



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Judgment No. 2017-UNAT-764



Zachariah



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... 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 [the Office of Human Resources Management (OHRM)] and other offices to "address the matter proactively":

Abolishments

5. A draft decision for the Secretary-General's consideration is attached.

Secretary-General's approval of termination of appointments

... By memorandum dated 31 December 2013, the Secretary-General approved the termination of the appointments of staff members listed in the USG/DM's proposal dated 30 December 2013, "on the grounds of abolition of posts pursuant to staff regulation 9.3(a)(i) and staff rule 9.6(c)(i)". Attached to the Secretary-General's memorandum was a table of 34 staff members on permanent appointments, indicating for each staff member their level, entry on duty; date of birth; age; retirement age; visa status; and nationality.

Termination letter of 31 December 2013

... By letter dated 31 December 2013, signed by the Executive Officer, DGACM, the Applicant was informed as follows:

On 27 December, the General Assembly approved the

Request for management evaluation

... On 4 February 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

Subsequent job search

... The Applicant applied for one available post. He explained that the salary of the other posts that remained available to him were far less than the salary he received on the post he had encumbered and, given his financial obligations, he could not afford such loss. The Applicant was not selected for the post he applied for. [The Chief, Meeting Support Section,] Mr. Nandoe's evidence was that the post which the Applicant had applied for was a G-7 position in the printing operations, but was not selected because another candidate who scored higher in the evaluations was selected.

Termination of permanent appointment

... The Applicant testified that, had he retired on 20 April 2014, he would have lost a significant portion of his pension since he had not completed 18 years of service. Consequently, to avoid such loss, he requested the Administration to extend his contract for an additional four months so that he could reach 18 years of service. The Administration granted his request but specifically indicated that during that time he could not search for an alternative position. The Applicant testified that he had no reasonable alternative but to retire at the end of the four-month-extension. Effective 1 September 2014, the Applicant accepted early retirement at age 55, after delayed termination of his permanent appointment.

3. Mr. Zachariah brought an application before the UNDT challenging "[t]he decision to abolish Applicant's post, effective January 2014, and as a result to terminate Applicant's permanent appointment". The staff member "seeks the immediate rescission of the 31 December 2013 decision to terminate his appointment"; and "enforcement of the Administration's duties to search out and find an alternative suitable post to Applicant within the General Service in its duty station (New York Headquarters) to retain Applicant in preference on all other types of appointments".

4. On 19 October 2016, the UNDT issued Judgment No. UNDT/2016/195. Initially, the Dispute Tribunal found that the staff member's application was not moot and was receivable. On the merits, the UNDT found: (i) "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"³ and "there was no breach of General Assembly resolution 54/249";⁴ (ii) "the Secretary-General had the legal authority to terminate [Mr. Zachariah's] ... appointment";⁵ (iii) "the Organization committed material

³ Impugned Judgment, para. 69.

⁴ *Ibid.*, para. 71.

⁵ *Ibid.*, para. 78.

irregularities and failed to act fully in compliance with the framework set out in staff rules 13.1(d)-(e) and 9.6(e)”⁶ by subjecting Mr. Zachariah to the requirement of competing for available posts against other, non-permanent staff members; and (iv) by failing “to reassign [Mr. Zachariah] as a matter of priority to another post matching his abilities and grade”.⁷ The Dispute Tribunal ordered rescission of the decision to terminate Mr. Zachariah’s contract or, in lieu of rescission, two years’ net base salary minus any termination indemnity paid to him. In addition, the UNDT awarded USD 7,000 as “compensation for emotional distress”.⁸

5. On 19 December 2016, the Secretary-General filed the appeal of Judgment No. UNDT/2016/195. On 13 March 2017, Mr. Zachariah filed an answer.

