UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2016-UNAT-705

De Aguirre

(Respondent/Appellant on Cross-Appeal)

v.

Secretary-General of the United Nations
(Appellant/Respondent on Cross-Appeal)

JUDGMENT

Before:	Judge Deborah Thomas-Felix, Presiding Judge Richard Lussick Judge John Murphy Judge Dimitrios Raikos Judge Sabine Knierim Judge Martha Halfeld
Case No.:	2016-939
Date:	28 October 2016
Registrar:	Weicheng Lin

Counsel for Ms. de Aguirre:	Self-represented
Counsel for Secretary-General:	Amy Wood

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations of Judgment No. UNDT/2016/035, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 22 April 2016, in the case of *De Aguirre v. Secretary-General of the United Nations.*

2. On 21 June 2016, the Secretary-General filed his appeal and on 18 August 2016, Ms. Aintzane Maria de Aguirre filed her answer to the appeal and a cross-appeal. In accordance with Order No. 270 (2016), the Secretary-General filed his answer to the cross-appeal on 7 October 2016.

3. The Appeals Tribunal is of the view that the appeal and cross-appeal raise significant questions of law. Consequently, they have been referred for consideration by the whole Appeals Tribunal, pursuant to Article 10(2) of the Statute of the Appeals Tribunal (Statute):

> Where the President or any two judges sitting on a particular case consider that the case raises a significant question of law, at any time before judgement is rendered, the case may be referred for consideration by the whole Appeals Tribunal. A quorum in such cases shall be five judges.

Facts and Procedure

4. Ms. de Aguirre contested two decisions before the Dispute Tribunal. First, she challenged the decision to abolish the post that funded her position of Associate Legal Officer, National Professional Officer B level, as of 1 June 2014, in the Regional Representation for Western Europe in Brussels (Brussels RRWE) of the Office of the United Nations High Commissioner for Refugees (UNHCR). Second, she challenged the decision to terminate her indefinite appointment, effective 31 May 2014.

5. The following facts and procedural history are taken from the UNDT Judgment:[1]

> ... The Applicant entered the service of the Brussels RRWE, UNHCR, on 1 February 2002 under a fixed-term appointment as a Senior Protection Assistant, G-7

[1] Impugned Judgment, paras. 2-21 and 26.

level. From 24 February 2002, until her separation on 31 May 2014, the Applicant held an indefinite appointment.

... By memorandum dated 15 March 2005, the then Regional Representative for Western Europe in Brussels ("Brussels Representative"), UNHCR, informed the Applicant that her post had been proposed for reclassification from G-7 to National Officer B level ("NOB"), as she felt that "the functions and responsibilities of [the] post ... correspond[ed] more to a position at the National Officer level". As a result, the Applicant was appointed to position No. 10011149 (Post No. 426032), NOB, Associate Legal Officer, Legal Unit, Brussels RRWE, UNHCR, in March 2007.

... From 16 November 2009 to 15 November 2010, the Applicant was on Special Leave Without Pay ("SLWOP").

... By email of 22 April 2013, the Brussels Representative informed her staff of changes in the regional representation structure. As for the "Protection" functions, she mentioned:

> In this context and for purposes of a) reinforcing our action viz the region to which we are providing support and b) separately strengthening our approach to Belgium and Luxembourg, [F.] will continue to head the Regional Protection Unit composed of [the Applicant] and they will focus their action on RRWE regional support. [P.] will continue to report to [F.] and will service the needs of all staff in Protection section. [V.] will continue to focus on Belgium and Luxembourg, reporting directly to [P.] and with the help of one (possibly) UNOPS [staff member] to assist her specifically on Lux.

... On 23 September 2013, the Applicant met with her supervisor, the [Senior Regional Legal Officer], and expressed her concern that she did not consider it "normal to feel as if she needed another year of SLWOP", due to the unequal distribution of workload and tensions among colleagues in the Legal Unit, Brussels RRWE.

... By confidential memorandum of the same day addressed to the Director, Regional Bureau for Europe, UNHCR, the Brussels Representative proposed changes in the structure of the Representation for 2014, which included a recommendation to "downgrade" two NOB Associate Legal Officers positions, one of which was encumbered by the Applicant.

... As of 4 November 2013, the Legal Unit, Brussels RRWE, was reinforced by recruiting a Legal Associate, G-6 level, under a temporary appointment. No vacancy announcement for this position was posted.

... By letter dated 18 November 2013, which she received on 20 November 2013, the Applicant was informed that the position she was encumbering would be discontinued as of 1 June 2014, "in line with a regional review of existing capacities" and "in accordance with relevant stipulations of IOM/051/2007-FOM/054/2007".

... By email and memorandum of 14 January 2014, the Applicant requested management evaluation of the decision communicated to her by letter of 18 November 2013.

... By email of 28 February 2014, the Office of the Deputy High Commissioner, UNHCR, informed the Applicant that her request for management evaluation was under consideration.

... On 26 March 2014, a Human Resources Associate, Brussels RRWE, sent the Applicant an email attaching a memorandum, dated 3 March 2014, providing details on her separation formalities.

... On 4 April 2014, the Brussels Representative sent the Applicant an email advising that the separation memorandum of 3 March 2014 had been officially withdrawn.

... Further to a request from Brussels Representative dated 8 April 2014, on 10 April 2014, the Regional Assignments Committee ("RAC"), UNHCR, issued its report confirming the "non-suitability of positions for a Comparative Review in the Regional Office in Brussels" with respect to the two NOB Associate Legal Officer positions identified for discontinuation. The Brussels Representative approved the recommendation on 11 April 2014.

... By letter dated 14 April 2014 from the Director, Division of Human Resources Management ("DHRM"), UNHCR, the Applicant was informed that her indefinite appointment would be terminated effective 31 May 2014, as it had been determined by the RAC that there were "no suitable positions against which a comparative review could take place".

