

Judgment No. 2018-UNAT-847



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JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/080, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 29 September 2017, in the case of *Timothy v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 28 November 2017, and Ms. Karen Timothy filed her answer on 26 January 2018.

Facts and Procedure

2. The following facts are uncontested:¹

... In 1998, the Applicant commenced employment with the United Nations. On 1 September 2004, the Applicant was appointed as a Senior Administrative Associate in [the Liaison Office of the United Nations High Commissioner for Refugees (LONY and UNHCR, respectively) in New York], where she served until her separation.

... On 13 October 2011, the Applicant was given an indefinite appointment in UNHCR retroactive to 1 July 2009. Her indefinite appointment letter stated in pertinent part as follows:

TENURE OF APPOINTMENT

The indefinite appointment is governed by the Staff Regulations and Staff Rules and in particular by Staff Rule 13.2. The indefinite appointment has no specific expiration date and does not carry any expectancy of conversion to any other type of appointment.

The indefinite appointment may be terminated by the High Commissioner in accordance with the relevant provisions of the Staff Regulations and Staff Rules, in which case you shall be given a three-month period of notice. Should your appointment be terminated, you will receive such indemnity as may be provided for under the Staff Regulations and the Staff Rules. There is no entitlement to either a period of notice of an indemnity payment in the event of dismissal for misconduct pursuant to Chapter X of the Staff Rules.

... On 11 January 2016, the Director of LONY sent a letter to the Applicant which stated:

...

As a result of a comprehensive review of the LONY structure, a number of positions are proposed for change [...] it is proposed to discontinue the position you currently encumber, 10008112, Snr. Admin. Associate, G7 [...].

¹ Impugned Judgment, paras. 3-27.

There is a six[-]month notification

... In particular, the Respondent requested the Tribunal to clarify the “precise scope of its request with regard to field offices”, stating in his motion as follows:

[8] UNHCR has 470 field offices in 128 countries and thousands of positions in the General Service category at the GS-7 level and below. Therefore, it would be excessively difficult for the Respondent to comply with the Tribunal’s request in these two paragraphs.

[9] In any event, pursuant to [s]taff [r]ule 4.4(a), staff members belonging to the General Service category must be recruited locally. Unless they have legal status in a particular duty station, they cannot be offered positions in the General Service category. Consequently, the availability of posts in the General Service category in the field is not relevant to the facts of this case.

... The Respondent further indicated that pursuant to staff rule 4.4(a), staff members belonging to the General Service category must be recruited locally and that he considered the requested information for the General Service category in the field irrelevant, stating that, “the availability of posts in the General Service category in the field is not relevant to the facts of this case”. With regard to para. 7(h) of Order No. 43 (NY/2017), which requested the Respondent to produce documents relating to positions that remained in UNHCR in New York, the Respondent proposed providing a staffing table for the UNHCR Liaison Office in New York, but requested the Tribunal to specify a time period for the staffing table.

... On 6 April 2017, by Order No. 70 (NY/2017), the Tribunal denied the Respondent’s motion for interpretation as unwarranted, noting that the Respondent did not indicate what aspects of paras. 7(a) and 7(e) of Order No. 43 (NY/2017) were unclear or ambiguous, but rather indicated that producing such documents [was] difficult. The Tribunal’s original instructions remained and the Tribunal further instructed the Respondent to produce documentation containing the special circumstances and conditions determined by the Secretary-General, and by UNHCR, based on which staff members who have been recruited to serve in posts in the General Service and related categories may be considered internationally recruited, if any, pursuant to staff rule 4.5(c). The Respondent was instructed to inform the Tribunal if the Applicant was considered to be internationally recruited on or after 1 September 2004 pursuant to staff rule 4.5(c). With regard to the time period for the proposed staffing table, the Tribunal instructed the Respondent to provide the requested information for the positions that remained in UNHCR in New York from the date the Applicant’s post was abolished (13 September 2016) to the present. The Respondent was granted an extension to comply with Order No. 43 (NY/2017) and the requested documents in para. 12 of Order No. 70 (NY/2017) by 24 April 2017.

... On 24 April 2017, the Respondent filed his submission pursuant to Order No. 43 and Order No. 70 (NY/2017).

