

UNITED NATIONS DISPUTE TRIBUNAL

## **Background**

1. The Applicant is challenging the decision not to renew his fixed-term appointment ( FTA ) due to abolition of his post for reasons of nationalization. The Respondent argues that the decision to abolish the Applicant s post resulted from a legitimate organizational restructuring which led to a revision of the finance function

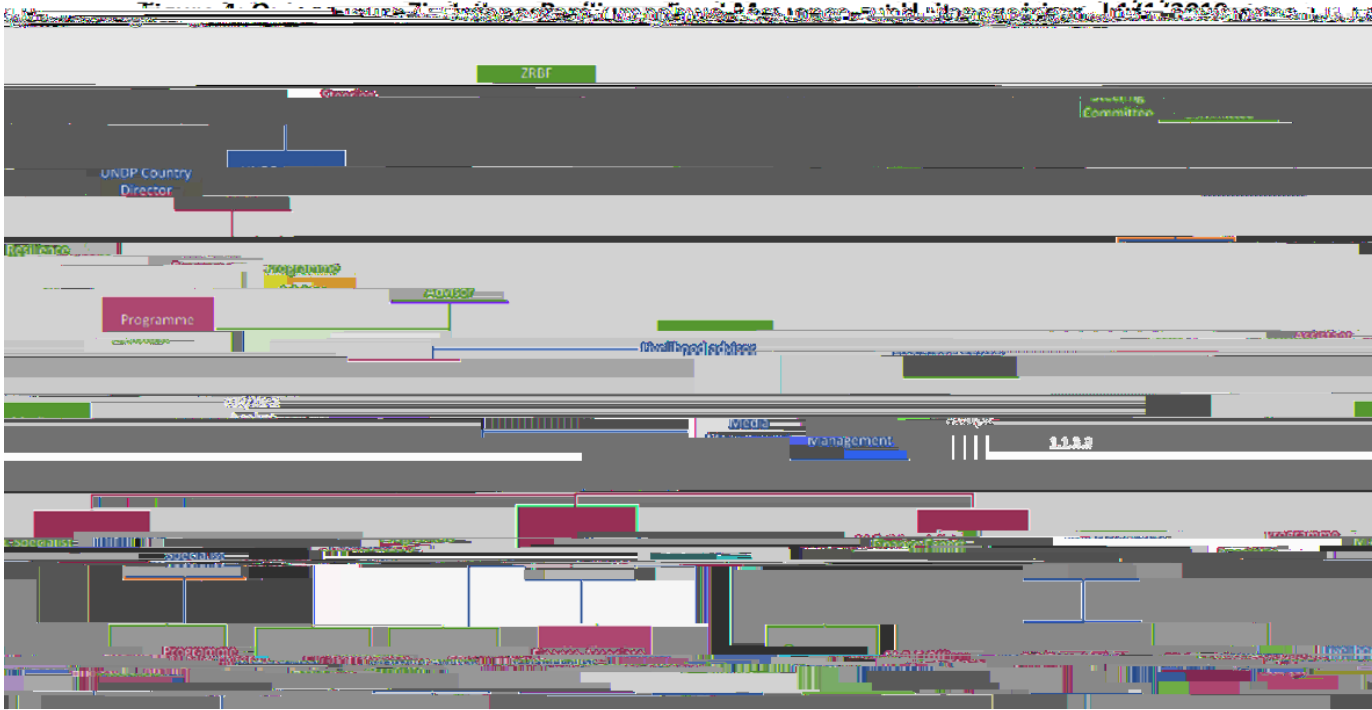


Figure 1: HR Strategy organogram, boxes marked with orange are international positions.

4. Based on this HR Strategy, on 26 February 2018, the Head of PMU invited the Applicant to a meeting to advise him that according to the long-term vision of ZRBF PMU, his position would no longer be required.