... By memorandum of 22 April 2014 from the Brussels WE Regional Representative, the Applicant was informed of her separation indemnities and modalities.

... By email of 30 April 2014 sent to the Deputy High Commissioner, UNHCR, the Applicant referred to her request for management evaluation of 14 January 2014, and attached a "follow-up Memorandum" entitled "Request for Management Evaluation of the Regional Representation for Western Europe – continued", in which she asked that the letter dated 14 April 2014 be withdrawn "in the absence of a (satisfactory) response to [her] request for management evaluation". In said memorandum, she questioned the discontinuation of her position and the subsequent decision to terminate her appointment effective 31 May 2014.

... On 7 May 2014, the Applicant filed before the [Dispute] Tribunal an application for suspension of action of the decision to discontinue her position and of the consecutive termination of her indefinite appointment. ...

> ... By Order No. 67 (GVA/2014) of 14 May 2014, the [Dispute] Tribunal concluded that the application had become moot since UNHCR had suspended the contested decisions pending the Applicant's request for management evaluation. In the Order, the [Dispute] Tribunal also rejected the Applicant's request for confidentiality.
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> ... By memorandum dated 20 May 2014, sent on 21 May 2014, the Deputy High Commissioner, UNHCR, replied to the Applicant's request for management evaluation, upholding the contested decisions.
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> ... On 22 May 2014, the Applicant filed [her application] with the [Dispute] Tribunal[.] ...
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> ...
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> ... On 23 June 2014, the Respondent filed his reply to the application[.] ...

6. In its Judgment, the Dispute Tribunal found that the decision to terminate Ms. de Aguirre's indefinite appointment was unlawful. With regard to the decision to abolish the post she encumbered and to discontinue the position of Associate Legal Officer, the Dispute Tribunal rejected Ms. de Aguirre's contention that the post had been reclassified rather than abolished. The Dispute Tribunal found that UNHCR's reclassification procedures were not invoked. The staffing changes in the Brussels RRWE went beyond a redefinition of duties and responsibilities. The restructuring process encompassed the abolition of different posts, including the post encumbered by Ms. de Aguirre, and the creation of new posts. The process leading to the abolition of the post encumbered by Ms. de Aguirre respected the applicable procedures, and there was no evidence of improper motives.

7. However, the Dispute Tribunal held that the decision to terminate Ms. de Aguirre's indefinite appointment was unlawful due to a fundamental procedural error in implementing UNHCR's Comparative Review Policy for Locally Recruited Staff Members (UNHCR Comparative Review Policy). The Dispute Tribunal found that there were options available to retain Ms. de Aguirre under paragraph 4 of the UNHCR Comparative Review Policy, which required UNHCR to verify that there were no staff members on temporary appointments undertaking similar functions to those of the discontinued position and whose contract discontinuation would mitigate the need for a comparative review. The Dispute Tribunal noted that the functions of Ms. de Aguirre's position as an Associate Legal Officer, NOB level (National Officer category), were similar to the functions of a staff member on a temporary

appointment who held a temporary position as Protection Associate at the G-6 level (General Service category).

8. The Dispute Tribunal ordered the rescission of the decision to terminate Ms. de Aguirre's indefinite appointment. In lieu of rescission, the Dispute Tribunal ordered the payment of compensation of two years' net base salary, plus interest.

Submissions

The Secretary-General's Appeal

9. The Secretary-General argues that the Dispute Tribunal erred in interpreting and applying Staff Rule 9.6(e), which governs the termination of appointments as a result of abolition of posts. Staff Rule 9.6(e) provides for a two-step process. First, the Administration must determine "the availability of suitable posts". Second, if such "suitable posts" are identified, then the Administration is required to engage in a comparative exercise to retain affected staff members, taking into account various factors.

10. The Dispute Tribunal erred by finding that the only relevant criterion for determining "the availability of suitable posts" under Staff Rule 9.6(e) and the UNHCR Comparative Review Policy was whether there was a staff member on a temporary appointment undertaking similar functions to those of the discontinued position. This finding is contrary to a plain reading of Staff Rule 9.6(e). The discontinuation of the temporary appointment of the staff member holding the temporary position of Protection Associate at the G-6 level would not have vacated a suitable post for Ms. de Aguirre. The G-6 post was in a different category than the NOB post that Ms. de Aguirre encumbered, and three grades lower. Furthermore, the staff member who held the temporary position of Protection Associate was performing different functions.

11. The Secretary-General contends that the record demonstrates that the Administration fulfilled its obligations under Staff Rule 9.6(e) as there were no other suitable posts in the National Officer category in the Brussels RRWE. As such, the decision to terminate Ms. de Aguirre's indefinite appointment was lawful.

12. The Secretary-General requests that the Appeals Tribunal vacate the Judgment except with respect to the Dispute Tribunal's finding that the decision to abolish the post encumbered by Ms. de Aguirre was lawful.

Ms. de Aguirre's Answer

13. Ms. de Aguirre contends that the Dispute Tribunal correctly found that the decision to terminate her indefinite appointment was unlawful. She discharged her burden of proof and provided evidence regarding the professional nature of the functions of the Protection Associate positions at the G-6 level in the Brussels RRWE.

14. Ms. de Aguirre argues that the Dispute Tribunal failed to find additional procedural errors in connection with the meeting of the RAC held on 10 April 2014. The procedural irregularities included missing documents, RAC's composition, and its competence to review her case in accordance with UNHCR's Policy and Procedures on Assignments of Locally Recruited Staff and the UNHCR Comparative Review Policy.