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4. The UNDT concluded that the decision to separate Ms. Timothy as a result of abolition of her G-7 step post was unlawful for the following reasons:²

a. Prior to taking the comparative review, UNHCR in New York did not verify that there

was not retained on any suitable available posts at her Professional grade level or lower within the parent organization, including but not limited to the New York office.

6. The UNDT granted the following relief:³

b. The contested decision is rescinded and the Respondent is to retain the Applicant with retroactive effect from 31 December 2016 in any current suitable available post(s): (a) occupied by a non-permanent/non-indefinite staff member, or vacant either at the General Service level (at the GS-7 level or lower) at UNHCR in New York (her duty station), as identified in the job family(s) and/or job network(s) to which the Applicant belonged prior to the abolition of her post, if applicable to UNHCR; *or* (b) occupied by a non-permanent/non-indefinite staff member, or vacant either at [...] her Professional (“P”) level or lower in the parent Organization (UNHCR), as identified in the job family(s) and/or job network(s) to which the Applicant belonged prior to the abolition of her post, if applicable to UNHCR;

c. In case the issuance of the decision to retroactively retain the Applicant from 31 December 2016 will no longer [be] possible within the deadline established by the Tribunal due to unforeseen circumstances, which are to be fully disclosed to the Applicant, pursuant to art. 10.5 (a) of the Statute, as an alternative to the rescission of the decision and to the specific performance ordered by the Tribunal, the Respondent may elect to pay to the Applicant a compensation of 12 months['] net-base salary. In addition, the Applicant shall receive compensation in the amount equal to the contributions (hers and that of the Organization) that would have been paid to the United Nations Joint Staff Pension Fund for this period;

d. The Respondent is to pay the Applicant a compensation of three months of net base salary as moral damages;

e. The awards of compensation shall bear interest at the U.S. Prime Rate with effect from the date this judgment is executable until payment of said awards. An additional five per cent shall be applied to the U.S. Prime Rate 60 days from the date this judgment becomes executable.

7. The UNDT based its award of moral damages on the unlawful termination decision as well as the unlawful discontinuation of Ms. Timothy’s indefinite appointment which was expected to continue until her retirement. The UNDT considered all factual elements together with the nature of the breach and concluded that harm was caused to Ms. Timothy’s dignity and career potential.

³ *Ibid.*, para. 95.

Submissions

The Secretary-General's Appeal

8. Staff Rules 9.6 and 13.1 set out the process that must be undertaken when a staff member is to be separated from service as a consequence of abolition of post and reduction of staff. In considering the legal obligations established by these provisions, the Appeals Tribunal held that the framework involves a two-step process, namely: (i) the Administration must determine the availability of suitable posts; and (ii) if such suitable posts are available, the Administration shall engage in a comparative exercise to retain affected staff members in a prescribed order of preference, with staff holding permanent appointments afforded the highest level of priority, taking into account in all cases the staff members' relative competence, integrity and length of service. The UNDT therefore exceeded its competence and erred in law in finding that although no suitable posts were available in LONY against which Ms. Timothy could be compared, the decision to terminate her appointment was nonetheless unlawful.

9. The UNDT erred in law in holding that a staff member affected by abolition of post has a right to be retained against a position for which he or she is not fully competent. The Appeals Tribunal has consistently recognized the paramount importance of maintaining the

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conflict with, nor place limits upon, the intention of Staff Rule 9.6(e) and its corresponding jurisprudence, which requires that the Administration place these staff members on lower level posts when suitable. Any policies unilaterally issued by UNHCR must comply

them and re-advertising the post. By not selecting Ms. Timothy and re-advertising the post, UNHCR failed to take any reasonable steps to place her in this suitable alternative post.

23. Ms. Timothy asks that the Appeals Tribunal reject the appeal in its entirety.

Considerations

Termination

24. The issue to be determined in this appeal is whether the UNDT erred in ruling that the termination of Ms. Timothy's indefinite appointment, effective 31 December 2016, was unlawful because she did not receive proper consideration as an indefinite appointee, and that the Administration committed material irregularities and failed to act fully in compliance with the relevant legal provisions.

25. The Administration has broad discretion to ressaTT44

(c) The Secretary-General may at any time terminate the appointment of a staff member who holds an indefinite appointment if in his or her opinion such action would be in the interest of the United Nations. Staff regulation 9.3 (b) and staff rule 9.6 (d) do not apply to indefinite appointments.