5. Around the same month, in February 2018, the donors approved the ZRBF budget which provided for the following approved organogram for the PMU:<sup>2</sup>

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<sup>2</sup> Trial bundle, page 603.



contesting the decision to abolish the position of Finance Specialist.<sup>4</sup>

8. On 31 October 2018, DFID completed its Annual Review of the ZRBF, which covered the period from 1 July 2017 until 30 June 2018, and one of its recommendations was an assessment of the UNDP PMU to determine whether, *the team had the right allocation of roles and responsibilities and help get the most out of the team's talent towards the effective management of ZRBF*".<sup>5</sup> The ZRBF annual review did not make any change to the ZRBF PMU organogram, reproduced in Figure 2 above.

9. By letter dated 19 November 2018, Mr. van Montfort, informed the Applicant that based on DFID's recommendation, UNDP would request for an independent assessment of the capacity of the PMU. Considering this, it had been decided to set aside the decision on the abolition of his post and that his FTA would be extended until 31 March 2019 pending the completion of the independent assessment.<sup>6</sup>

10. To carry out the capacity assessment, a three-member Capacity Assessment team (the Team) consisting of Mr. Alfredo Teixeira, (UNDP Deputy Resident Representative for Mali who participated as Team Leader) and two other colleagues was created. In a series of emails in early January 2019, Mr. van Montfort transmitted the terms of reference for the capacity assessment exercise to the Team. The scope of the capacity assessment is reproduced below.<sup>7</sup>

**Scope:**

that, beyond the capacity assessment of the current state (looking at roles, responsibilities, workflow, levels of delegation, team structure), an independent team **would help to review and finalize a long-term HR strategy for the PMU**. (Emphasis supplied)

This HR strategy should recognize that the project-driven capacity requirements of the PMU will evolve with the project and that hence forward planning would be helpful. Furthermore, such a stra





d. there was a clear disconnect between the Finance Unit and the rest of the PMU units, while there should have been a close working relationship notably on risk assessments and lessons learnt, particularly at the current evolving economic context; and

e. Consortia members noted that the quality of service provided by the Finance Unit were sub-standard with some of the Consortia complaining that they received confusing instructions that impeded their work instead of being informed and guided.

13. In their report, the Capacity Assessment Team proposed the following functional structure for ZRBF PMU.<sup>10</sup>

Figure 1: Proposed Functional Structure



Figure 3: Capacity Assessment Team Functional Structure proposal

<sup>10</sup> Trial bundle, page 200.







19. On 11 June 2019, the Applicant requested management evaluation of the decision. He received a response on 25 July 2019.

20. On 23 October 2019, the Applicant filed this application challenging the impugned decision.

21. The Respondent filed his reply on 2 December

authority.

- i. The Capacity Assessment was conducted with predetermined results as evidenced by the diversion from DFID recommendation.
  - ii. The re-classification and nationalization of his post were done in violation of UNDP policy.
- b. The DFID recommendation did not indicate anything about the long-term HR strategy, rather it stated, ~~help get the best~~ out of the . The DFID recommendation was to find out talent within the team but this recommendation was tainted with improper motivation and diverted to achieve the goal set by the management.
- c. The Capacity Assessment Team was not able to maintain independence throughout the process.
- i. The Applicant's responses in relation to his feedback to the Capacity Assessment report were only shared with him during the trial in this case indicating intentional suppression of facts.
  - ii. The Capacity Assessment Team only conducted a functional analysis instead of looking at the issues holistically and, in this way, the DFID recommendation was diverted to fulfil UNDP Zimbabwe's management's agenda of abolition of the Finance Specialist position.
  - iii. ~~The Capacity Assessment Team~~ The Capacity Assessment Team had not discussed the HR strategy during their meeting with PMU staff while references have been made from tq0.00000912 0 612 792 reW\*nBT/F1 12 Tf1 0 0 1 227.69 346.25 Tm/F

report which created serious negative impressions about the Finance Unit among the donors. The Finance Unit was presented to the donors negatively without it being indicated that the information was for improper motivation, discrimination, humiliation, and lack of integrity on the part of the Capacity Assessment Team.

