

TO: All Heads of Departments and Offices

DATE: 25 August 2016

FROM: Yukio Takasu
DE: Under-Secretary-General for Management

REFERENCE:

SUBJECT: **Lessons Learned Guide for Managers (Volume Five)**
OBJET:

1. I am pleased to provide you with the fifth volume of the *Lessons Learned Guide*, which addresses issues relating to managing organizational change, including retrenchment, restructuring, downsizing and abolition of post.
2. The current volume of the *Lessons Learned Guide* provides managers with updated information and analysis concerning the outcome of cases from the United Nations Dispute Tribunal (“UNDT”) and the United Nations Appeals Tribunal (“UNAT”) as they relate to the application of the Staff Regulations and Rules. In doing so, the *Guide* will assist managers to gain a deeper understanding of the Organization’s internal system of justice and will foster a greater appreciation of their duties and responsibilities when managing organizational changes.
3. I would like to thank everyone who provided feedback on the previous volumes of the *Lessons Learned Guide*, and look forward to your continued engagement in the process of promoting greater efficiency in the management and administration of the human resources of the Organization.

cc: Executive Officers
Chiefs of Administration

UNITED NATIONS
OFFICE OF THE UNDER-SECRETARY-GENERAL
FOR MANAGEMENT



**LESSONS LEARNED FROM THE JURISPRUDENCE OF
THE SYSTEM OF ADMINISTRATION OF JUSTICE:**

A GUIDE FOR MANAGERS

**Managing Organizational Change (Retrenchment, Restructuring,
Downsizing and Abolition of Posts)**

VOLUME #5

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Introduction

1. The fifth volume of the Lessons Learned Guide, prepared by the Management Evaluation Unit (MEU) is intended to draw the attention of managers to lessons learned from the jurisprudence of the United Nations Dispute Tribunal (UNDT) and Appeals Tribunal (UNAT) relating to organizational change including retrenchment, restructuring, downsizing and the abolition of posts.
2. Managers have crucial roles in effectively and efficiently managing periods of organizational change and their effects on staff. This guide is intended to assist managers involved in or affected by organizational changes by drawing their attention to relevant regulations, rules and legal principles as interpreted and applied by the Tribunals.
3. It should be noted that, while there are some guidelines, there is currently no comprehensive Organizational policy on the issue of retrenchment, restructuring, downsizing or abolition of post. Each downsizing or restructuring process that has transpired utilized an approach unique to the mission, office or entity. While organizational change may touch on a number of internal regulations and rules of which managers should be aware including preference of retention, there is no definitive set process that must be followed in such circumstances.¹ This guide is therefore not intended to provide a comprehensive statement of the law or to provide detailed legal advice on specific administrative decisions.² Rather, it identifies several guiding principles from the jurisprudence of the UNDT and the UNAT which may assist managers in approaching decisions concerning retrenchment, restructuring, downsizing or abolition of posts:
4. Through the case-law of the UNDT and the UNAT, the Organization has learned a number of important lessons on issues of organizational change, *inter alia*:
 - The Organization has broad discretion in managing organizational change;
 - Decisions must be based on valid reasons and supported by the facts;
 - Managers must follow the applicable rules and procedures; and
 - Managers should communicate clearly and transparently with staff and should consult with staff representatives as appropriate.
5. It should be noted that these lessons have been derived from what the UNDT and UNAT have considered to be legally required and do not necessarily reflect fully “best practices”. For further guidance, and in cases of doubt, managers should consult

¹ Office of Human Resources Management, *Managing Organizational Change (during times of restructuring, downsizing and abolition of posts): Reference Materials for Heads of Department, Office or Mission and Programme Managers* (July 2013) (hereinafter: “OHRM Reference Materials”), para. 3.

² Further practical guidance is available in the *OHRM Reference Materials*, *supra* note 1, as well as in previous guidelines and in after action reviews or lessons learned documents related to prior downsizing exercises.

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appropriate Organizational resources, in particular the Field Personnel Division (FPD) of the Department of Field Support (DFS) or the Office of Human Resources Management. Managers may also seek the advice of the MEU.

