good faith effort to find an alternative suitable post. The Tribunal found that the applicant's fixed-term contract expired and hence staff rule 9.6(e) did not apply (see paras. 71–77 of *Pacheco*).

48. In *Rosenberg* UNDT/2011/045 (case concerning UNDP; no appeal), the Tribunal found that reorganization was a valid exercise of the Respondent's discretion and the decision not to retain the staff member further was not unlawful.

49. In *El-Kholy* UNDT/2016/102 (judgment concerning UNDP; presently under appeal), the Tribunal provided a detailed exam UNee.00t

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> 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.
>
> …
>
> 86. By simply stating that he could not consider the Applicant for any position for which she had not applied and that she could not be considered for placement or lateral move, the Respondent admits that no consideration whatsoever for any such available posts was given to the Applicant. The Administration did not even look for available posts for 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.

Former United Nations Administrative Tribunal

52.

56. Although the rulings of the UNAdT referred to above relate to cases involving UNICEF and UNDP, the UNAdT found that a duty to deploy good faith efforts to find alternative employment for the displaced staff member existed for any permanent staff member whose terms of employment were governed by the Staff Regulations and Rules. See, e.g., para. VIII of Judgment No. 1163, *Seaforth* (2003), stating that "where there is an abolition of a 100 series post, the Respondent has an obligation to make a bona fide effort to find staff members another suitable post, assuming that such a post can be found, and with due regard to the relative competence, integrity and length of service of that staff member". See also para. VII of Judgment No. 1254 (2005).

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:

the independent nature of the international civil service and, in a key part of his lecture, underlined the significance of permanent status for the staff of the Organization:[3]

> A risk of national pressure on the international official may also be introduced, in a somewhat more subtle way, by the terms and duration of his appointment. A national official, seconded by his

63. It is important to keep in mind the reasons for the creation and existence of an institute of permanent staff in the context of an international organization such as the United Nations. Staff members of the Organization owe their allegiance to no national government. Having complied with all the necessary requirements and criteria for a permanent appointment, and having received such an appointment, they become entitled to certain legal protections and advantages as articulated in the Staff Regulations and Staff Rules, including as compared to staff on other types of appointments. This reasoning applies equally to permanent staff regardless of the type of their contractual arrangement (professional-level, general service-level, or other).

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 selected by the Secretary-General" (UNAdT Judgment No. 29, *Gordon* (1953)). The UNAdT subsequently remarked that "[p]ermanent appointments are granted to those staff members who are intended for the career service" (UNAdT Judgment No. 85, *Carson* (1962)).

Alleged breach of General Assembly resolution 54/249

65. The Applicant submits that the decision to terminate his permanent appointment was contrary to General Assembly resolution 54/249 (Questions relating to the proposed budget for the biennium 2000–2001), adopted on 23 December 1999.

66. General Assembly resolution 54/249 (adopted on 23 December 1999) stated:

> *The General Assembly*,
>
> ...
>
> 59. *Requests* the Secretary-General to undertake a comprehensive review of the post structure of the Secretariat, taking into account, inter alia, the introduction of new technology, and to make proposals in the proposed programme budget for the biennium 2002-2003 to address the top-heavy post structure of the Organization;
>
> 60. *Welcomes* the use of information technology as one of the tools for improving the implementation of mandated programmes and activities;
>
> …
>
> 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.

> 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 permanents 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 initiated by the Secretary-General, i.e., [the Applicant's] permanent appointment cannot be terminated by the Secretary-General (Staff Rules 9.6(a) and 9.6(b)).

75. This submission advanced by the Applicant is unpersuasive. Staff rule 13.1(a) states clearly that 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 [i.e., under staff rule 13.1]".

76. This means that, in the event of a conflict between staff rules 9.6 and 13.1, the provisions of staff rule 13.1 would prevail as *lex specialis*. However, because the Staff Regulations are superior to the Staff Rules (*Villamoran* UNDT/2011/126), provisions of staff rule 13.1 cannot override the application of staff regulation 9.3(a)(i), which provides that the Secretary-General may terminate continuing appointments, particularly given the language of staff rule 13.1(a), which provides that "permanent appointments shall be governed by the terms and conditions applicable to continuing appointments, except as provided under the present rule".

77. Notably, staff rule 13.1(d) specifically discusses abolition of posts and reduction of staff, including the order of retention of staff, with preference given to staff on permanent appointments, "provided that due regard shall be given in all cases to relative competence, integrity and length of service".

78. Therefore, it follows from the language of staff rule 13.1(a), 13.1(d), and staff regulation 9.3(a)(i) that contracts of permanent staff may be terminated by the Secretary-General, provided that it is lawfully done, i.e., that relevant conditions concerning preferential retention are satisfied.

79. Therefore, the Tribunal concludes that the Secretary-General had the legal authority to terminate the Applicant's permanent appointment.

Compliance with the requirements of staff rule 13.1

80.

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

competing with staff members on fixed-term and/or temporary contracts. There was no actual preference afforded to permanent staff.

87. Unlike in *El-Kholy*, where the applicant was offered posts which she declined, the Applicant in this case was not offered any positions prior to the abolishment of his post, or subsequent thereto. The Respondent in this case placed not an iota of evidence before th

Relief

92. By resolution 69/203, adopted on 18 December 2014 and published on 21 January 2015, the General Assembly amended art. 10.5 of the Tribunal's Statute to read as follows:

> 5. As part of its judgement, the Dispute Tribunal may only order one or both of the following:
>
> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an 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.

93. 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 contractual obligations (*Warren* 2010-UNAT-059; *Iannelli* 2010-UNAT-093). In *Antaki* 2010-UNAT-095, the Appeals Tribunal stated that "compensation may only be awarded if it has been established that the staff member actually suffered damage".

94. Both the Dispute Tribunal and the Appeals Tribunal have stated that the injured party has a duty to mitigate losses and that any earnings should be taken into account for the purposes of calculating compensation (*Koh* UNDT/2009/078; *Tolstopiatov* UNDT/2011/012; *Garcia* UNDT/2011/068; *Mmata* 2010-UNAT-092).

95. The Applicant seeks compensation for emotional pain and suffering. He states that the salary of the new position he has been assigned to is less than the salary he received previously. The Applicant requests compensation for loss of income and loss of pension benefits and dependency allowance.

96. The Applicant successfully mitigated his loss by finding alternative available employment with the Organization, albeit at a lower level. However, staff rule 13.1 does not require that placement efforts necessarily result in the staff member's assignment to a higher or same level post (*El-Kholy* UNDT/2016/102; *Hassanin* UNDT/2016/181; ILOAT Judgment No. 1782 (1998)). Available suitable posts may be found at a lower salary level. The Applicant has not introduced any evidence that other, *higher* level posts for which he was suitable were available and for which he was not considered, and the Tribunal will not speculate in this regard. Accordingly, given that the Applicant continued his employment and mitigated his losses, albeit at a lower level, the Tribunal does not find that any compensation for pecuniary harm is warranted.

97. However, the Tribunal finds that, although the Applicant was able to secure alternative employment, the Administration subjected him to unnecessary stress associated with having to apply for vacancies and compete with other, non-permanent staff. The Tribunal is satisfied, on the evidence before it, that the Applicant suffered emotional distress as a result of the process that was not fully in compliance with the framework set out in staff rules 13.1(d) and 9.6(e). Given the evidence given by the Applicant and the circumstances of this case, including that the Applicant was able to secure alternative employment and remained on payroll, the Tribunal finds it appropriate to award the sum of USD3,000 as compensation for emotional distress.

98. The Applicant also seeks compensation in connection with a physical injury sustained by him in 2014. He submits that "[a]s a consequence [of intense stress], he fell off his bike and suffered" an injury. The Tribunal is not persuaded that the Applicant has established a link between the contested administrative decision and his bike accident and resulting injury. His claims in this regard are dismissed.

Orders

99. The application succeeds in part.

100. The Applicant is awarded the sum of USD3,000 as compensation for emotional distress.

101. The aforementioned sum 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 19th day of October 2016

Entered in the Register on this 19th day of October 2016

(*Signed*)

Hafida Lahiouel, Registrar, New York