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, Chie

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 is a long-serving employee of the United Nations, having worked with the Organization for approximately 25 years. He received a permanent appointment effective 1 October 1992.

11. Prior to 20 April 2014, the Applicant was Lead Printer at the Publishing Section at the grade TC-6, step 7. The Applicant was retained on a temporary funded post (Digital Scanning). His current grade is G-6, step 11, and he still holds a permanent appointment with the UN.

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

12. 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.

13. 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 pi5pe lat t

the appointments of a number 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 (t). 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 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* (UNDteoder juce inurineionrrevieiren

> 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

18. 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

19. 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

> Second, that the deadline for the application to the temporary digitization posts has been extended, once again, until 28 February. Staff need to apply to a job opening in order to be considered for posts.

26 February 2014 contract extension

20. By letter dated 28 February 2014, the Applicant was notified by the Management Evaluation Unit ("MEU") that two days earlier they had been advised by the Administration of the extension of the Applicant's appointment until 20 April 2014. The letter further stated that, since the extension of his appointment superseded the contested decision, it effectively rendered his request for management evaluation moot, and his management evaluation file would therefore be closed.

Filing of an application before the Tribunal

21. On 21 March 2014, the Applicant filed the present application.

Subsequent job search

22. The Applicant applied for a vacant post at a grade lower to his prior grade. As a consequence, the Applicant was retained at G-6 level, step 11.

Continued employment

23. The Applicant's permanent appointment was not terminated as he secured further employment at the G-6 level, step 11, against a special funding post.

Applicant's submissions

24.

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

25. 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 Section when it adopted the programme budget for the 2014–2015 biennium by resolution 68/246 of 27 December 2013. General Assembly resolutions are binding upon the Secretary-General and on the Organization. The Secretary-General has the legal authority and obligation to implement the General Assembly's decision to abolish the posts (*Ovcharenko et al. and Kucherov* UNDT/2014/035, paras. 30–33);

b. Staff regulation 9.3 and staff rules 13.1 and 9.6(c)(i) give the Secretary-General the authority to terminate permanent appointments due to abolition of posts. This authority is also reflected in the Applicant's letter of appointment;

c. The Organization complied with its obligations under staff rule 13.1(d) and (e). Starting 2013, well in advance, the Organization made substantial good faith efforts to find available and suitable positions at Headquarters. DGACM consulted with the staff representatives to ensure that the Organization made good faith efforts to assist permanent staff. The Organization provided training and career support to the affected staff. The Organization took active steps to identify available and suitable positions for affected staff members, including:

(i) DGACM implemented a hiring freeze on external recruitment in the General Service category from 2012; (ii) the Executive Office, with the assistance of OHRM, notified staff directly of vacancies (in the Secretariat and other agencies) in New York; (iii) in February 2013, the ASG/OHRM approved a measure whereby the OHRM initially released to Hiring Managers only the profiles of eligible and qualified internal candidates in the Publishing Section in order for Hiring Managers to give them priority consideration for positions advertised in Inspira; (iv) in October 2011, the Organization allowed on an exceptional basis 31 staff members in the Trades and Crafts category

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 represen

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

26. 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;

27. 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;

28. 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.

29. Staff rule 13.1 states in relevant parts (emphasis added):

> **Rule 13.1**
>
> **Permanent appointment**
>
> (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.
>
> …
>
> (d) 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 be effectively 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. …
>
> (e) The provisions of paragraph (d) 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

w e r m s l

> 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.

31. The General Assembly in adopting the statutes setting up the Tribunals by resolution 63/253 established the new "system of administration of justice consistent with the relevant rules of international law and the principles of rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike".

32. It has been noted that while the United Nations Organization "does not deal with labour matters as such, and recognizes the ILO [International Labour Organisation] as the specialized agency responsible for taking appropriate action for the accomplishment of the purposes set out in [the ILO] Constitution, some UN instruments of more general scope have also covered labour matters".[1] For example, some provisions concerning employment or labour matters are contained in the 1948 Universal Declaration of Human Rights,

Consideration

Receivability

35. The Respondent submitted that the present application was not receivable because the Applicant's permanent appointment was not terminated and he continued to be employed. Therefore, his retention renders his application moot and not receivable. The Respondent submitted that the Applicant should be precluded from bringing additional claims, such as his subsequent retention against a different post, which were not identified as contested decisions in his request for management evaluation. The Respondent submitted that consideration of such additional claims would be a back-door way of bringing new appeals without following the mandatory step of requesting management evaluation and filing an application on the merits before the Tribunal with regard to these separate claims.