Relevant Staff Regulations and Rules

6. Organizational changes may implicate a number of Staff Regulations and Rules. The Staff Regulations and Rules which may be relevant depend, *inter alia*, on the nature of the exercise in question and on the contractual status of the affected staff. However, managers should be aware of the key provisions described below.
7. Staff Rule 9.4 provides that a fixed-term or temporary appointment expires automatically and without prior notice on the expiration date specified in the letter of appointment. Pursuant to Staff Regulation 4.5 and Staff Rules 4.13 and 4.14, neither a temporary nor a fixed-term appointment carries any expectancy, legal or otherwise, of renewal. Managers should be aware, however, of relevant jurisprudence of the Tribunals (discussed below) holding that a decision not to renew an appointment must be based on valid reasons. Furthermore, if the Administration gives a staff member an express promise in writing that his or her appointment will be renewed or extended, this may create a legitimate expectation of renewal which may be enforced by the Tribunals.³
8. Staff Regulation 9.3 (a) (i) and Staff Rules 9.6 (c) and (e) provide that the Secretary-General may terminate a temporary, fixed-term or continuing appointment “if the necessities of service require abolition of the post or reduction of the staff” and that staff members must be given the reasons for their termination. They must also be given the appropriate notice (or compensation in lieu thereof) specified in their letters of appointment or in the Staff Rules, and they may be entitled to receive termination indemnity pursuant to Staff Regulation 9.3. Staff Rule 13.1 establishes specific procedures which must be followed in cases of termination of permanent appointments.
9. Staff Rules 9.6 (e) and 13.1 (d) provide that, where the necessities of service require abolition of a post or the reduction of staff, staff members shall be retained in the following order of preference, subject to the availability of suitable posts for which their services can be effectively utilized, and provided that due regard shall be given in all cases to relative competence, integrity and length of service:
 - (i) staff members holding permanent appointments;
 - (ii) staff members holding continuing appointments;
 - (iii) staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment; and
 - (iv) staff members holding fixed-term appointments.

³ *Igbinedion*, 2014-UNAT-411; *Ahmed*, 2011-UNAT-153.

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Lesson 1: The Organization has broad discretion in managing organizational change

10. The UNAT has consistently upheld the right of the Organization to structure its staffing. As stated by the UNAT, “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’”.⁴ Decisions related to organizational change are generally matters within the Administration’s discretion.⁵
11. Restructuring is a valid reason for abolishing or reclassifying posts.⁶ Financial concerns,⁷ avoiding duplications or gaps in functions,⁸ streamlining,⁹ shifting Organizational priorities¹⁰ or operational realities¹¹ may all justify such restructuring.
12. The abolition of a post is a valid reason for not renewing an appointment,¹² for terminating an appointment¹³ or for reassigning a staff member (provided that such reassignment is at the same grade).¹⁴ Where the abolition of a post is foreseen, a staff member’s appointment may be renewed only until the planned abolition of post and may be renewed for a duration of less than a full year.¹⁵ Repeated renewal of a staff member’s appointment does not in itself give rise to an expectation of subsequent renewal, unless the Organization makes an express promise, in writing, that gives the staff member an expectancy that his or her appointment will be renewed or extended.¹⁶
13. Managers should note in particular that the “re-profiling” or “redeployment” of a post in the budget does not eliminate the need to comply with procedures regarding the reclassification of posts.¹⁷ When the duties of a post change, or are expected to change, substantially as a result of a restructuring and/or General Assembly resolution, a request for reclassification should be submitted.¹⁸ A request for classification advice may be submitted prior to a budget submission.¹⁹ A request for reclassification or for

⁴ *Pacheco*, 2013-UNAT-281 (internal citations omitted).

⁵ *Bali*, 2014-UNAT-450.

⁶ *Pacheco*, 2013-UNAT-281; *Gehr*, 2012-UNAT-236; *Islam*, 2011-UNAT-115; *see also van der Valk*, United Nations Administrative Tribunal (UNAdT) Judgment No. 117 (1968).

⁷ *Gehr*, 2012-UNAT-236; *see also Vaporidis*, UNDT/2012/055; *Mistral El-Kidwa*, UNDT/2011/199.

⁸ *Gehr*, 2012-UNAT-236.

⁹ *Raj*, UNAdT Judgment No. 350 (1985).

¹⁰ *Pacheco*, UNDT/2012/008, *affirmed by* 2013-UNAT-281.

¹¹ *Kacan*, 2015-UNAT-582.

¹² *Pacheco*, 2013-UNAT-281; *Islam*, 2011-UNAT-115.

¹³ *Ruyooka*, UNDT/2013/154, *affirmed by* 2014-UNAT-487; *see also Bye*, UNDT/2009/083; *Van der Valk*, UNAdT Judgment No. 117 (1968).