Submissions

The Secretary-General’s Appeal

6. The UNDT erred in law and exceeded its competence by finding that Mr. Zachariah’s application was receivable as the DGACM notice to Mr. Zachariah of the General Assembly’s decision to abolish his post is not an appealable administrative decision that has a direct and negative impact on the staff member’s rights. Rather, the decision to terminate Mr. Zachariah’s appointment was contingent upon him not finding an alternative position; thus, the notice was preparatory and “hypothetical” in nature in that it depended on future events. In the absence of an appealable administrative decision, the UNDT did not have jurisdiction to entertain the application.

7. The Secretary-General further maintains that the UNDT erred in law and exceeded its jurisdiction by considering evidence that post-dated Mr. Zachariah’s request for management evaluation and that he had not challenged before the MEU. The UNDT’s jurisdiction is limited to matters presented to management evaluation.

8. The UNDT erred in law by finding that the Secretary-General failed to fully comply with Staff Rules 9.6 and 13.1. Staff Regulation

13. The UNDT did not err or exceed its jurisdiction when it admitted and considered evidence of the Administration's handling of Mr. Zachariah's applications following his request for management evaluation. The Secretary-General may not, on the one hand,

Considerations

Receivability

17. The Secretary-General contends that Mr. Zachariah's application does not contest an administrative decision which is subject to judicial review because he might not have been terminated if he had been able to find another position before the expiration of the notice period. The Dispute Tribunal rejected this contention, stating: ⁹

... The letter of termination stated in no uncertain terms that the post against which [Mr. Zachariah] 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 [Mr. Zachariah's] permanent appointment" and that, "[i]n the event [Mr. Zachariah] [is] not selected for a position, ... [he] will be separated from service not less than three months (90 days) of receipt of this notice". This letter, without any doubt, affected [Mr. Zachariah's] terms of employment, as it resulted in the termination of his employment by abolishment of the post he encumbered, with a three-month notice.

18. As the Appeals Tribunal has often reiterated, for purposes of judicial review under the Dispute Tribunal's Statute, the Dispute Tribunal is to apply the definition of administrative decision set forth in *Andronov*:¹⁰

... There is no dispute as to what an "administrative decision" is. It is acceptable by all administrative law systems that an "administrative decision" is a unilateral

terms of appointment or contract of employment of the individual staff member.¹¹ Additionally, the Dispute Tribunal may consider “the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision”¹²

20. At the time Mr. Zachariah’s application was pending before the Dispute Tribunal, the General Assembly had approved the Secretary-General’s proposed programme budget for the biennium 2014-2015, section 2 of which provided for the abolition of 59 posts in the Publishing Section of the Meetings and Publishing Division of DGACM, including the post against which Mr. Zachariah’s contract was charged. The termination letter of 31 December 2013, resulting from the abolishment of Mr. Zachariah’s post, was a final decision of the Administration to terminate his permanent appointment with the Organization, as demonstrated by the language in the letter stating that “the present letter ... constitutes the formal notice of termination of your permanent appointment under staff rule 9.7”. The mere fact that Mr. Zachariah’s separation from service would not occur if he were selected for another position does not diminish the fact that the decision to terminate his permanent employment had been made. Thus, the termination letter of 31 December 2013 was a challengeable administrative decision¹³

21. Considering these factors, we find that the Dispute Tribunal correctly determined that Mr. Zachariah was challenging an administrative decision that “produced direct legal consequences” affecting his employment; Mr. Zachariah’s post was abolished by the General Assembly and his position was terminated. The UNDT correctly found that Mr. Zachariah’s application was receivable and adjudicated the merits of his claims.

¹¹ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 49, citing *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058, para. 17.

¹² *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 50, citing *Bauzá Mercère v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-404, para. 18 and citations therein.

¹³ See *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481.

*Merits**(i) Evidence Post-Management Evaluation*

22. The role of the Dispute Tribunal in characterizing the claims a staff member raises in an application necessarily encompasses the scope of the parties' contentions¹⁴

... The duties of [the Dispute Tribunal] prior to taking a decision include adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task. ...

... Thus, the authority to render a judgment gives the [Dispute Tribunal] an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review.