15. Ms. de Aguirre requests the Appeals Tribunal to dismiss the appeal.

Ms. de Aguirre's Cross-Appeal

16. Ms. de Aguirre argues that the Dispute Tribunal failed to exercise jurisdiction over the issue of abuse of authority in connection with the decision to abolish the post she encumbered. First, Ms. de Aguirre contends that the Dispute Tribunal failed to address the practice whereby staff members are carrying out duties and responsibilities that do not correspond with the classification of the posts that they encumber. The UNDT Judgment "thus allows managers to discontinue and create positions without due regard for the nature of the duties and responsibilities required, contrary to [Staff] Regulation 2.1". The Administration did not provide evidence that the two new Protection Associate positions at the G-6 level in the Brussels RRWE had been classified. Second, Ms. de Aguirre submits that the reasons given by the Administration for the restructuring of the Brussels Regional Office, as set out in the memorandum dated 23 September 2013, were not genuine.

17. Ms. de Aguirre contends that the Dispute Tribunal failed to meet the required standards of due process. First, the Dispute Tribunal made findings of fact based on a memorandum of 23 September 2013 regarding the restructuring process, which was filed

by the Secretary-General on a confidential basis. Only paragraphs 12 and 13 of the memorandum were shared with her and the confidential information ought to have been removed from the case file. Second, the Dispute Tribunal erred by not finding that the delay in receiving a response to her request for management evaluation constituted a breach of her fundamental rights. Third, the Dispute Tribunal's delay in ruling on two of her motions constituted a failure to dispose of the proceedings in a fair and expeditious manner.

18. Lastly, Ms. de Aguirre submits that the Dispute Tribunal failed to consider her request for compensation for harm in the form of neglect and emotional stress, and adverse effects on her professional development, career progression and job security. The Dispute Tribunal also failed to consider certain aggravating factors.

19. Ms. de Aguirre requests the Appeals Tribunal to rescind the decision "to discontinue the position No. 10011149, Associate Legal Officer" as of 1 June 2014, and to award her an appropriate amount of compensation for breach of her fundamental rights and for harm suffered.

The Secretary-General's Answer to the Cross-Appeal

20. The Secretary-General argues that Ms. de Aguirre has not established any grounds of appeal. A cross-appeal is not an opportunity for Ms. de Aguirre to reargue her case. Ms. de Aguirre has not demonstrated that the Dispute Tribunal failed to properly exercise its jurisdiction. The Dispute Tribunal did address Ms. de Aguirre's contentions regarding classification of posts and she has not demonstrated that the Dispute Tribunal made any error warranting a reversal of its findings. Also, Ms. de Aguirre only requested management evaluation of the decision to abolish the post she encumbered. She did not request management evaluation of an administrative decision concerning the classification of her post. Further, Ms. de Aguirre's general misgivings about the manner in which UNHCR posts are classified does not give rise to a contestable administrative decision, that is a specific administrative decision with direct, individual legal consequences. Finally, the Dispute Tribunal is not required to refer to each and every argument put forward by the parties, or explain the probative value afforded to each piece of evidence adduced by the parties in the case.

21. The Secretary-General submits that Ms. de Aguirre has failed to demonstrate that the Dispute Tribunal committed an error of procedure such as to affect the decision of the case. By Order No. 107 (GVA/2014), the Dispute Tribunal ordered that the Secretary-General produce to Ms. de Aguirre all documents filed *ex parte*, as redacted by the Dispute Tribunal, in accordance with Article 18 of the Dispute Tribunal's Rules of Procedure (UNDT Rules). The record demonstrates that the Dispute Tribunal actively and appropriately managed Ms. de Aguirre's case.

22. The Secretary-General argues that Ms. de Aguirre has not established that the Dispute Tribunal erred in declining to award her compensation for moral harm. Ms. de Aguirre did not adduce any evidence in support of her claim of moral harm. Under the Statutes of the Dispute Tribunal and Appeals Tribunal, an award of compensation for harm must be supported by evidence.

23. The Secretary-General requests that the Appeals Tribunal dismiss the cross-appeal in its entirety.

Considerations

24. The issues to be determined in this appeal and cross-appeal are, as contended by the parties, (i) whether the UNDT erred in finding that the discontinuation of the position encumbered by Ms. de Aguirre, effective 1 June 2014, was lawful and (ii) whether the UNDT erred in holding that the termination of Ms. de Aguirre's indefinite appointment, effective 31 May 2014, was unlawful.

25. The Appeals Tribunal first addresses the issue of procedural irregularities raised by Ms. de Aguirre in her cross-appeal, and then examines the issues of the legality of both the discontinuation of the position Ms. de Aguirre encumbered and of the decision to terminate Ms. de Aguirre's indefinite appointment.

Alleged procedural errors by the UNDT

i. The confidentiality issue

26. At the outset, we note the large discretion afforded to the UNDT in relation to case management matters. Our jurisprudence has consistently held that the Appeals Tribunal will not lightly interfere with the broad discretion of the UNDT in the management of its cases.[2]

27. Ms. de Aguirre contends that the findings in paragraphs 52, 53, 63, 70 and 71 of the impugned Judgment appear to be based on evidence that has not been shared with her.

28. The Appeals Tribunal finds no merit in Ms. de Aguirre's argument. We are not persuaded, in all the circumstances of this case, that either the imposition of confidentiality by the UNDT or its failure to lift the confidentiality Order impacted on Ms. de Aguirre's due process entitlement. Furthermore, nothing in the record suggests that the UNDT took consideration of any privileged item of evidence in this memorandum that goes to the nub of the present case. The only paragraphs of the memorandum of 23 September 2013 mentioned in the impugned UNDT Judgment are paragraphs 12 and 13, which were shared with Ms. de Aguirre.

ii. Request for management evaluation

29. It is a matter of fact that the management evaluation process initiated by Ms. de Aguirre was responded to outside of the 45-calendar day period provided for in Staff Rule 11.2(d). By the time Ms. de Aguirre received the MEU's answer to her request, she had (following the expiry of the 45-day period) filed her application with the UNDT. The UNDT observed that the lack of a response to a request for management evaluation by the end of the prescribed deadline does not constitute a breach of a fundamental right, if the said response is received within the 90-day deadline to seek judicial review,[3] thus resetting the deadline for it[4] with the result of the Applicant's entitlement to apply to the Dispute Tribunal not being affected. This is what Ms. de Aguirre in fact did.

