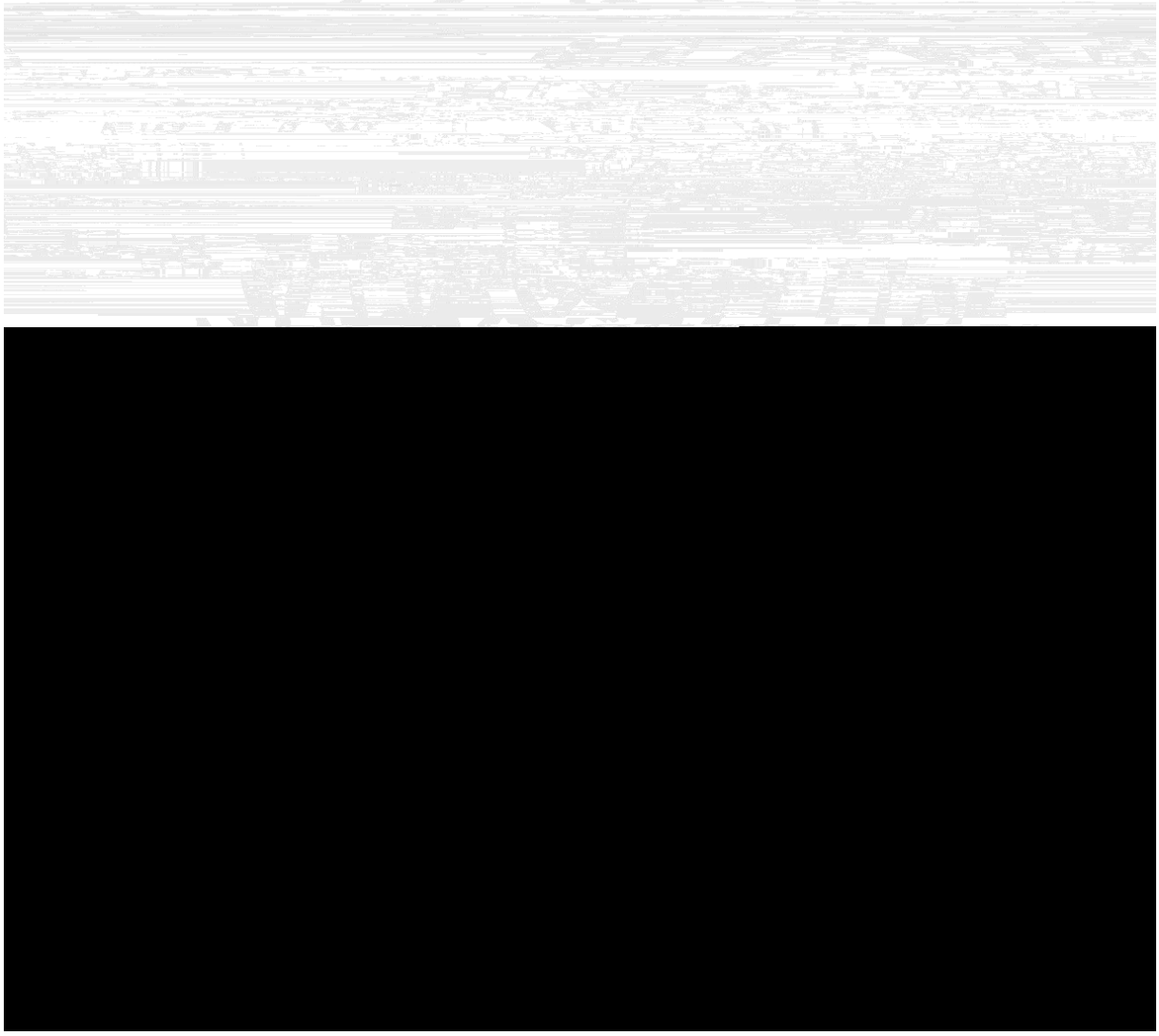
Judgment No. 2017-UNAT-765



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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 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:
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> …
>
> (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

... On 27 December 2013, the General Assembly approved the Secretary-General's proposed programme budget for the biennium 2014–2016,[2] 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

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

> Termination of appointments on abolition of posts – DGACM staff members
>
> 1. I refer to the attached recommendation by the USG/DGACM for the Secretary-General to terminate the appointments of a number

[2] This should read "biennium 2014-2015".

of staff members currently serving with DGACM. This recommendation follows General Assembly decision 68/6 (Sect. 2) that led to the abolition of posts effective 31 December 2013.

2. DGACM has reviewed and is continuing to review possibilities to absorb affected staff members; in line with staff rule 9.6(e) and (f). While it was possible to otherwise accommodate some staff members encumbering posts slated for abolition, and while others have found alternative employment in the Organization, the attached list concerns staff members where this was not possible at this time.

3. Given DGACM's confirmation that consultation efforts with staff representatives and affected staff members have been undertaken and that staff rules 9.6(e) and (f) have been taken into account and complied with, I support the recommendation that the Secretary-General consider the termination of the appointments of the staff members listed in the attachment. Once the Secretary-General has taken a decision, such decision will be conveyed to the staff members through their parent department. In case of termination, this will be a termination notice pursuant to staff rule 9.7. Should any of these staff members secure alternative employment in the Organization prior to any termination taking effect, such termination would be rendered moot.

4. Please note that the authority to terminate for abolition of posts or reduction of the staff has been retained by the Secretary-General pursuant to Annex I of ST/AI/234/Rev.1. We would appreciate [the Executive Office of the Secretary-General (EOSG)'s] assistance in securing the Secretary-General's decision on this matter at the earliest convenience. Given the required standards for delegation of authority, most recently under judgement *Bastet*

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 Secretary-General's proposed programme budget for the biennium

Request for management evaluation

... 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.