29. The Comparative Review Policy sets out the “principles and procedures” to be followed by UNHCR in cases of anticipated termination of appointments for abolition of posts and reduction of staff for staff members in the General Service and National Officer categories pursuant to Staff Rule 9.6(e) and (f). It reads in relevant parts:⁸

2. As UNHCR is an organization which frequently needs to adjust its structure and presence both in the field and at Headquarters, based on the operational requirements, post discontinuations are an unavoidable occurrence. Staff members whose posts are discontinued will not automatically be separated. Where staff remain without a position following a staffing review and the most recent Assignments Committee (AC) posting session, the Deputy High Commissioner (for Headquarters in Geneva) or Representative/Head of Office (outside Geneva) will decide whether a comparative review needs to take place.
3. A comparative review will, in principle, cover one duty station rather than all duty stations in one country. Regional Hubs and out-posted Headquarters units will neither be combined with any regular UNHCR office at that duty station, nor with headquarters, for the purposes of a comparative review. The authority to approve a comparative review beyond one duty station in the Field rests with both the relevant Director and the Director of DHRM. In exceptional circumstances, where there is agreement between the Representative and/or the Heads of Offices in one country, both the relevant Director and the Director of DHRM may approve one joint comparative review to be conducted for all relevant positions in the country.

Comparative Review Principles

4. Prior to undertaking a comparative review, the concerned office should verify that there are no staff members on temporary appointments or affiliate workforce undertaking similar functions to those of the discontinued position(s) and whose contract discontinuation would mitigate the need for a comparative review.
5. A comparative review process is the means by which staff members encumbering positions which are to be abolished, and who hold indefinite or fixed-term appointments not expiring on or before the effective date of the abolition of the relevant position, will be matched against suitable posts according to a set of criteria relating to the staff members’ suitability for such posts. The “suitable posts” are interpreted, for the purpose of the comparative review, as posts at the staff member’s duty station and at the staff member’s grade level and within the same functional group as per the

⁸ Internal footnotes omitted.

position title (Annex I lists the different functional groups and for the purposes of this policy, groupings under Level Three shall apply). In the absence of suitable positions against which a comparative review may take place, upon confirmation by the Assignments Committee (AC), the incumbent of the abolished position will be separated as per applicable procedures.

30. The purpose of Staff Rule 9.6(e) is to mitigate the effects of retrenchment on staff members holding non-temporary appointments, insofar as suitable posts are available “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”.⁹

31. Staff Rule 9.6(e) specifically sets forth a policy of preference for retaining a staff member with a continuing appointment who is faced with the abolition of a post or reduction of staff,¹⁰ and creates an obligation on the Administration to make reasonable efforts to find suitable placements for the redundant staff members whose posts have been abolished.¹¹ As such, a decision to abolish a post triggers the mechanism and procedures intended to protect the rights of a staff member holding a continuing post, under the Staff Rules and the Comparative Review Policy, to proper, reasonable and good faith efforts to find an alternative post for him or her who would otherwise be without a job. Failure to accord to the displaced staff members the rights conferred under the said provisions will constitute a material irregularity.

32. Therefore, the Administration is bound to demonstrate that all reasonable efforts have been made to consider the staff member concerned for available suitable posts. Where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given.¹²

33. Staff Rule 9.6 expressly states that in all cases due regard must be given to relative competence, integrity and length of service. Thus, skills and length of service are paramount criteria in any contemplated selection for retrenchment. However, the Staff Rule sensibly provides that the selection criteria are subject to the qualification that suitable posts be available. In other

⁹ *El-Kholy v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-730, para. 24.

¹⁰ *Comp. Fasanella v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-765, para. 24.

¹¹ *El-Kholy v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-730, paras. 25 and 31.

¹² *caT Tph. GCI. (GCI. Ph) HrTDo) Amoder)u20D-. (D) A. (T) lapp*

words, the criteria of skills retention and favouring staff members holding continuing appointments can only be implemented, if there are suitable posts available that permit UNHCR to achieve its policy.

34. The Comparative Review Policy gives effect to Staff Rule 9.6 and effectively and consciously embodies the preferred policy of the Rule.¹³ Paragraph 5 of the Comparative Review Policy contemplates a process by which staff members holding indefinite and fixed-term appointments are matched against suitable posts - defined in the paragraph to mean posts at the same duty station, at the same grade level and within the same functional group as per the position title. If there are no vacant suitable posts, the staff member whose post has been abolished will be separated.