30. The Appeals Tribunal has considered Ms. de Aguirre's submissions on the matter and is satisfied that there is no merit in them. Ms. de Aguirre does not demonstrate how the alleged delay of response on the part of the Administration prejudiced her or violated her due process rights. We dismiss her cross-appeal on this issue accordingly.

[2] *James v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-600, para. 19, citing *Leboeuf et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-354, para. 8.
[3] See Article 8(1)(*d*)(i)b of the UNDT Statute and Article 7(1)(b) of the UNDT Rules of Procedure.
[4] Impugned Judgment, para. 92.

The issues raised on the merits of the case by the appeal and cross-appeal

i. Discontinuation of the position encumbered by Ms. de Aguirre

31. It is well settled jurisprudence that "an international organization necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff".[5] This Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However, 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.

32. In the instant case, the Dispute Tribunal concluded that the discontinuation of the position encumbered by Ms. de Aguirre resulted from its abolition in the context of a restructuring exercise, which had not been prompted, or influenced, by any improper motive other than following considerations of reorganization of posts expressed in the detailed memorandum of 23 September 2013 of the Brussels Representative.

33. Ms. de Aguirre has failed to demonstrate any error in the UNDT's finding that the Administration's decision to discontinue the position she was encumbering resulted from a valid exercise of the discretionary power of the Administration and was not tainted by improper motives. She merely voices her disagreement with the UNDT's findings and resubmits her arguments before the UNDT. She has not met the burden of proof of demonstrating an error in the Judgment such as to warrant its reversal.

ii. Termination of Ms. de Aguirre's indefinite appointment

34. The Dispute Tribunal found that the decision to terminate Ms. de Aguirre's indefinite appointment was flawed due to a fundamental procedural error in the implementation of the UNHCR Comparative Review Policy. The Secretary-General argues in his appeal that the Dispute Tribunal erred in reaching this finding by making an error of law in interpreting the UNHCR Comparative Review Policy.

[5] *Khalaf v. Secretary-General of the United Nations,* Judgment No. 2016-UNAT-678, para. 38; *Matadi et al. v. Secretary-General of the United Nations,* Judgment No. 2015-UNAT-592, para. 16; *Gehr v. Secretary-General of the United Nations,* Judgment No. 2012-UNAT-236, para. 25.

35. The Secretary-General may terminate the appointment of a staff member on a number of grounds, including abolition of posts or reduction of staff (Staff Rule 9.6(c)(i)). In such cases, the Organization must follow the requirements set out in Staff Rule 9.6(e) and (f), as follows:

> (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:
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> (i) Staff members holding continuing appointments;
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> (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.
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> When the suitable posts available are subject to the principle of geographical distribution, due regard shall also be given to nationality in the case of staff members with less than five years of service and in the case of staff members who have changed their nationality within the preceding five years.
>
> (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.

36. The UNHCR 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). Under the heading "Comparative Review Principles", the Policy provides as follows:[6]

> 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

[6] Emphases added.

> 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 position title* (Annex I lists the different functional groups and for the purposes of this policy, groupings under Level Three shall apply)[7]. 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.

37. The issue raised in the Secretary-General's appeal is the proper interpretation of paragraph 4 of the UNHCR Comparative Review Policy. We agree with the Dispute Tribunal's findings that the Policy established a two-step process in cases of abolition of posts or reduction of staff. Before undertaking a comparative review, UNHCR was required to follow the preliminary step set out in paragraph 4. Only after the concerned office had verified that there were "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" would a comparative review process be undertaken in accordance with paragraph 5 of the UNHCR Comparative Review Policy.

38. Where we disagree with the Dispute Tribunal is in its interpretation of the scope of UNHCR's undertaking in paragraph 4 of the UNHCR Comparative Review Policy to verify that there are no staff on temporary appointments "undertaking similar functions" to those of the discontinued position, and whose contract discontinuation would mitigate the need for a comparative review.

39. In her application, Ms. de Aguirre asserted that there was a staff member on a temporary appointment performing similar functions to those that she performed in her discontinued position. Ms. de Aguirre's position of Associate Legal Officer was in the National Professional Officer category, level B (NOB level). The staff member on a temporary appointment was a Protection Associate in the General Service category, level 6 (G-6 level).

[7] Footnote omitted.

40. In interpreting the phrase "similar functions" in paragraph 4 of the UNHCR Comparative Review Policy, the Dispute Tribunal contrasted the different wording used in paragraphs 4 and 5. In paragraph 5, the comparative review involved the matching of staff members against "suitable posts", which are defined "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". The Dispute Tribunal noted that there was no condition in paragraph 4 as to the grade of the temporary position, nor was there any reference to "suitable posts" and/or "functional groups". Further, the inclusion of these concepts in paragraph 5 would make paragraph 4 redundant. The only requirement in paragraph 4 was to search for staff members on temporary appointments who were undertaking "similar functions" to the functions of the discontinued position.[8]

41. The Dispute Tribunal went on to examine the functions of the staff member on a temporary appointment who held the temporary position of Protection Associate at the G-6 level. Based on a review of the job descriptions of a Protection Associate at the G-6 level and Associate Legal Officer at the NOB level, and the duties and samples of work undertaken by the staff member on the temporary appointment, the Dispute Tribunal concluded that the functions of the staff member on the temporary appointment were similar to those performed in Ms. de Aguirre's position. The Dispute Tribunal concluded, therefore, that Ms. de Aguirre ought to have been offered the temporary position.[9]

42. In his appeal, the Secretary-General contends that the Dispute Tribunal made an error of law in interpreting paragraph 4 of the UNHCR Comparative Review Policy by disregarding the requirement in Staff Rule 9.6(e) as to "the availability of suitable posts". Paragraph 4 of the UNHCR Comparative Review Policy must be read together with this requirement. The Secretary-General argues that a post that is in another category than the abolished post cannot be regarded as a suitable post under Staff Rule 9.6(e). Further, the Protection Associate position that the staff member held on a temporary basis was at the G-6 level in the General Service category, three levels below Ms. de Aguire's position as Associate Legal Officer at the NOB level in the National Professional Officer category.