[On 7 February 2014, temporary job openings for Publishing Production Assistant positions (digital scanning) at the G-4, G-5 and G-6 level were issued. The vacancies were only open to DGACM staff in order to prioritize them, particularly those, whose posts had been abolished. On 10 February 2014, the Executive Officer, DGACM, sent an e-mail to these staff members, including Mr. Fasanella, to emphasize that the deadline to apply was 15 February 2014. Subsequently, the deadline was extended to 28 February 2014, and then extended again to 7 March 2014. TheDGACM staff, including Mr. Fasanella, were notified each time there was an extension.]

24 February 2014 email

... 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 latest letter delivered which was 20 January. For all staff with

superseded the contested decision, it effectively rendered his request for management evaluation moot, and his management evaluation file would therefore be closed. [In addition, the letter stated that this was without prejudice to future requests for management evaluation.]

Filing of an application before the Tribunal

... On 21 March 2014, the Applicant filed the … application [before the UNDT].

Subsequent job search

... The Applicant testified that he had applied to at least one job opening, without success. Mr. Nandoe[, the Chief, Meeting Support Section,] confirmed in his oral evidence that the Applicant was considered for G-5 and G-6 positions in the distribution operations but was not selected because he did not have the required experience. 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.

Termination of permanent appointment

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

indemnity paid to him upon his separation. In addition, the UNDT awarded USD 7,000 as "compensation for emotional distress". [5]

Submissions

The Secretary-General's Appeal

4. The Secretary-General submits that the UNDT erred in law in finding Mr. Fasanella's application receivable on the basis that the 31December 2013 DGACM notice to Mr. Fasanella of the General Assembly's decision to abolish his Deceo

established jurisprudence supports the conclusion that an open, transparent process provides an appropriate means by which the Administration may evaluate a staff member's suitability, as

staff in these selection exercises. Rather, the evidence supported the opposite conclusion that the Administration disregarded length of service and contract status. The efforts mentioned by the Secretary-General are not "minimally sufficient" to show that the Administration fulfilled its obligation of priority retention of permanent staff members. Mr. Fasanella complied with the requirement of "reasonable cooperation" by (unsuccessfully) applying for posts.

12. Finally, the UNDT did not err in awarding compensation to Mr. Fasanella. The UNDT enjoys discretion to determine damages in each particular case. The Secretary-General failed to discharge his burden to show that the UNDT erred in its determination of the appropriate remedy. The Secretary-General misrepresents the record when he states that there was no evidence on the mitigation of loss through employment income. In fact, Mr. Fasanella testified at his oral hearing as to his financial situation and gave specific information with respect to his economic loss. The Secretary-General did not present evidence to rebut this testimony. The UNDT also correctly awarded compensation for emotional distress as it was best placed to assess and weigh the evidence before it. The Secretary-General has not presented any argument in opposition to this award.

13. Mr. Fasanella requests that the Appeals Tribunal reject the appeal in its entirety and uphold the UNDT Judgment.

Considerations

Receivability

14. The Secretary-General contends that Mr. Fasanella'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: [6]

> … The letter of termination stated in no uncertain terms that the post against which the Applicant had been placed was abolished by the General Assembly effective 1 January 2014, and "as a result, the Secretary-General has decided to terminate [his] permanent employment". The letter further stated that it constitute[d] the formal notice of termination of [the Applicant's] permanent appointment" and that, "[i]n the event [the Applicant is] not selected for a position, … [he] will be separated from service not less than three months (90 days) of receipt of this notice". This letter,

[6] Impugned Judgment, para. 35.

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submitted by the moving party, whatever name the party attaches to the document,[12] 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.[13] The evidence of which the Secretary-General complains is relevant to the UNDT's

its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff".[15] This Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff.[16] Even in a restructuring exercise, like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members.[17] In the present case, however, as the General Assembly abolished a number of DCACM posts before the notice of termination was sent to Mr. Fasanella, there can

abolition of posts and reduction of staff expressly incorporates Staff Rule 13.1 and sets forth a similar policy of preference for the retention of permanent or continuing staff. [19]

26. At the hearing before the Dispute Tribunal, the Administration presented evidence that "[t]he Applicant [Mr. Fasanella] applied for vacant posts at the G-5 and/or G-6 level but his job applications were rejected". As he did not obtain another position, Mr. Fasanella was terminated, taking early retirement.

27. The Dispute Tribunal correctly concluded that Mr. Fasanella's status as a permanent staff member provided him "with additional legal protections and guarantees",[20] as recognized historically within the Organization: [21]

> … It is important to keep in mind the reasons for the creation and existence of an

28. The Dispute Tribunal also properly concluded that the Administration had authority

terminating Mr. Fasanella. As the UNDT found, the Administration did not meet its burden. Mr. Fasanella – 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. Fasanella did apply for two positions, and the Administration does not claim that he was not qualified for these posts.

32. 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, integr

Staff Rules. The award of in-lieu compensation

Judge Knierim's Dissenting Opinion

The

THE UNITED NATIONS APPEALS TRIBUNAL

implemented a hiring freeze on external recruitment in the General Service category. Additionally, the Administration offered career training and directly notified Mr. Fasanella of vacancies, some of which were restricted to the affected DGACM staff members; it also extended his appointment beyond the three-month notice period to afford him additional

Original and Authoritative Version: English

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

(Signed)

Judge Knierim

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

(Signed)

Weicheng Lin, Registrar