36. The letter of termination dated 31 December 2013 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".

37. The Applicant's termination never took effect as he was retained against a different post. However, the Applicant states that, although his permanent appointment was not terminated, the decision dated 31 December 2013 was unlawful and caused him harm because he unlawfully lost his post and had to look for alternative employment and, in the process, suffered emotional distress.

38. The Tribunal finds that, pursuant to art. 2.1 of the Tribunal's Statute, the present application is receivable. The Tribunal will now examine whether the termination of the Applicant's employment by abolishment of post was lawful.

Overview of relevant case law

United Nations Dispute and Appeals Tribunals

39. As noted by the United Nations Appeals Tribunal in *Masri* 2016-UNAT-626 (para. 30), "it is within the remit of management to organize its processes to lend to a more efficient and effective operation of its departments." However, there is a long line of authorities regarding the Respondent's duties towards staff members on abolished posts. In one of the earliest Dispute Tribunal cases on the subject matter—*Dumornay* UNDT/2010/004 (case concerning the United Nations Children's Fund ("UNICEF"), affirmed on appeal)—the Tribunal examined in paras. 30–34 whether there were reasonable efforts by the Administration to find alternative employment for the applicant who was a permanent staff member on an abolished post. The Tribunal found that the applicant failed to show that UNICEF did not fulfil its obligations.

40. In *Dumornay* 2010-UNAT-097, the Appeals Tribunal affirmed *Dumornay* UNDT/2010/004, referring in para. 21 to "reasonable efforts … to try to find [the Applicant] a suitable post":

> … Dumornay [permanent staff member] was given a three-month temporary appointment after her post was abolished and reasonable efforts were made by the Administration to try to find her [the Applicant—a permanent staff member] a suitable post …

41. In *Bye* UNDT/2009/083 (case concerning the United Nations Office of the High Commissioner for Human Rights; no appeal), the Tribunal observed that it was unclear whether the requirement of good faith efforts to find alternative employment applied to staff on non-permanent appointments other than permanent staff on abolished posts. However, the Tribunal noted that the former United Nations Administra

47. In *Pacheco* UNDT/2012/008 (case concerning the Office for the Coordination of Humanitarian Affairs ("OCHA"); affirmed on appeal), the Tribunal dismissed the applicant's claim that OCHA was obliged to make a good faith effort to find an alternative suitable post. The Tribunal found that the applicant's fixed-term contract expired and hence staff rule 9.6(e) did not apply (see paras. 71–77 of *Pacheco*).

48. In *Rosenberg* UNDT/2011/045 (case concerning UNDP; no appeal), the Tribunal found that reorganization was a valid exercise of the Respondent's discretion and the decision not to retain the staff member further was not unlawful.

49. 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 (e) that a termination as a result of the abolition of a post is lawful provided that the provisions of the Staff Rules are complied with in a proper manner. It is also abundantly clear from this rule, read together with staff rule 13.1(d), that there is an obligation on the Administration to give proper and priority consideration to permanent staff mem5 01anen1tabee mwe/TT7 1-95 5 The

subject to the following conditions or requirements: relative

> 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 are at risk of separation prior to considering others and giving priority to those holding permanent contracts.
>
> …
>
> 86. By simply stating that he could not consider the Applicant for any position for which she had not applied and that she could not be considered for placement or lateral move, the Respondent admits that no consideration whatsoever for any such available posts was given to the Applicant. The Administration did not even look for available posts for 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.

50. 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.

51. 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

52. 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 for permanent staff members whose posts are abolished. The UNAdT stated that "[i]n order to prove that the staff rights have not been disregarded, the Respondent has to show in this case: (a) that the Applicant was in fact considered for available posts and (b) that the Applicant was genuinely found not suitable for any of them".