[8] Impugned Judgment, paras. 80-82.
[9] *Ibid*., paras. 83-86.

43. The starting point in interpreting the UNHCR Comparative Review Policy are the principles of interpretation set out by the Appeals Tribunal in the case of *Scott*:[10]

> The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author.

44. The interpretation of a rule is made within the context of the hierarchy in which the rule appears.[11] A staff member's appointment is subject to the Staff Regulations and Rules, and also incorporates the relevant administrative issuances issued by the Organization. In general terms, administrative issuances set out instructions and procedures for the implementation of the Staff Regulations and Rules. Just as a Staff Rule may not conflict with the Staff Regulation under which it is made, an administrative issuance may not conflict with the applicable Staff Regulation or Rule which it implements. Finally, in interpreting the terms of a staff member's appointment, we may also draw upon general principles of law insofar as they apply to the international civil service.[12]

45. As we have noted above, the aim of the UNHCR Comparative Review Policy was to set out the principles and procedures to be followed by UNHCR in order to satisfy its obligations under Staff Rule 9.6(e) and (f). UNHCR's obligations under Staff Rule 9.6(e) towards staff members whose appointments are terminated due to abolition of posts or reduction of staff are subject to the "availability of suitable posts in which their services can be effectively utilized". For staff members in the General Service and related categories, which includes staff members in the National Professional Officer category,[13] 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

[10] *Scott v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-225, para. 28.
[11] See also *Mashhour v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-483, para. 22.
[12] See *Assale v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-534, para. 34, citing *Hunt-Matthes v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-444/Corr.2, para. 26.
[13] See Staff Rule 2.1(b).

consideration for "suitable posts" available within their parent organization at their duty station.

46. The phrase "similar functions" in paragraph 4 of the UNHCR Comparative Review Policy cannot be interpreted in isolation from the Staff Rule that it was designed to implement. The phrase "similar functions" is general in nature and its meaning can only be understood within the context of Staff Rule 9.6(e) and (f).

47. In this case, we note that the limited issue to be determined is whether a post in the General Service category is a suitable post *vis-à-vis* a post in the National Professional Officer category. The phrase "suitable posts" in Staff Rule 9.6(e) and (f) is not defined in the Staff Rules. However, 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.

48. Under Staff Regulation 2.1, the Secretary-General is required to make appropriate provision for the classification of posts and staff according to the nature of the duties and responsibilities required, in conformity with the principles laid down by the General Assembly. As the Appeals Tribunal explained in the cases of *Chen* and *Tabari*, the purpose of Staff Regulation 2.1 is to implement the principle of equal pay for equal work.[14]

49. Under Staff Rule 2.1(a), posts shall be classified in categories and level, except for posts of Under-Secretary-General and Assistant Secretary-General. Posts are to be classified "according to standards promulgated by the Secretary-General and related to the nature of the duties, the level of responsibilities and the qualifications required". Under Staff Rule 2.1(b), each post shall be assigned to a suitable level in any of the following categories:

> Professional and higher categories, Field Service category, General Service and related categories, including but not limited to National Professional Officers, Trades and Crafts and Security Service categories.

50. The International Civil Service Commission (ICSC) has provided guidance on the nature of the work performed in each category of posts. The General Assembly established the ICSC with the mandate to regulate and coordinate the conditions of service of the United Nations common

[14] *Tabari v. Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-030, para. 17; *Chen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-107, paras. 18 and 21.

system.[15] The ICSC's functions include the establishment of job classification standards for categories of staff.[16]

51. For posts in the Professional category, the ICSC has explained that professional work is "analytical, evaluative, conceptual, interpretive and/or creative and thus requires the application of the basic principles of an organized body of theoretical knowledge". Further, "[p]rofessional work require[s] the understanding of an organized body of theoretical knowledge which is of a level equivalent to that represented by a university degree".[17]

52. With respect to the National Professional Officer category, the ICSC has noted that the work performed in this category "should have a national content". Further, the work "should be at the Professional level and the same standards of recruitment qualifications and performance as required for other Professional staff should apply".[18]

53. The ICSC has defined work in the General Service category as work that "contributes to the execution of the programmes of the organization through work that is procedural, operational and technical" and "involves the application of specific knowledge gained through experience and familiarity with the procedures of the organization". In terms of education requirements, the ICSC has stated that "[t]he performance of General Service functions often requires post-secondary education and technical or administrative training".[19]

54. It follows from the foregoing that the comparison of functions required in paragraph 4 of the UNHCR Comparative Review Policy must entail, as a minimum, a comparison of functions of positions belonging in the same category of posts. This interpretation is necessary 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". Without interpreting paragraph 4 of the UNHCR Comparative Review Policy in this way, the requirement to have regard to "suitable posts" in the Staff Rule is not implemented.

[15] ICSC Statute, Article 1.
[16] *Ibid.*, Article 13.
[17] Report of the ICSC, A/35/30, para. 261. See also the extracts from the ICSC compendium at http://icsc.un.org/compendium/default.asp.
[18] Report of the ICSC for the year 2006, A/61/30, annex IX, para. 3.
[19] Report of the ICSC for 2009, A/64/30, annex VIII.