d. The Respondent acknowledged that the PMU and qualified to deliver the core functions of the PMU. The Applicant argues that if no individual staff capacity assessment was conducted then the Capacity Assessment Team would not be able to confirm that the PMU staff were competent and qualified. The Capacity Assessment Team failed to take note of the second part of the DFID recommendation which was to get the most of . This is evidence that the Capacity Assessment Team was improperly motivated and biased.

e. The donors as well as the SC meeting minutes do not mention blanket approval of the ZRBF structure, rather, the approval was specific. It was highlighted how three to four positions were undergoing major change and needed to be put up under competitive processes with one new position being introduced. The Respondent's statement of approval of the ZRBF PMU structure was not substantiated with evidence.

f. The Applicant argues that the re-classification of the Finance Specialist post was done in violation of UNDP HR policy, as a result, his contract was for all intents terminated and he therefore requests termination indemnity as per staff rule 9.3(c).

g. The Tribunal refused to allow him to cross examine his former supervisor has limited his opportunity to discuss vital issues which are relevant to this case as she was the one who was behind all decisions related to the abolition of his post.

h. As per world-wide standard practices, the Plan/Strategy is prepared before implementation, however, in this case, Mr. van Montfort and his team had implemented the wish list of the abolition of the Finance Specialist position before development of the Plan and strategy. This was inconsistent with standard practices, and an example of discrimination and abuse of authority.

i. The Applicant submits that the Capacity Assessment report was flawed.

i. The ZRBF PMU was managing its programme without any problems, and its delivery was as per plan hence the change of Finance function was biased and made with improper motivation.

ii. No qualified finance expert was included in the Capacity Assessment Team, as such, they failed to identify the correct problems, consequently, they made confusing, biased, and incorrect recommendations about the Finance Unit.

iii. The Capacity Assessment Team's recommendation to provide day-day support to the Grantees is not consistent with the signed Grants Agreement between UNDP and the Grantees.

26. The Applicant requests the Tribunal to grant him the following reliefs:

a. c art.  
10(5)(b) of the UNDT Statute;

b. retroactive reinstatement to the United Nations Joint Staff Pension Fund;

c. compensation in the amount et base salary for emotional injury and distress; and

- d. an order directing the Respondent to reinstate him to his position or to direct the competent authority to deploy him in any other suitable position.

*The Respondent*

27. The relevant part of the Respondent's case is summarized below.

28. The Respondent contends that the decision to abolish the position of Finance Specialist was a proper exercise of administrative discretion.

- a. The scope of the capacity assessment was consistent with DFI recommendation.

- i. Contrary to the Applicant's claim that the objective of the capacity assessment was not consistent with the recommendation made by DFID in its 2018 annual review report, Mr. Teixeira clarified that the Capacity Assessment Team was based on their Terms of Reference, which quoted the recommendation made by DFID, and defined the scope and expectations of their mission.

- ii. In accordance with the recommendation to determine whether the PMU team had the right allocation of roles and responsibilities to effectively manage the ZRBF, the capacity assessment was ev5n1(mana)6(g)-9(e)4(-)119





participated in all the meetings that the Capacity Assessment Team had with the PMU team - one of which did not include the Head of the PMU - and that he was a very active participant at these meetings, where he presented his views. Mr. Teixeira explained that having considered the various views of the stakeholders, the Capacity Assessment Team conducted their own analysis and independently reached their conclusions, which were then incorporated into a draft report that was shared with all the stakeholders.

v. In addition to considering the oral feedback provided by the stakeholders during the meetings with the Capacity Assessment Team, Mr. Teixeira provided proof that the Team also reviewed and took into consideration the comments of the stakeholders who provided written comments on the draft report. This included several comments provided by the Applicant and Mr. Kausiyo, as well as other members of the PMU, the donors and the Government. After consideration of all the comments - to which the Team provided written responses - the Team revised its report.

c. The capacity assessment report properly reflected the information gathered.

i. As explained by Mr. Teixeira, the capacity assessment report was not tasked to assess individual performance and did not place blame on any person or team, but its role was to conduct a review of the functions within the PMU, which included the finance function. Mr. Teixeira stated that Consortia partners, and in particular CARE International, had indicated that the financial support provided did not meet their expnBT/F1 12 Tf1 0 0 1 248.69 320.09 Tm0 g0 G[(s)] TJETQqeF1 12 Tfy1 1 24





Contracts

ting ~~Remuneration~~ for Service Contract ,  
which include provisions concerning the classification of the terms of  
reference of Service Contracts to determine the appropriate level of  
pay.

iii. E



Advisor in the PMU - which was created in 2019 following the recommendation of the capacity assessment - was also a national position. Mr. van Montfort further confirmed that the position of M&E Specialist in the PMU also subsequently became a national position.

- v. Regarding the nationalization of the position, Mr. van Montfort further noted that all the finance positions in the UNDP Country Office were held by nationals of Zimbabwe, including the person in charge of the finance team.
  
- g. The decision to abolish the Finance Specialist post was properly motivated.
  - i. Mr. van Montfort took the decision to abolish the post of Finance Specialist in his capacity as Resident Representative. The decision was taken following the capacity assessment of the PMU, which recommended the revision of the finance function and subsequent to the approval of the Capacity Assessment Team's recommendations by the SC, and to the formulation and classification of the new Terms of Reference of the finance position. On this basis and given that the P-3 post of Finance Specialist was no longer contemplated in the new PMU structure, it was decided to abolish the post.
  - ii. Mr. van Montfort indicated that the Applicant's name did not influence the decision to abolish the position. In this regard, Mr. van Montfort explained that all HR matters had been taken away from the programme management. The Applicant has failed to adduce any evidence to connect the decision to abolish the position to the Applicant's name.

the Applicant's 2016 performance evaluation, which was rated as  
satisfactory. The decision was driven by the changing needs of the  
ZRBF programme, as reflected in the new PMU structure, and was  
properly motivated.

iv. The record shows that the Applicant encumbered the post of  
Finance Specialist until its expiry on 30 June 2019. As clarified by Mr.  
van Montfort, the position was abolished after the Applicant's  
separation once the post was vacated.

h. The Applicant is not entitled to a termination indemnity.

i. The Applicant argues that his contract was terminated  
that he is entitled to receive a termination indemnity.

ii. The Applicant did not present this claim in his request for  
management evaluation and should accordingly be precluded from  
raising it at this stage. The claims not first raised by the Applicant in a  
request for management evaluation are not receivable *ratione  
materiae*.

29. In conclusion, the Respondent submits that the Administration has  
demonstrated that it undertook a legitimate organizational restructuring of the PMU,  
which led to the abolition of the Finance Specialist position. While the Applicant  
claims improper motives, he has failed to present any evidence to support his  
allegations. The Respondent submits that the contested decision was properly  
motivated and was the result of a lawful exercise of discretion. For the foregoing  
reasons, the Respondent requests that the application be dismissed.

## **Considerations**



*Judicial Review*

33. It is important from the outset to lay out the role of the Dispute Tribunal in exercising judicial review;

[is] to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the substance of the decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker. This is a misunderstanding of the delicate task of conducting a judicial review because du





restructuring shall be legitimate when the Administration demonstrates that the process adhered to the principl

43. Four witnesses gave evidence. Over the course of the trial, it emerged that several documents raised in oral hearing were not available to the Applicant at the

assertions of bias. The motion was disallowed on the ground that it was not advisable to have this witness attend court.

46. The Applicant stated that the reason for not renewing his position was not justified. He argued that he was discriminated against, that the Country Director abused his authority and that he was harassed by his supervisor. On 26 February 2018, the Applicant was invited to a meeting with his supervisor to be advised of a long-term strategy of PMU. The Applicant was not shown nor given an opportunity to provide feedback on the HR strategy.