53. The UNAdT long noted the importance of respecting the rights of staff members on permanent appointments. In

abolished posts, was "vital to the security of staff who, having acquired permanent status, must be presumed to meet the Organization's requirements regarding qualifications". The UNAdT further stated that "while efforts to find alternative employment cannot be unduly prolonged and the staff member concerned is required to cooperate fully", such efforts must be conducted "in good faith with a view to avoiding, to the greatest possible extent", a situation in which permanent staff members with a significant record of service are dismissed and forced "to undergo belated and uncertain professional relocation".

54. In Judgment No. 1409, *Hussain*

56. 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

57. 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").

58. 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 provisi

statedIn

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> At all events, in law the publication of an invitation for applications does not equate with a formal proposal to assign the complainants to a new position, issued specifically in order to comply with the duty to give priority to reassigning staff members holding a contract for an indefinite period of time.

60. In Judgment No. 3437 (2015), at para. 6, the ILOAT stated:

> The Tribunal's case law has consistently upheld the principle that an international organization may not terminate the appointment of a staff member whose post has been abolished, at least if he or she holds an appointment of indeterminate duration, without first taking suitable steps to find him or her alternative employment (see, for example, Judgments 269, under 2, 1745, under 7, 2207, under 9, or 3238, under 10). As a result, when an organisation has to abolish a post held by a staff member who, like the complainant in the instant case, holds a contract for an indefinite period of time, it has a duty to do all that it can to reassign that person as a matter of priority to another post matching his or her abilities and grade. Furthermore, if the attempt to find such a post proves fruitless, it is up to the organisation, if the staff member concerned agrees, to try to place him or her in duties at a lower grade and to widen its search accordingly (see Judgments 1782, under 11, or 2830, under 9).

Legal status of "permanent staff"

61. The status of a "permanent" staff member signifies a particular type of an employment relationship, whereby the Organization, in recognition of the staff member's exemplary and long service, provides her or him with additional legal protections and guarantees.

62. The historic reasons for the creation and importance of permanent staff were eloquently articulated by Mr. Dag Hammarskjöld, the second Secretary-General of the United Nations, in a lecture entitled "The International Civil Servant in Law and in Fact", delivered at Oxford University on 30 May 1961, several months before his tragic death. The Secretary-General spoke to

the independent nature of the international civil service and, in a key part of his lecture, underlined the significance of permanent status for the staff of the Organization:[3]

> A risk of national pressure on the international official may also be introduced, in a somewhat more subtle way, by the terms and duration of his appointment. A national official, seconded by his government for a year or two with an international organization, is evidently in a different position psychologically—and one might say, politically—from the permanent international civil 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 a predominant system of fixed-term appointments to be granted mainly to officials seconded by their governments. This line is prompted by governments which show little enthusiasm for making officials available on a long-term basis, and, moreover, seem to regard—as a matter of principle or, at least, of 'realistic' psychology—the international civil servant primarily as a national official representing his country and its ideology. On this view, the international civil service should be recognized and developed as being an 'intergovernmental' secretariat composed principally of national officials assigned by their governments, rather than as an 'international' secretariat as conceived from the days of the League of Nations and until now. In the light of what I have already said regarding the provisions of the Charter, I need not demonstrate that this conception runs squarely against the principles of Articles 100 and 101.

[3] Dag Hammarskjöld, *The International Civil Servant in Law and in Fact: Lecture delivered to Congregation at Oxford University* (30 May 1961), available at http://www.un.org/depts/dhl/dag/docs/internationalcivilservant.pdf (United Nations Department of Public Information, Dag Hammarskjöld Library, "Dag Hammarskjöld" http://www.un.org/depts/dhl/dag/time1961.htm).

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

> 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 initiated by the Secretary-General, i.e., [the Applicant's] permanent appointment cannot be terminated by the Secretary-General (Staff Rules 9.6(a) and 9.6(b)).

75. This submission advanced by the Applicant is unpersuasive. Staff rule 13.1(a) states clearly that 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 [i.e., under staff rule 13.1]".

76. This means that, in the event of a conflict between staff rules 9.6 and 13.1, the provisions of staff rule 13.1 would prevail as *lex specialis*. However, because the Staff Regulations are superior to the Staff Rules (*Villamoran* UNDT/2011/126), provisions of staff rule 13.1 cannot override the application of staff regulation 9.3(a)(i), which provides that the Secretary-General may terminate continuing appointments, particularly given the language of staff rule 13.1(a), which provides that "permanent appointments shall be governed by the terms and conditions applicable to continuing appointments, except as provided under the present rule".