55. We find that the Dispute Tribunal interpreted paragraph 4 of the UNHCR Comparative Review Policy too narrowly, and its interpretation is incompatible with the higher norms set out in Staff Rule 9.6(e) and (f).

56. Therefore, to give full effect to Staff Rule 9.6(e) and (f) under paragraph 4 of the UNHCR Comparative Review Policy, a staff member on a temporary appointment as Protection Associate in the General Service category at the G-6 level could not be regarded as performing functions like Ms. de Aguirre in her position of Associate Legal Officer in the National Professional Officer category at the NOB level. As such, UNHCR did not fail to follow the procedures set out in paragraph 4 of the UNHCR Comparative Review Policy.

57. Accordingly, the Secretary-General's appeal is granted. We have examined the arguments made by Ms. de Aguirre in her cross-appeal on the merits of the case. We consider that Ms. de Aguirre is seeking to reargue her case and she has not met her burden of establishing that the Dispute Tribunal erred. Therefore, the UNDT Judgment is vacated.

Judgment

58. The Appeals Tribunal, pursuant to Article 4(2) of the Appeals Tribunal's Rules of Procedure, by majority with Judge John Murphy, Judge Dimitrios Raikos and Judge Martha Halfeld dissenting, allows the Secretary-General's appeal. Ms. de Aguirre's cross-appeal is dismissed and Judgment No. UNDT/2016/035 is vacated in its entirety.

59. Judge Raikos and Judge Halfeld append a joint dissenting opinion. Judge Murphy appends a separate dissenting opinion.

Original and Authoritative Version: English

Dated this 28th day of October 2016 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Thomas-Felix, Presiding	Judge Lussick	Judge Knierim

Entered in the Register on this 20th day of December 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar

Judge Raikos' and Judge Halfeld's Joint Dissenting Opinion

1. We respectfully dissent. We would dismiss the Secretary-General's appeal.

2. The UNDT held that the procedure leading to the termination of Ms. de Aguirre's indefinite appointment was vitiated by procedural error and thus the termination decision was flawed. The Secretary-General submits in his appeal that the UNDT erred in so holding.

3. Quite properly, the starting point for the UNDT was to consider whether the applicable Regulations and Rules and the additional provisions in the UNHCR Comparative Review Policy, which has been issued to provide "principles and procedures for the comparative review to be followed in cases of anticipated termination for abolition of posts ... pursuant to Staff Rule 9.6(e) and (f) in the General Service and National Officer categories", were followed.

4. In terms of the termination for abolition of post, Staff Rule 9.6 *inter alia* provides that:

> (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.When the suitable posts available are subject to the principle of geographical distribution, due regard shall also be given to nationality in the case of staff members with less than five years of service and in the case of staff members who have changed their nationality within the preceding five years.
>
> (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 station.

5. On the other hand, the UNHCR Comparative Review Policy provides in section "Comparative Review Principles", as follows:

> 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 position title (Annex I lists the different functional groups and for the purposes of this policy, groupings under Level Three shall apply).[20] 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.

6. With regard to the aforesaid provision, the Dispute Tribunal opined:[21]

> ... The Tribunal disagrees with the Respondent and is of the view that, indeed, paragraph 4 of the [UNHCR] Comparative Review Policy should have been applied in the Applicant's case. Furthermore, had this been done, there would have been no need for a comparative review, as its application would clearly have "mitigated the need for [it]" as expressly provided in paragraph 4 of the [UNHCR] Comparative Review Policy.
>
> ... The Respondent, incorrectly, mixes the criteria of paragraphs 4 and 5. Indeed, paragraph 4 makes no reference to "suitable posts" and/or "functional groups". It only requires to look for "staff members on temporary appointments or affiliate workforce undertaking similar functions to those of the discontinued position". To fully grasp the reach of this provision, one must read it in connection with staff rule 9.6(e), combined with paragraph 8 of the [UNHCR] Comparative Review Policy, which create an obligation for UNHCR to undertake efforts to retain certain staff, among whom are those holding an indefinite appointment such as was the case of the Applicant at the time. Applying the suitable posts and functional groups requirements to paragraph 4 would make the provision redundant.
>
> ... Paragraph 4 of the [UNHCR] Comparative Review Policy provides for no particular implementation requirement other than the discontinuation of the engagement of the person under a temporary appointment and, such discontinuation

[20] Footnote omitted.
[21] Impugned Judgment, paras. 80-83.

> can only be rendered meaningful if it is to make possible the appointment in his or her instead of the staff member concerned by the abolition to such temporary post, should they so agree. Relevantly, there is no condition as to the grade of the temporary position or to the type of post being encumbered, that is regular or temporary. The relevant criterion under this provision is that of the need for the staff member on a temporary appointment to be "undertaking similar functions to those of the discontinued position".
>
> ... To ascertain whether "functions" are "similar", one should have recourse to the practicalities of the position, that is, what is actually the work being undertaken and not refer exclusively to the job description, as such job descriptions invariably are the subject of informal variation to meet needs, as in this case has been admitted by the Respondent, who submitted that the G-6 TA position holder undertook other work while awaiting the appointment of an incumbent to the P-3 post.

7. We share the view of the first instance Judge and consider that the applicable instruments concerning the exercise to abolish a post clearly state that, 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. The text leaves no doubt that it was mandatory for the Administration to follow this sequence of action. The UNDT correctly concluded that paragraph 4 of the section entitled "Comparative Review Principles" of the UNHCR Comparative Review Policy operates as a precondition before the undertaking of the comparative review process provided for in paragraph 5 of the said instrument .

8. As set out by the Appeals Tribunal in *Scott*:[22]

> The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author.

[22] *Scott v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-225, para. 28.