35. Nevertheless, while efforts to find a suitable post for the displaced staff member rest with the Administration, the person concerned is required to cooperate fully in these efforts.¹⁴

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... Staff member(s) recruited through competitive examination for a career appointment serving on a two[-] year fixed-term appointment have a lower level of protection than the staff members with continuing/indefinite appointments, and s/he has the right to be retained in any suitable positions vacant at the date of abolition or reduction of staff, or any suitable positions occupied at the date of abolition or reduction of staff, by staff members holding fixed-term appointments and temporary appointments.

... Staff members holding fixed-term appointments have the right to be retained in any suitable positions vacant at the date of abolition or reduction of staff, or occupied at the date of abolition or reduction of staff by staff members with temporary appointments.

42. The Appeals Tribunal finds that the UNDT's conclusions that the redundant staff members who enjoy a higher level of legal protection from being terminated have the right to be retained either in any suitable positions vacant at the date of abolition or reduction of staff, or in any suitable positions occupied at the date of abolition, or reduction of staff, by staff members having a lesser level of protection in this regard, are legally not correct. As correctly contended by the Secretary-General, under the legal framework envisaged by Staff Rules 9.6(e) and (f) and the Comparative Review Policy, the Administration is bound to consider the redundant staff members only for suitable posts that are vacant or likely to become vacant in the future²⁰ and to assign the affected staff members holding continuing or indefinite appointments on a preferred basis in the order of preference prescribed in Staff Rule 9.6(e).

43. In the course of its Judgment, the UNDT held that:²¹

... Further, the Tribunal underlines that staff member(s) affected by abolition of post or reduction of staff has the right to be considered and retained for any of the available suitable positions as detailed above on a preferred or non-competitive basis in the mandatory order established by staff rule 9.6 (e). Therefore, the staff member(s) is entitled to be retained without having to go through a competitive selection process for the available suitable post(s), including without applying for vacant job opening(s) since such a step represents the beginning of any competitive selection process based on the staff member(s) relative competence, integrity, length in service and where required to (...) his/her nationality and gender.

... The Tribunal considers that a competitive review process may be justified only when two or more identical posts are to be restructured and because there are no sufficient similar available suitable posts for all staff members at the same level affected by the abolition and at least two of them insist to be retained on the same post. In this case, it may be necessary to give due regard to the staff members['] relative competencies for new posts,

²⁰ See *El-Kholy v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-730, para. 29.

²¹ Impugned Judgment, paras. 64 and 65.

integrity and length in service and therefore to compare them in order to decide who is to be retained in the highest position(s) available.

44. The Secretary-General submits that the UNDT's holding that a staff member affected by abolition of post has a right to be considered for a position for which he or she did not apply, is in direct contradiction to the established jurisprudence and constitutes a reversible error of law.

45. We agree with the Secretary-General that it is lawful and reasonable for the Administration to expect affected indefinite appointment holders to cooperate fully in the process. As already mentioned, a staff member holding a continuing or indefinite appointment 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. So, if the Administration informs the affected staff members that they are expected to apply for suitable available positions, they are obliged to fully cooperate and make a good faith effort in order for their applications to succeed. This includes a duty to apply within the deadlines and to respect the formal requirements.²²

46. Based on these considerations, we find erroneous the UNDT's holding that staff members are entitled to be retained without having to apply for vacant job opening(s) since such a step represents the beginning of any competitive selection process based on the staff members' relative competence, integrity, length in service and where required, nationality and gender.

47. Once the application process is completed, however, the Administration is required by Staff Rule 9.6(e) and (f) and the Comparative Review Policy to consider the continuing or indefinite appointment holder on a preferred or non-competitive basis for the position, in an effort to retain him or her.²³ 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.

48. In his appeal, the Secretary-General contends further that the UNDT exceeded its competence and erred in law by holding that the UNHCR Administration was required to consider the availability of all lower level posts in both the general services and professional categories at headquarters and in the field.