47. On 8 March 2018, a notice of abolition of \_\_\_\_\_ position was written and hand delivered to the Applicant on 9 March 2018 (barely a week after the meeting). There was no consultation prior to this notice he said. He tried to submit comments regarding the proposed restructuring, but his comments were not reviewed or taken into consideration. The meeting with the Head of PMU was not a consultation meeting or held with a view to solicit \_\_\_\_\_ views but to inform him that a decision had been made to restructure PMU. The notice read;

*... the Finance Specialist, P3, position is being abolished. A national position is being created as part of the long-term vision and strategy of the ZRBF to build capacity of national staff". You will be requested to support and train the new national staff during the transition period.*

48. He believed that his immediate supervisor, the Head of PMU, did not like him because he had uncovered some financial anomalies in procurement, and he disagreed with some financial decisions. As a result, he was given a poor rating for his 2016 performance review. He was side-lined in decision making affecting the Finance Unit. For example, he did not participate in the preparation of the 2018 budget, and he was skipped over in favour of his subordinate in the chain of command because his supervisor did not want to deal with him. It was innate



of his team members possessed such expertise either



abolished<sup>37</sup>.

e. The Team considered this HR strategy and adopted some of its recommendations, most notably, reducing the finance portfolio<sup>38</sup>, although relevant documentary evidence including the ZRBF Annual Review Report prepared by DFID dated 31 October 2018 and the EU Result Oriented Monitoring (ROM)

*you start implementation, the conceptualization that you need, previous, you don't need it anymore. So then, you have local capacity, you use local capacity<sup>43</sup>. The witness extended this philosophy to finance in these words, an international financial person, you need when you develop the programme, that we need the expertise, high level expertise, and you may need an international. But when you move forward, the tendency for most of the organization, most of the UNDPt we*



Assessment Team<sup>47</sup>. He was self-contradictory in that although he said the HR Strategy was not a final document, it needed eternal and independent , he went ahead and implemented it in March 2018 only to be put on hold eight months later in November 2018. Further, he was not able to show the la

and the governing body for policy decisions was the ZRBF SC. In restructuring PMU using the method that he took, he failed to take into consideration the procedures set out in the UNDP legal framework for a lawful restructuring exercise. By inserting an agenda without producing any authority to do so from the governing body, the witness acted *ultra vires*. As per the project documents,

**(emphasis supplied)** Taking into consideration the elements mentioned above (status of ZRBF, PMU functions, management funding, and time extension), **the following organogram was approved**<sup>51</sup>.

62. The HR Strategy document was at cross purposes with the DFID Annual Report 2018 which had an organogram that was approved by the donors at the inception of the programme in 2015 and reviewed in 2016, 2017 and 2018<sup>52</sup>. None of the recommendations in this report related to redesigning the organogram. The EU ROM Report which was also reviewed did not make any recommendation to restructure the PMU. On the contrary, this document was clear that ZRBF had not reached the stage where it could be run by the nationals. In the relevant parts on building national capacity and sustainability of ZRBF it states:

### **CROSS CUTTING ISSUES**

*Build national and local capacity – coordinated strategic planning around resilience:*

Ultimately, resilience building should be led by national governments wherever possible, particularly in providing the enabling environment necessary for improving the absorptive, adaptive, and transformative capacities of households, communities and higher-level. The prospects for sustainability of the ZRBF are relatively good although whether the ZRBF can be fully taken over/managed by the government (MAMID) will depend on the political and economic development<sup>53</sup>.

63. In relation to finance management, the report provides the complexities as follows:

The ZRBF as a multi-donor fund has a highly complex set-up with funds committed in an irregular pattern and with different donor requirements, which complicates the management and implementation of the programme. ZRBF also has to comply with the different donor

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<sup>51</sup> Organogram Zimbabwe Resilience Fund Management Unit envisioned 1/1/2019 (page 9 HR Strategy document) Programme Management Unit (PMU) capacity requirements strategy, Trial bundle, from page 903, at page 911.