¹⁴ *Rees*, 2012-UNAT-266; *Gehr*, 2012-UNAT-236; *see also Jocondo*, UNDT/2014/082; *Kamunyi*, 2012-UNAT-194.

¹⁵ *See Pacheco*, UNDT/2012/008, *affirmed by* 2013-UNAT-281.

¹⁶ *Igbinedion*, 2014-UNAT-411; *Ahmed*, 2011-UNAT-153.

¹⁷ *See Eissa*, UNDT/2013/112, *affirmed by* 2014-UNAT-469.

¹⁸ ST/AI/1998/9.

¹⁹ ST/AI/1998/9.

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classification advice is subject to approval, and managers should therefore wait for its outcome before taking any decision affecting a staff member on that basis.

14. Once approved, reclassification of a post shall not affect the existing contractual status, salary or other entitlements of a staff member.²⁰ Staff members whose posts are classified at a level below their personal grade level shall retain that grade and salary level on the understanding that every reasonable effort will be made to reassign them to a post at their personal grade level.²¹ Reclassification therefore does not provide a valid reason for terminating an appointment. Reclassification may provide a basis for not renewing a temporary or fixed-term appointment once it expires, insofar as such renewal concerns a future and not the existing contractual status.²² However, in such circumstances every reasonable effort must first be made to reassign the staff member, and the decision not to renew the appointment should not be improperly motivated.
15. There is no obligation to find an alternative post for a staff member whose appointment is to be terminated or not to be renewed following the abolition of a post.²³ The UNAT has also found that staff members on permanent appointments have no absolute right to be given preference in applying for other posts.²⁴ However, where internal procedures require the Administration to take steps to support affected staff, these procedures should be followed.²⁵ In any case, decisions to select staff affected by downsizing or restructuring should accord with the staff selection system.²⁶

Lesson 2: Decisions must be based on valid reasons and supported by the facts

16. The UNAT has held that, “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”.²⁷ Legal principles applicable to the exercise of discretionary authority apply.²⁸ As stated by the UNAT,

“[T]he Administration’s discretionary authority is not unfettered. [...] The Administration must act in good faith and respect procedural rules. Its decisions must not be arbitrary or motivated by factors inconsistent with proper administration

²⁰ ST/AI/1998/9.

²¹ ST/AI/1998/9.

²² See *Guzman*, Oder No. 126 (NBI/2014); *Komeh*, UNDT/2011/152.

²³ *Pacheco*, UNDT/2012/008, affirmed by 2013-UNAT-281; *Dumornay*, UNDT/2010/004, affirmed by 2010-UNAT-097.

²⁴ *Messinger*, 2011-UNAT-123.

²⁵ See *Dia*, UNDT/2015/066, upheld by 2015-UNAT-553.

²⁶ ST/AI/2010/3; see also *Ljungdell*, 2012-UNAT-465.

²⁷ *Matadi et al.*, 2015-UNAT-592; *Ahmed*, 2011-UNAT-153; see also *Hersh*, 2014-UNAT-433; *Obdeijn*, 2012-UNAT-201; *El Khatib v. UNRWA*, 2011-UNAT-142.

²⁸ *Matadi et al.*, 2015-UNAT-592.

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*[...] We would add that its decisions must not be based on erroneous, fallacious or improper motivation.*²⁹

17. A decision to terminate or not to renew an appointment must be based on valid reasons and supported by the facts.³⁰ Managers should ensure contemporaneous documentation of their decisions.³¹ If budgetary reasons are provided for the abolition of posts, managers must be able to demonstrate that such budgetary constraints exist³² and that the staff members in question are affected by the budgetary constraints at issue.³³ Managers should therefore ensure that staffing tables are up-to-date and correct before conducting any downsizing or retrenchment exercise and that any reassignments or other changes to staffing tables are properly documented. Where a comparative review is necessary, managers should ensure and maintain contemporaneous documentary records of the scores awarded to staff members and the basis for those scores.³⁴
18. In complying with the duty to act fairly and justly, managers may not, for instance, manipulate a job description in order to benefit one staff member to the detriment of others.³⁵ A staff member also may not be transferred to another section solely for the purpose of rendering him/her subject to downsizing.³⁶ Restructuring or reorganizing should not be used to resolve management/performance concerns regarding a particular staff member³⁷ or as a means of discipline.³⁸ In determining whether a decision is based on valid reasons and properly motivated, the Tribunals may make inferences and draw conclusions from the totality of the surrounding circumstances.³⁹
19. Where an organizational change will affect multiple staff, any differentiation in treatment should be based on objective criteria. In cases of retrenchment or downsizing of a number of similarly-situated staff, a comparative review based on pre-approved criteria is typically used to determine which staff will be retained.⁴⁰ The purpose of the comparative review exercise should be clear, and standard procedures and objective criteria should be adopted in advance of the review.⁴¹ Before initiating a comparative review exercise, managers are encouraged to seek guidance from FPD/DFS or OHRM as appropriate.