9. Based on the previous considerations, we hold that, contrary to the Secretary-General's contention, the phrase "prior to undertaking" in the aforementioned paragraph 4 is clear and therefore, must be interpreted by its literal meaning, without further investigation. Moreover, nothing in the language of the said paragraph suggests that for the purpose of its application any other criterion than the discontinuation of a staff member on a temporary appointment undertaking similar functions to those of the discontinued position has to be met. In addition, under the applicable UNHCR Comparative Review Policy, the UNDT correctly concluded that there is no condition as to the grade of the temporary position or to the type of post being encumbered, that is regular or temporary.

10. Further, with regard to the issue of the similar functions undertaken by the staff member on a temporary appointment, the UNDT rightly opined:[23]

> ... To ascertain whether "functions" are "similar", one should have recourse to the practicalities of the position, that is, what is actually the work being undertaken and not refer exclusively to the job description, as such job descriptions invariably are the subject of informal variation to meet needs, as in this case has been admitted by the Respondent, who submitted that the G-6 TA position holder undertook other work while awaiting the appointment of an incumbent to the P-3 post.
>
> ... Furthermore, the Tribunal notes that as early as 24 September 2013,[24] it was anticipated to create the new G-6 and new P-3 positions, between which the functions of the abolished post had been allocated. In October 2013, necessary action was taken to reinforce the Legal Unit, RRWE, with a temporary post, namely the G-6 TA and, additionally, in May 2014, i.e., before the separation of the Applicant, the RRWE staffing table showed two G-6 regular posts ("Protection Associate", positions 10020933 and 10021772) against one of which the G-6 TA was being charged.
>
> ... The record therefore shows that there were options open to the UNHCR to retain the Applicant under the provision of paragraph 4 of the [UNHCR] Comparative Review Policy. The [Dispute] Tribunal notes that, not only was there a staff temporarily appointed performing functions similar to those of the post flagged for abolition, but[...] also, two positions in the same functional group as the one of the post flagged for abolition existed prior the Applicant's separation from service.
>
> ... From its examination of the evidence, including the terms of reference of the G-6 TA, the job description of the National Professional Officer post encumbered by the Applicant, description of the duties and samples of work undertaken by the G-6 TA staff member, the Tribunal is of the view that the functions of the G-6 TA and that of

[23] Impugned Judgment, paras. 83-86.
[24] Footnote omitted.

> the post encumbered by the Applicant were "similar". The Applicant should have been offered the temporary position, in accordance with paragraph 4 of the Comparative Review Policy.

11. In this regard, we are persuaded that the Dispute Tribunal carefully reviewed the facts before it and we find it arrived at reasonable conclusions of fact. The Secretary-General's appeal does not satisfy the burden arising from Article 2(*e*) of the Appeals Tribunal Statute as he failed to demonstrate that the impugned Judgment was based on an error of fact resulting in a manifestly unreasonable decision.

The award of compensation issue

12. Article 10(5) of the UNDT Statute, paralleled in Article 9(1) of the Statute of the Appeals Tribunal, provides as follows:

> As part of its judgement, the Dispute Tribunal may 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 the 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, ... and shall provide the reasons for that decision.

13. The UNDT's discretion under Article 10(5)(*a*) is constrained by the mandatory requirement to set an amount of compensation (no greater than that provided for in Article 10(5)(*b*) of the UNDT Statute) as an alternative to an order rescinding a decision on appointment, promotion or termination. Accordingly, pursuant to Article 10(5) of the UNDT Statute, where the UNDT rescinds a contested administrative decision concerning appointment, promotion or, as in this case, termination, the UNDT must set an amount of compensation in lieu of rescission or specific performance which the Secretary-General may elect to pay instead.

14. The UNDT may award compensation for actual pecuniary or economic loss, including loss of earnings. We have consistently held that "compensation must be set by the UNDT following a principled approach and on a case by case basis" and "[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case".[25] We further stated that "[t]he assessment of compensation must also be done on a case-by-case basis. Contemplating the particular situation of each claimant, it carries a certain degree of empiricism to evaluate the fairness of the 'in lieu compensation' to be fixed".[26] Relevant considerations in setting compensation include, among others, the nature of the post formerly occupied (i.e. temporary, fixed-term, permanent), the remaining time to be served by a staff member on his or her appointment and their expectancy of renewal, or whether a case was particularly egregious or otherwise presented particular facts justifying compensation beyond the two-year limit.[27]

15. In the instant case, the UNDT found that Ms. de Aguirre was unlawfully terminated by the Administration. The UNDT therefore rescinded this unlawful decision and awarded compensation in lieu of re-instatement pursuant to Article 10(5)(*a*) of the UNDT Statute quoted above.

16. Ms. de Aguirre submits that the UNDT failed to award her compensation under Article 10(5)(*b*) of the UNDT Statute, for harm in the form of neglect and emotional stress, adverse effects on her professional development and career progression and loss of job security. Further, Ms. de Aguirre claims that the UNDT failed to take into account the aggravating factors of her case.

17. It is clear from paragraphs 90 and 91 of the impugned Judgment that the UNDT considered Ms. de Aguirre's submissions, noting that "the Applicant is eligible until 30 April 2019 for internally advertised vacancies in the international professional category to which she applies". Having done so, the UNDT concluded that: "However, considering that UNHCR failed in its duty of care towards the Applicant in connection with measures in place related to termination for abolition of posts, the Tribunal finds that it would be adequate in

[25] *Faraj v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-587, para. 26, citing, *inter alia*, *Solanki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-044, para. 20.
[26] *Mwamsaku v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-246, para. 29.
[27] *Faraj v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-587, para. 26.

the present case to award compensation in lieu of rescission in an amount equal to two years' net base salary, based on the Applicant's salary on the date of her separation from service."[28]

18. In view of the foregoing and the large discretion afforded to the UNDT in matters related to compensation, we are satisfied that in its assessment of compensation in lieu of reinstatement, the UNDT was mindful of Ms. de Aguirre's claims for harm, in the form of neglect and emotional stress, as well as adverse effects on her professional development and career progression, including loss of job security, and nonetheless considered that the awarded alternate compensation adequately compensated Ms. de Aguirre for the alleged harm. Absent any error of law or manifestly unreasonable factual findings, the Appeals Tribunal will not interfere with the discretion vested in the UNDT to decide on remedy.