23. The Secretary-General submits that the UNDT erred in law and exceeded its jurisdiction by considering matters beyond the scope of Mr. Zachariah's request for management evaluation and the MEU's response. There is no merit to this complaint for several reasons. First, as quoted above, the UNDT has discretion to interpret the application broadly in light of numerous factors. It is the role of the Dispute Tribunal to adequately interpret and comprehend the application submitted by the moving party, whatever name the party attaches to the document,¹⁵ as the judgment must necessarily refer to the scope of the parties' contentions. Thus, the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review. As such, the Dispute Tribunal may consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed.¹⁶ The evidence about which the Secretary-General complains is relevant to the UNDT's interpretation of Mr. Zachariah's application.

¹⁴ *Massabni v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-238, paras. 2-3.

¹⁵ *Chaaban v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-611, para. 16; citing *Gakumba v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-591, para. 21 and citations therein.

¹⁶ *Chaaban v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-611, para. 18.

24.

27. The Administration may terminate the appointment of a permanent staff member whose post has been abolished or due to reduction of staff, provided it complies with the requirements set forth in applicable regulations and rules. Staff Rule 13.1(d) specifically sets forth a policy of preference for retaining a staff member with a permanent appointment who is faced with the abolition of a post or reduction of staff, stating:²⁰

... If the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts for which their services can effectively be utilized, *staff members with permanent appointments shall be retained in preference to those on all other types of appointments, provided that due regard shall be given in all cases to relative competence, integrity and length of service.* Due regard shall also be given to nationality in the case of staff members with no more than five years of service and in the case of staff members who have changed their nationality within the preceding five years when the suitable posts available are subject to the principle of geographic distribution.

28. Staff Rule 13.1(e) provides that “[t]he provisions of paragraph (d) above insofar as they relate to staff members in the General Services and related categories shall be deemed to

29. At the hearing before the Dispute Tribunal, the Administration presented evidence that “Mr. Zachariah applied for the G-7 position for the printing operations (Job Number 27589), but was not selected. He was interviewed for the position but another candidate who scored higher in the evaluations was selected.” As he did not obtain another position, Mr. Zachariah was terminated, taking early retirement.

30. The Dispute Tribunal correctly concluded that Mr. Zachariah’s status as a permanent staff member provided him “with additional legal protections and guarantees”,²² as recognized historically within the Organization: ²³

... 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

does not give priority to affected staff, nor does it equate with a formal proposal to assign a permanent staff member to a new position....

32. The mandatory language of Staff Rule 13.1 – providing that staff members with permanent appointments “shall be retained in preference to those on all other types of appointments” – requires more than placing them in the same competitive pool as other applicants for a position.

33. The Dispute Tribunal found that as to Mr. Zachariah, who applied for one vacancy and “was required to compete competitively ... against non-permanent staff members”;²⁹ the Administration presented not “a n iota of evidence ... that the required criteria were applied or considered, such as [Mr. Zachariah’s] contract status, suitability for vacant posts, special skills, length of service, competence and integrity, nationality, etc. ... [T]he main method of retention of staff was through a competitive process, without consideration of priority criteria such as contract type or seniority.”³⁰

34. The Appeals Tribunal agrees that Mr. Zachariah’s termination was unlawful, albeit without fully agreeing with the reasoning of the Dispute Tribunal. Initially, the Administration has the burden of showing that it complied with the Staff Rules in terminating Mr. Zachariah. As the UNDT found, the Administration did not meet its burden. Mr. Zachariah – and any permanent staff member facing termination due to abolition of his or her 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. Mr. Zachariah did apply for a position, and the Administration does not claim that he was not qualified for that post.

35. Once the application process is completed, however, the Appeals Tribunal is of the view that the Administration is required by Staff Rule 13.1(d) to consider the permanent staff member on a preferred or non-competitive basis for the position, in an effort to retain the permanent staff member. This requires determining the suitability of the staff member for the post, considering the staff member’s competence, integrity and length of service, as well as other factors such as nationality and gender. Only if there is no permanent staff member who is suitable, may the Administration then consider the other, non-permanent staff members who

²⁹ *Ibid.*, para. 83.

