



Case No. UNDT/NBI/2015/045

Judgment No.: UNDT/2017/084

Kenya until he was posted to South Africa on 5 April 2012 as the Technical Adviser on Population and Development.

9. In early March 2011, a shortage of condoms

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restructuring exercise that was about to commence at the two UNFPA Regional Offices in Africa. The email from Dr. Onabanjo contained information pertaining to the restructuring process which entailed a job-matching exercise and a job fair. Staff members were also apprised of separation packages that they could apply for. By mid-November, staff members were informed of the timelines for the job-matching exercise.

21. On 18 November 2013, the Applicant spoke to the Director of the Division of Human Resources (DGR), Mr Michael Emery. The latter suggested that the Applicant consider a separation package as part of the restructuring exercise, which the Applicant again declined. The DHR then wrote to the Applicant and invited him to participate in

the job matching exercise. The Applicant was particularly asked to consider three positions, which had been previously discussed with him.

22. The job-matching exercise for professional staff closed on 25 November 2013. The Applicant did not participate in the said job-matching exercise.

23. The results of the job-matching exercise were communicated to the Executive Director of UNFPA on 4 December 2013 by memorandum. The said memorandum also stated that the Applicant refused to participate in the exercise.

24. Thereafter, the abolition of the Technical Adviser post which the Applicant had encumbered since his reassignment to the Regional office in Johannesburg was thus approved on 7 January 2014.

25. On 15 January 2014, the DHR informed the Applicant that his post had been abolished. He was invited to use the six-month lead time to apply and compete for suitable vacancies within UNFPA.

26.

the Office of Staff Legal Assistance (OSLA).





part of the *res gestae* and are critical to the proper understanding and adjudication of the present application.

38. In *Zachariah* 2017-UNAT-764, the United Nations Appeals Tribunal (UNAT) held that this Tribunal has the discretion to interpret an application broadly in the light of numerous factors. It added that this Tribunal must adequately interpret and comprehend the application whatever the name attached to it since the judgment must necessarily refer to the scope of the contentions by the parties. UNAT held further that the Dispute Tribunal has inherent power to define and individualize the administrative decision challenged by a party and to identify the subjects of judicial review.

39. It is not disputed that following a widely-publicized incident of condom shortage in parts of Eastern Kenya, the Applicant, Mr. Makinwa, set up a fact-finding mission on the issue. It is not disputed also that neither the draft of that fact-finding mission nor its final report was shown to the Applicant for his comments even though he was singled out for blame by UNFPA in the report for a condom shortage which appeared to involve many stake-holders and players.

40. It is a matter of undisputed fact that during the next performance evaluation he rebutted. It is also a matter of fact that the rebuttal proceedings took UNFPA one year to complete and that the decision to reassign the Applicant to the sub-regional office in South Africa was made and implemented while the rebuttal process was yet to be completed. It is in evidence also that the rebuttal panel relied on the fact-finding report to make certain deductions in favour of upholding the appraisal which the Applicant complained of.

41. It is not disputed that on 30 March 2012, one Ms. Serina Choo who was Chief of Recruitment in UNFPA DHR informed the Applicant on behalf of UNFPA



***breach its obligations of good faith when it terminated the Applicant's permanent appointment?***

45. It was argued on behalf of the Applicant that the Staff Regulations and Rules place an obligation on UNFPA to protect staff members such as the Applicant who have permanent contracts in cases of abolition of post or reduction of staff. Whereas both the Applicant and UNFPA were obliged to act in good faith towards each other, UNFPA breached its obligations of good faith towards the Applicant by not making any efforts at finding a suitable position for him in the Organization.

46. UNFPA was already under discussion in January 2013 and its implementation at the time of his reassignment was imminent. UNFPA management knew that his new post was due to be abolished and the fact that the said management went forward to place him on that post amounted to constructive dismissal.

47. The Respondent contended that the decision to terminate the post encumbered by the Applicant in the sub-regional office in Johannesburg was solely related to the restructuring within the UNFPA East and Southern Africa Regional Office (ESARO) performance. That restructuring required the abolition of all the existing posts and the creation of new ones for optimal performance.

48. Regarding to be retained following the abolishment of his post, the Respondent argued that the principle of protecting the career and rights of staff members holding permanent appointments does not mean that the Organization has a legal obligation to place such staff members on alternative posts.

49. Additionally, the Respondent submitted that the process of finding an alternative post for a staff member holding a permanent appointment should involve



separations as a result of resignation, abandonment of post, expiration of appointment, retirement or death do not constitute termination.

53. Staff rule 9.6(e) provides for termination for abolition of posts and reduction of staff. This provision and staff rule 13.1(d) both provide in particular that where the necessities of service require that the services of staff members be terminated as the result of the abolition of a post or reduction of the staff and, subject to the availability of suitable posts in which their services can be effectively utilized when they possess relative competence, integrity and length of service, staff members holding continuing or permanent appointments shall be retained over others.