<sup>52</sup> This annual review covers the period 1 July 2017 to 30 June 2018. This is the third annual review of the ZRBF. The second annual review was

requirements in terms of reporting, financial issues, etc., which is both cumbersome and time demanding; for instance, DFID requirements of quarterly progress (financial) reports are extremely time-consuming for both the implementing partners and PMU. Moreover, for example DFID rules for commitment of funds have delayed activities (recruitment of staff) as DFID cannot avail funds in advance of need. **Despite the complex set-up, the programme is well-managed by the PMU and the Steering committee is well-functioning and provides good steering of the programme**<sup>54</sup>. (Emphasis supplied).

64. Considering that the HR Strategy document was prepared by the Head of PMU, restructuring the Finance Unit, without consulting the Unit, nor shared with the donors or stakeholders and that it contradicted findings of donor reports on review of ZRBF, it was an unsafe document to use in the capacity assessment exercise. The Country Director, himself, opined in his oral testimony that, sharing “*the HR Strategy would have just confused people*”<sup>55</sup>. It was not safe because there was a perception that its author, who was in conflict with her supervisee, might be biased. The perception here is real and the apprehension of bias not unfounded hence the Tribunal concurs with the Applicant that in as far as the capacity assessment report relied on the HR Strategy document to arrive at its decision to abolish the Finance Specialist position, that decision was arrived at by using irrelevant consideration, it was biased against him. The Tribunal finds that had the HR Strategy document not formed part of the guiding material for the capacity assessment exercise relating to finance functions, the outcome would have been different. Relying on the HR Strategy produced absurd and perverse results compared with the objectives recommendation and the donors expectations.

### *(3) Implementation of the recommendation*

65. The capacity assessment exercise was concerned with the functional review of the PMU but evidence has shown that on was concerned, the decision was a *fait accompli* regardless of the exercise. The

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<sup>54</sup> Page 701, ROM Report.

<sup>55</sup> Transcript dated 30 March 2022, page 18.





*Abuse of Authority and Discrimination*

67. Where discrimination is alleged to have influenced the impugned decision, the Tribunal must consider whether in arriving at the decision, similarly placed individuals were treated equally. In this case, the Tribunal will consider whether the selection of the individual whose position is declared redundant and abolished among several similarly placed individuals, followed a competence, integrity or length of service test, which under the staff rules is considered an objective criterion<sup>60</sup>.

68. The Administration did not specify or cite any specific special measure, Regulation or Rule, or Administrative Instruction or minutes of the SC issued on: (1) restructuring PMU in order to create a job opportunity for a national (nationalization); (2) restructuring PMU to cut management costs and hence save funds for more beneficiaries; and (3) restructuring PMU because ZRBF had reached a point where it was time to hand over some functions to the nationals. The documentary evidence on the record points to the contrary that: (1) ZRBF was a donor funded project which had an agreed organogram providing for both national and international positions, with nationals taking up 85% of the positions in PMU management; (2) ZRBF had adequate resources to see the project successfully through to 2021 and (3) ZRBF was still experiencing challenges in particular relating to finance, in that the systems were not flowing as smoothly as alleged by the second witness.

69. By its failure to follow the Regulations and Rules for the restructuring and abolition of the Finance Specialist position, the Tribunal agrees with the Applicant that he was singled out among the three international staff members, to pave way for national staff without a legitimate objective criterion, and in violation of the clear organogram agreed to by ZRBF and in force at the material time<sup>61</sup>.

70. The Tribunal is persuaded by the Applicant's evidence that he was a direct supervisee at the material time and by the Country Director and confirmed by the

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<sup>60</sup> Staff rule 9.6.

Capacity Assessment Team Leader that he had a sour relationship with the Head of PMU. He tried to report the situation to management in 2017 but up until the separation, his problems with his supervisor had not been resolved. The Applicant was side-lined and ignored by his supervisor in major activities involving his Unit. It is easy to infer that in the absence of any legitimate justification for the restructuring,



Case No.: UNDT/NBI/2019/148

Judgment No.: UNDT/2022/069