²² *Smith v. Secretary-General of the United Nations*, Judgment No. 20

49. Specifically, the Secretary-General argues that the UNDT exceeded its competence and erred in law by improperly expanding the scope of the Administration's obligation to identify an

same level with her abolished G-

in the General Services and related categories, Staff Rule 9.6(f) states that the provisions of Staff Rule 9.6(e) are deemed to be satisfied if such staff members have received consideration for “suitable posts” available within their parent organization at their duty station.

56. It is true that the phrase “suitable posts” in Staff Rule 9.6(e) and (f) is not defined in the Staff Rules. The Appeals Tribunal has found that the provisions on classification of posts and staff under Chapter II of the Staff Regulations and Rules guide us in the interpretation of this phrase and that in order to give effect to the requirement in Staff Rule 9.6(e) and (f) regarding the “availability of suitable posts” in which the affected staff member’s services “can be effectively utilized”, the “suitable posts” must, at least, belong in the same category to that encumbered by the redundant staff member.³⁵

57. However, with the exception of said mandatory requirements established by Staff Rule 9.6(e) and (f) and the jurisprudence of the Appeals Tribunal, i.e. that “suitable posts” be available within their parent organization at their duty station and belong in the same category to that encumbered by the redundant staff member, nothing in the language of Staff Rule 9.6(e) and (f) indicates that the (right and at the same time) obligation of the Administration to consider the redundant staff member for suitable posts, vacant or likely to be vacant in the future, is limited to the staff member’s grade level. On the contrary, by applying the general principle of interpretation *ubi lex non distinguit, nec nos distinguere debemus*, i.e. where the law does not distinguish, neither should we distinguish, the Administration is under an obligation to make proper, reasonable and good faith efforts to find an alternative post for the displaced staff member at his or her grade level or even at a lower grade, if, in the latter case, the staff member concerned has expressed an interest.

58. It follows from the above, that the specific provision of paragraph 5 of the Comparative Review Policy, which interprets the term “suitable posts”, for the purpose of the comparative review, as posts at the staff member’s duty station and at the staff member’s grade level and within the same functional group as per the position title, is, at this point, as correctly found by the UNDT, in conflict with the applicable Staff Rule 9.6(e) and (f) which it implements, on account of narrowing its scope of application, thereby not advancing its aforementioned purpose to mitigate the effects of the retrenchment. Thus, contrary to the Secretary-General’s contention, Ms. Timothy should have been considered not only for suitable available posts at the same level with her

³⁵ *De Aguirre v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-705, paras. 47 and 54.

abolished G-7 post, in New York, but also for all the lower available suitable posts in New York, for which she had expressed her interest by way of application thereto.

59. However, the UNDT's finding that Ms. Timothy should have also been considered for available suitable posts covering the entire parent organization, including but not limited to her duty station (New York), because she had passed the exam for the Professional level,³⁶ is erroneous since the abolished post she was encumbering at the critical time fell into the General Services

62. Indeed, we are satisfied that Ms. Timothy fully cooperated in the relevant process and diligently applied for 18 UNHCR job vacancies, including two within LONY, one at the GS-5 level, the position of Senior Administrative and Finance Assistant in LONY and the other one, also at the GS-5 level, the External Relations Assistant post within LONY. Nevertheless, once the application process had been completed, Ms. Timothy was not considered by the Administration, as required by Staff Rule 9.6(e) and (f) and the Compa967 -1.n 21.04321.7486 0 TD-.18a Tm.poC5 an0 in n0111 T TD20.-3.86

66. However, General Assembly resolution 69/203, adopted on 18 December 2014, amended Article 10 of the UNDT Statute. Article 10(5) of the UNDT Statute now states in relevant part:³⁹ “As part of its judgement, the Dispute Tribunal may only order one or both of the following: (...) (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.”

67. In the instant case, the UNDT found that the moral damage (non-pecuniary damage) was caused to Ms. Timothy “as a result of the unlawful termination decision, which breached her right to be retained according to the mandatory provisions of [Staff Rule] 9.6(e)(i) and 9.6(f) and the harm caused to her by the unlawful discontinuation of her indefinite contract with UNHCR”.⁴⁰ Further, the UNDT held that “[s]ince the Applicant did not indicate that she suffered mental distress and/or anxiety, the Tribunal considers that all factual elements together with the nature of the breach constitute[...] sufficient evidence in the present case to conclude that harm was caused to the Applicant’s dignity and to her career potential”.⁴¹

68. We find that the UNDT erred in awarding compensation for moral damage when

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