54. In addition, UNFPA Personnel Policies and Procedures Manual (PPPM) of 1 January 2014 at its paragraph 7.2.6 restates the protection of staff in cases of abolition of post or reduction of staff as provided for under the Staff Rules already mentioned above.

55. About affording staff rule 9.6(e) and 13.1(d) protection to staff members whose posts are abolished or who lose their jobs because of reduction of staff, the provisions of paragraph 7.2.11 of the PPPM further require the affected staff members to apply to available UNFPA posts for which they believe they have the required competencies. The language of the said paragraph 7.2.11 is mandatory.

56. Although the following paragraph 7.2.12 of the PPPM provide that the DHR or relevant managers in the field may draw the attention of affected staff members to specific posts and solicit applications from them; or at their own initiative, add the names of affected staff members to a list of applicants even though they did not apply, these actions and steps are not mandatory.

57. During the on-going restructuring in the UNFPA Africa Regional offices, on 24 October 2013 UNFPA Regional Director for ESARO, Dr. Onabanjo, published guidelines for implementation of the new restructuring to staff members, most of who



He said also that he asked him to apply to suitable positions in the job fair but that the Applicant did not apply to any post.

61. When cross-examined, the witness said the restructuring process started in December 2012 after a working group in the Africa region presented a document on restructuring in September 2012. In response to a question, he stated that there were no D-1 posts available for the JME and JF. Still in response to another question, the witness said he told the Applicant that if he was matched to a P-5 post, he had full authority to assure him that he would retain his personal grade of D-1 but still the Applicant did not apply.

62. Also in evidence is an email to the Applicant dated 19 November 2013 from the UNFPA Director of Human Resources, Michael Emery. In that email, Mr. Emery referred to a conversation the previous day in which the Applicant refused to take an ASP. He also asked the Applicant to participate in the ESARO JME and to apply for the three posts suggested to him by Mr. Bernasconi.

63. In his pleadings, the Applicant stated that while he was a D-1 officer, the only options UNFPA offered him were an early retirement package of USD150,000 which he refused and then he was asked to apply for only P-5 level posts. He continued that applying for P-5 level posts would have affected his financial basis, benefits and pension contributions. He added that UNFPA did not tell him whether he would continue to be paid at his personal D-1 level even if he were to be placed on a P-5 level post during the JME.

64.

P-5 post he was encumbering in the sub-regional office in Johannesburg was the only professional post that was abolished in the ESARO restructuring exercise. In his sworn testimony, the Applicant told the Tribunal that following the restructuring, there were





have made good faith efforts in securing the Applicant, who was a D-1 officer, another post only if he invited him to consider and apply for D-1 posts.

69. In the light of the prevailing circumstances, such a position would be grossly untenable. This is because the restructuring exercise in issue appeared to have produced only P-

strange and incredible that the Applicant who had served for about 30 years in UNFPA did not raise the issue of his personal D-1 grade with HR officers when invited to apply for P-5 posts.

73. It was also submitted on behalf of the Applicant that the obligation to make good faith efforts to retain the Applicant upon the abolition of his post was an obligation for both the Respondent and the Applicant himself. It was further submitted that even though the Applicant had the duty to look for and apply for available positions on which to place the Applicant.

74. The Tribunal agrees totally that the obligation of good faith in finding a suitable position for the Applicant upon the abolition of his post was an obligation for both the Respondent and the Applicant. It was up to both parties to work together in cooperation to fulfil that obligation. The facts as already stated above show that UNFPA HR personnel (Bernasconi and Emery) reached out to the Applicant and invited and encouraged him to apply for three P-5 posts in order to make him participate in the JME and JF and to find him a possible placement. The evidence also is that the Applicant did not apply to any posts.

75. In *Zachariah*<sup>1</sup>, UNAT held that any permanent staff member facing termination due to abolition of post must show an interest in a new position by timely and completely applying for the position; otherwise, the Administration would be engaged in a fruitless exercise, attempting to pair a permanent staff member with a position that would not be accepted. UNAT upheld the UNDT judgment in favour of the applicant Mr. Zachariah who had a permanent appointment and had applied for a post in the new structure. While the Respondent did not claim that Mr. Zechariah was not qualified for the post he applied for, the Respondent could not show that priority

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<sup>1</sup> 2017-

consideration was given to the said applicant when another candidate was selected for the post.



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Judge Nkemdilim Izuako

Dated this 31<sup>st</sup> day of October 2017

Entered in the Register on this 31<sup>st</sup> day of October 2017



Abena Kwakye-Berko, Registrar, Nairobi