³⁰ *Ibid.*, para. 86.

applied for the post. As this was not done for Mr. Zachariah, the UNDT properly concluded that the decision to terminate Mr. Zachariah was unlawful.³¹

(iii) *Remedies*

36. Pursuant to Article 10.5(a) of the UNDT Statute, the Dispute Tribunal rescinded Mr. Zachariah's termination and, in lieu of reinstatement, ordered two years' net base salary, less any amount of termination indemnity.³² The Secretary-General challenges the in-lieu compensation, arguing that Mr. Zachariah must show mitigation. That is not so. As we stated in *Eissa*,³³ "[in-lieu] compensation is not compensatory damages based on economic loss. Thus, there is no reason to reduce this award by the amount of the termination indemnity" or to require mitigation. Accordingly, we find that the UNDT erred in reducing Mr. Zachariah's in-lieu compensation by the amount of his termination indemnity, to which he has a right under the Staff Regulations and Staff Rules. The award of in-lieu compensation should be modified to strike the deduction for termination indemnity.

37. Mr. Zachariah testified that he did not earn any compensation after his termination due to his wife's illness. Plus, he was forced to sell his house and relocate to a less expensive area in order to keep his expenses to a minimum. He also stated that he was devastated by the loss of his job and the fact that he had no choice but to take early retirement. Based on Mr. Zachariah's testimony, the UNDT awarded him USD 7,000 as damages for emotional stress.³⁴ The Appeals Tribunal has recently confirmed that the concerned staff member's testimony by itself is not sufficient to establish that he suffered compensable harm.³⁵ Thus, the award of compensatory damages for emotional distress in the amount of USD 7,000 should be reversed.

³¹ *Ibid.*, para. 91.

³² *Ibid.*, paras. 96-97. See, e.g., *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092.

³³ *Eissa v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-469, para. 27. Any language to the contrary in *Bowen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-183, para. 3, is distinguishable as the parties in that case apparently agreed to the amount of in-lieu compensation awarded by the Dispute Tribunal.

³⁴ Impugned Judgment, paras. 95 and 98.

³⁵

Judgment

38. The appeal is granted in part. Judgment No. UNDT/2016/195 is affirmed as to the rescission of the termination of Mr. Zachariah's contract; however, the award of alternative compensation to rescission is modified, so that the Secretary-General may elect to pay compensation in the amount of two years' net base salary without any reduction for termination indemnity, and the award of USD 7,000 as compensation is reversed.

Original and Authoritative Version: English

Dated this 14th day of July 2017 in Vienna, Austria.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Raikos

Entered in the Register on this 5th day of September 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar

Judge Knierim's Dissenting Opinion

1. I most respectfully dissent from the Judgment.

The Administration's duties under Staff Rule 13.1(d)

2. My colleagues are of the view that the Administration is required by Staff Rule 13.1(d), in a selection process, to consider a permanent staff member facing termination due to abolition of his or her post on a preferred and non-competitive basis for a position and that other, non-permanent staff members who applied for the post, may only be considered if there is no permanent staff member who is suitable among the applicants.¹

3. I do not agree. Staff Rule 13.1(d) does not order the Administration to give priority to permanent staff members and retain them once they are considered suitable. On the contrary, Staff Rule 13.1(d) specifically states that such priority may only be granted to permanent staff members under the condition that due regard has been given, inter alia, to relative competence ("... staff members with permanent appointments shall be retained in preference to those on all other types of appointments, provided that due regard shall be given in all cases to relative competence, integrity and length of service"). Giving due regard to relative competence necessarily requires the Administration to assess the permanent staff member's competence in relation to all other staff members applying for a position. Under Staff Rule 13.1(d), the Administration is

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