77. Notably, staff rule 13.1(d) specifically discusses abolition of posts and reduction of staff, including the order of retention of staff, with preference given to staff on permanent appointments, "provided that due regard shall be given in all cases to relative competence, integrity and length of service".

78. Therefore, it follows from the language of staff rule 13.1(a), 13.1(d), and staff regulation 9.3(a)(i) that contracts of permanent staff may be terminated by the Secretary-General, provided that it is lawfully done, i.e., that relevant conditions concerning preferential retention are satisfied.

79. Therefore, the Tribunal concludes that the Secretary-General had the legal authority to terminate the Applicant's permanent appointment.

Compliance with the requirements of staff rule 13.1

80. 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.

81. 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 the provisions of the Staff Rules are complied with in a proper manner. The Administration must give proper consideration, on a priority basis, with

the view to retaining those permanent staff members whose posts have been abolished. Even though in assessing the suitability of staff members, due consideration must be given to relative competence, integrity and length of service, nothing in the Staff Rules states that such suitability can only be assessed if that staff member has applied for a post and competed for it against staff on other types of contracts. Rather, under the framework envisaged by staff rules 9.6 and 13.1, it is incumbent upon the Organization to review all

competing with staff members on fixed-term and/or temporary contracts. There was no actual preference afforded to permanent staff.

87. 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.

88. 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 the requirement of priority for retention of permanent staff and failed to fully honour the material provisions of staff rule 13.1 with respect to the Applicant. As the Tribunal stated in *El-Kholy*, the onus was on the Administration to carry

out a matching exercise prior to opening the vacancy to others, whether by an advertisement or otherwise.

89. Staff rule 13.1 is clear that permanent staff on abolished posts, if they are suitable for vacant posts, should only be compared against other permanent staff—it would be a material irregularity to place them in the same pool as continuing, fixed-term, or temporary staff members. Further, as noted in *Hassanin*, the advertising of a post with an invitation to apply 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 (see also ILOAT Judgement No. 3238 (2013)).

90. The Tribunal finds that staff rule 13.1(d) does not provide for a right to alternative employment at the same or hi

Relief

92. By resolution 69/203, adopted on 18 December 2014 and published on 21 January 2015, the General Assembly amended art. 10.5 of the Tribunal's Statute to read as follows:

> 5. As part of its judgement, the Dispute Tribunal may only order one or both of the following:
>
> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

93. The 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 (*Warren* 2010-UNAT-059; *Iannelli* 2010-UNAT-093). In *Antaki* 2010-UNAT-095, the Appeals Tribunal stated that "compensation may only be awarded if it ha

95. The Applicant seeks compensation for emotional pain and suffering. He states that the salary of the new position he has been assigned to is less than the salary he received previously. The Applicant requests compensation for loss of income and loss of pension benefits and dependency allowance.

96. The Applicant successfully mitigated his loss by finding alternative available employment with the Organization, albeit at a lower level and on a post subject to special funding. However, staff rule 13.1 does not require that placement efforts necessarily result in the staff member's assignment to a higher or same level post (*El-Kholy* UNDT/2016/102; *Hassanin* UNDT/2016/181; ILOAT Judgment No. 1782 (1998)). Available suitable posts may be found at a lower salary level. The Applicant has not introduced any evidence that other, *higher* level posts for which he was suitable were available and for which he was not considered, and the Tribunal will not speculate in this regard. Accordingly, given that the Applicant continued his employment and mitigated his losses, albeit at a lower level, the Tribunal does not find that any compensation for pecuniary harm is warranted.

97. However, the Tribunal finds that, although the Applicant was able to secure alternative employment, the Administration subjected him to unnecessary stress associated with having to apply for vacancies and compete with other, non-permanent staff. The Tribunal is satisfied, on the evidence before it, that the Applicant suffered emotional distress as a result of the process that was not fully in compliance with the framework set out in staff rules 13.1(d) and 9.6(e). Given the evidence given by the Applicant and the circumstances of this case, including that the Applicant was able to secure alternative employment and remained on payroll, the Tribunal finds it appropriate to award the sum of USD3,000 as compensation for emotional distress.

Orders

98. The application succeeds in part.

99. The Applicant is awarded the sum of USD3,000 as compensation for emotional distress.

100.