19. As we find that the UNDT did not commit any error of law in its assessment of the compensation award, which we find was fair and reasonable, we will not interfere with the award in the matter before us.

20. For these reasons, we would dismiss the Secretary-General's appeal and Ms. de Aguirre's cross-appeal.

[28] Impugned Judgment, para. 91.

Original and Authoritative Version: English

Dated this 28th day of October 2016 in New York, United States.

(Signed) *(Signed)*

Judge Raikos Judge Halfeld

Entered in the Register on this 20th day of December 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar

Judge Murphy's Dissenting Opinion

1. I have had the pleasure of reading the majority Judgment in this matter prepared by the Judge President. I am unable to agree with it. I align rather with the reasoning of the minority Judgment prepared by Judge Raikos and Judge Halfeld. I wish, however, to add a few additional reasons of my own.

2. The purpose of Staff Rule 9.6 is clear. It aims firstly at mitigating the consequences of redundancy for staff members and to retain skills within UNHCR, where possible. It does not deal with the processes of selection of staff for retrenchment. It merely stipulates an order of preference as part of the criteria for selecting staff for retrenchment. Staff members holding continuing appointments take preference over fixed-term and temporary staff.

3. 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 words, the criteria of skills retention and favouring more permanent staff can only be implemented if there are suitable posts available that permit UNHCR to achieve its policy. I use the term "permanent staff" loosely to refer to those with indefinite or fixed-term appointments to conveniently distinguish them from temporary staff. The Staff Rule does not seek to define "suitable posts". It leaves the concept open-ended, thereby allowing for flexibility in implementation. Generally, the word "suitable" means "right or appropriate for a particular person or situation".

4. The UNHCR Comparative Review Policy gives effect to Staff Rule 9.6 and effectively and consciously embodies the preferred policy of the Rule. It establishes a two-phase process to achieve skills retention and to hold good on the promise of security of tenure for permanent staff.

5. Paragraph 5 of the UNHCR 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 (presumably vacant) suitable posts, the staff member whose post has been abolished will

be separated. The object of the exercise is simple and laudable. It is to avoid terminating redundant staff by giving them suitable vacant posts if their skills match the requirements of grade and functionality at the duty station.

6. Paragraph 4 of the UNHCR Comparative Review Policy, however, aims to obviate the need for a comparative review. It seeks to serve the purpose and policy of Staff Rule 9.6 through a process of "bumping". It requires that before a comparative review takes place and an attempt is made to match skills, grade etc. against suitable posts, UNHCR should look at its temporary staff complement to determine if there are staff members who are "undertaking similar functions" to those of the post about to be abolished or declared redundant. Once it is established that there are such posts, it then asks the second question mandated by paragraph 4, namely: will the discontinuation of the temporary contract mitigate the need for a comparative review under paragraph 5 of the Policy? If the answer to that question is in the affirmative, then there is a "suitable post" available and in the interests of retaining skills and honouring the service of long serving staff members that post must be offered to the staff member whose post has been abolished. This practice is common and applied universally in most labour law systems and is referred to as "bumping". Put simply, temporary staff members lose their jobs before permanent staff members and they are bumped out of their posts provided the permanent staff member is able to perform the functions of the job. Higher grade and level are not relevant in such a process. All that is required is similarity in function and the willingness of the staff member, if need be, to step into a job at a lower grade, level etc. in order to avoid termination of employment. Retrenchment will then have been avoided in a manner consistent with the duty on all employers to mitigate retrenchment or avoid it by finding the selected permanent staff member suitable alternative employment. The employer has done what is right and appropriate in the situation for the particular person selected.

7. The UNDT was clearly appreciative of the policy of bumping intended by the UNHCR Comparative Review Policy, as was the draftsman of the policy. It concluded correctly in our view that in deciding whether the temporary post was one of similar function, one considers only the practicalities of the position and the work that is actually being undertaken. It also was correct in its conclusion that paragraph 4 gives proper expression to the purpose of Staff Rule 9.6. Competence has been retained, length of service has been recognised and a permanent staff member has been retained in a suitable post of similar function, albeit at the

expense of a temporary staff member. But the fair and objective selection criterion applied has advanced the policy of the Rule.

8. The Judgment of the majority in this appeal, in my respectful opinion, fails to give adequate effect to the purpose of the Staff Rule and the intention of the policy. Instead, it imposes a strict interpretation of "suitable posts" as would apply in an equal pay dispute. We are not here concerned with equal pay issues. The UNHCR Comparative Review Policy is aimed at mitigating the effects of retrenchment on non-temporary staff members. The interpretation preferred by the majority undermines the intended protection, by preferring temporary staff above those with more secure tenure. The interpretation accordingly ignores important contextual considerations. Staff Rule 9.6 is not concerned exclusively with job descriptions. In its own express terms it favours "competence, integrity and length of service" and establishes a hierarchy offering positive consideration to staff members holding continuing appointments or fixed-term contracts above temporary staff.

9. The UNDT was also correct that the application of the process in paragraph 4 of the UNHCR Comparative Review Policy is a pre-condition to a lawful administrative decision. Non-observance of a material pre-condition infringes the principle of legality and the decision falls therefore to be rescinded on that ground.

10. I would accordingly dismiss the appeal and uphold the decision of the UNDT.

Original and Authoritative Version: English

Dated this 28th day of October 2016 in New York, United States.

(Signed)

Judge Murphy

Entered in the Register on this 20th day of December 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar