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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 was a long-serving employee of the United Nations, having worked with the Organization for approximately 31 years. He received a permanent appointment effective 1 August 1986. The Applicant worked as a Supervisor in the Publishing Section until 20 April 2014, when his permanent appointment was terminated and he took early retirement.

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

11. 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 proposals for specific posts to be abolished, including in DGACM.

12. 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 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. …
>
> I.108 The Advisory Committee recommends the approval of the proposed abolishment of 99 posts in the Department.

General Assembly resolution 68/246

13. 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

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

> 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

17. 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

18. 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 <u>latest</u> letter delivered which was

Termination of permanent appointment

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

Applicant's submissions

23. 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.

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

24. 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

e. In 2013, DGACM secured extra-budgetary funding from the Government of Qatar to establish a digitization project. On 7 February 2014, temporary job openings were posted at the G-4, G-5 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 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

25. 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;

26. 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;

27. 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.

28. 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.

30. The General Assembly in adopting the statutes setting up the Tribunals by resolution 63/253 established the new

40. 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.

41. 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.

42. 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.

43. 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

UNAMI on temporary assignment whose post had been abolished.

… The former United Nations Administrative Tribunal has

47. 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 (e455d (e455d (e455d T Tc.6(5r

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)]TJ-13.02 Twkl.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.

48. 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.

49. 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

50. In Judgment No. 85, *Carson* (1962) (case concerning a former staff member of UNICEF), the UNAdT stated at paras. 8–11 that a good faith effort must be made by the Organization to find alternative posts fo8(ant Noaff)]TJ-15.54 0 .725 TD.0001 5

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".

53. 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)).

54. 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

55. 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").

56. 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:

servant who does not contemplate a subsequent career with his national government. This was recognized by the Preparatory Commission in London in 1945 when it concluded that members of the Secretariat staff could not be expected 'fully to subordinate the special interests of their countries to the international interest if they are merely detached temporarily from national administrations and dependent upon them for their future'. Recently, however, assertions have been made that it is necessary to switch from the present system, which makes permanent appointments and career service the rule, to

62. 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

63. 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.

64. 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;

65. 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.

66. 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.

67. The Tribunal notes that the General Assembly resolution 54/249 pre-dated the events in question by approximately 14 years, and was obviously issued in the context of a different biennial cycle. The General Assembly's statement in para. 62 of resolution 54/249 that "the introduction of new technology should lead neither to the involuntary separation nor necessarily to a reduction in staff" were limited to the biennium 2000–2001. The language of the resolution indicates that its intention was not to take away the Secretary-General's lawful authority under the Staff Regulations and Rules to terminate appointments following the abolition of posts (hence the use of the phrase "*should* [not]" as opposed to "*shall* [not]"). Notably, in this case it was the General Assembly's own approval by resolution 68/246, adopted on

27 December 2013, of the proposal to abolish 59 posts that precipitated the termination of contracts of the affected staff. The General Assembly's approval of the proposed abolition demonstrates that the General Assembly did not consider its own resolution 54/249 as preventing the abolishment of posts.

68. The Tribunal therefore finds that the language of General Assembly resolutions 54/249 and 68/246 did not have the effect of taking away the authority of the Secretary-General to terminate permanent appointments based on approved abolition of posts, particularly in changed circumstances as the evidence indicated.

69. Moreover, it is generally recognized that where the employer contemplates the introduction of major changes in production, program, organization, structure or technology, terminations of employment may arise as a result of such changes (see ILO Convention on Termination of Employment (Convention No. C158) and Termination of Employment Recommendation (Recommendation No. 166). This is also recognized in the case law of the Dispute Tribunal and the Appeals Tribunal (see, e.g., *Rosenberg* UNDT/2011/045 (not appealed); *Adundo et al.* UNDT/2012/077 (not appealed); *Masri* 2016-UNAT-626). Further, in cases of *bona fide* downsizing or redundancy, the employer has a wide but not unfettered discretion in the implement6.58 -c545Us17.92 .725 TD.0004 Tc.0358not aidim

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

Authority to terminate the Applicant's contract

71. 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.

72. 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 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

Compliance with the requirements of staff rule 13.1

78. 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.

79. 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 prerogative is not unfettered is also trite law. With regard to permanent appointees, the law is clearly set out in the aforementioned jurisprudence, including *El-Kholy* UNDT/2016/102 and *Hassanin* UNDT/2016/181. Termination as a result of the abolition of a post is lawful provided

> 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.

81. 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.

82. The Applicant's applied for vacant posts at the G-5 and/or G-6 level but his job applications were rejected. Mr. Nandoe testified that the Applicant could have applied to the digital scanning posts, as those would have matched his experience, but he did not do so. 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,

83. 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* UNDT/2016/183). Staff regulation 1.2(c) allows the Administration to reassign staff laterally (see also sec. 11 of ST/AI/2010/3, which specifically permits the placement of staff affected by abolition of posts outside the normal selection process). The evidence in this case, including Mr. Nandoe's testimony, indicates that there were, in fact, available posts against which the Applicant could have been considered as a staff member on continuing appointment affected by post abolition, without having to apply and compete for them. No evidence has been adduced as to whether these available posts would have been at a higher or lower level as compared to the Applicant's former post, and the Tribunal will not speculate in this regard.

84. It is troubling that the Applicant, a permanent staff member on an abolished post, was required—in breach of staff rule 13.1—to apply competitively for vacant positions, let alone compete for them with other, non-permanent staff. There is no record, and indeed the Respondent did not produce any evidence, of any distinction being made during these selection exercises between permanent staff and other categories of staff. The evidence in this case indicates that the Applicant and other permanent colleagues were competing with staff members on fixed-term and/or temporary contracts. There was no actual preference afforded to permanent staff.

85. 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 the Tribunal to show that the required criteria were applied or considered, such as the Applicant's contract status, suitability for vacant posts, special skills, length of service, competence and

integrity, nationality, etc., with a view to positioning him or offering him a position. There was no evidence of him being placed in a redeployment pool or of any effort to match his special skills, experience, taking into account other material criteria with a view to matching him with any vacant, new, or opening positions. The documentary evidence in this case, as well as the oral testimony of Mr. Nandoe, Ms. Asokumar and the Applicant, illustrates that the main method of retention of staff was through a competitive process, without consideration of priority criteria such as contract type or seniority.

86. Although the Administration took certain actions in an effort to find employment for the affected staff, as attested to by Ms. Asokumar—such as, since 2013, training, temporary reassignments to learn new skills, and waiving the ASAT to allow staff in the Trades and Crafts category to apply to posts in General Service category—the Administration not only shifted the onus of finding a suitable post onto the affected staff members, but did not give proper consideration to the distinction between permanent staff, like the Applicant, and other types of staff. As a result, the Administration contravened

95. The Applicant was paid termination indemnity upon his separation from service. As the Appeals Tribunal stated in *Bowen* 2011-UNAT-183, the Applicant's termination indemnity should be taken into account when awarding compensation. This is consistent with the Appeals Tribunal's pronouncement in *Warren* 2010-UNAT-059 that "the very 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". Therefore, any amount of termination indemnity paid to the Applicant upon his separation is to be deducted from the final amount of compensation to be paid as alternative to rescission (see also *Koh* UNDT/2010/040; *Tolstopiatov* UNDT/2011/012; *Cohen* 2011-UNAT-131). It should be noted, in this regard, that termination indemnity is separate and distinct from compensation for unused annual leave or any pension withdrawals.

96. In all the circumstances of the present case, the Tribunal finds it

Orders

98. The application succeeds.

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

100. 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.

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

102. 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 19th day of October 2016

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

(*Signed*)

Hafida Lahiouel, Registrar, New York