²⁹ *Asaad v. UNRWA*, 2010-UNAT-021.

³⁰ *Islam*, 2011-UNAT-115; see *Ahmed*, 2011-UNAT-153.

³¹ See, e.g., *Liverakos*, 2012-UNAT-206

³² *Leclercq*, UNDT/2013/055, affirmed by 2014-UNAT-429.

³³ *Adundo et al.*, UNDT/2012/118; see also *Liverakos*, 2012-UNAT-206.

³⁴ See *Bali*, 2014-UNAT-450.

³⁵ See *Hersh*, 2014-UNAT-433.

³⁶ *Kavakwe*, UNDT/2012/037.

³⁷ See *El Khatib v. UNRWA*, 2011-UNAT-142; *Leclercq*, UNDT/2013/055, affirmed by 2014-UNAT-429; see also *Rosenberg*, UNDT/2011/045.

³⁸ *Kavakwe*, UNDT/2012/037; *Bangoura*, UNAdT Judgment No. 1029 (2001).

³⁹ See, e.g., *Zamel*, 2015-UNAT-602.

⁴⁰ *Adundo et al.*, UNDT/2012/118.

⁴¹ *Adundo et al.*, UNDT/2012/118.

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Lesson 3: Managers must follow the applicable rules and procedures

20. Subject to applicable regulations, rules and policies (including those related to the order of preference among different types of appointment), the Administration has discretion in determining which criteria to apply and the procedures to follow in deciding which staff to retain.⁴²
21. It is important to note that where Information Circulars are issued at the local level in addition to the Organization's Regulations and Rules to govern a downsizing or transition, such Circulars are not "merely issued for information purposes". They also provide "the legal framework for the transition" and may give rise to entitlements.⁴³ Once the Organization adopts additional internal procedures and criteria for dealing with staff whose posts are abolished, it is obliged to follow consistently these procedures and criteria.⁴⁴
22. Managers should ensure that the performance management and development system is respected and enforced.⁴⁵ Where performance is to be used as a factor in a comparative review, managers should utilize performance appraisal documents as reflecting past performance.⁴⁶ Managers should therefore ensure that performance appraisals are up-to-date and properly completed before conducting a retrenchment or downsizing exercise.⁴⁷

Lesson 4: The Administration should communicate clearly and transparently with staff and should consult with staff representatives as appropriate

23. Managers should provide staff members with reasons for their decisions.⁴⁸ Providing reasons not only fosters transparency, but it also facilitates the staff member's assessment of courses of action and subsequent review.⁴⁹ While there is no legal requirement to provide advance notice, keeping staff informed of the prospect of and progress regarding abolition of post or restructuring is generally considered good practice.⁵⁰ There is no requirement to obtain the consent of a staff member before taking a decision affecting him/her.⁵¹

⁴² *Pacheco*, UNDT/2012/008; *Van der Valk*, UNAdT Judgment No. 117 (1968); *see also Al-Alamy*, UNDT/2012/090.

⁴³ *Sannoh*, 2014-UNAT-451; *see also Hersh*, 2014-UNAT-433-Corr.1.

⁴⁴ *Sannoh*, 2014-UNAT-451; *Tsoneva*, 2013-UNAT-339; *Mistral Al-Kidwa*, UNDT/2011/199.

⁴⁵ ST/AI/2010/5.

⁴⁶ *Adundo et al.*, UNDT/2012/118.

⁴⁷ *See, e.g.*, OIOS Internal Audit Division, *Retrenchment of Staff in UNMIK*, AP2009/650/04 (28 April 2010).

⁴⁸ *Gehr*, 2012-UNAT-236; *see also Obdeijn*, 2012-UNAT-201.

⁴⁹ *Gehr*, 2012-UNAT-236.

⁵⁰ *OHRM Reference Materials*, *supra* note 1.

⁵¹ *Gehr*, UNDT/2011/142, *affirmed by* 2012-UNAT-236.

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24. In addition, managers should consult with staff representatives on issues or policies affecting a significant number of staff in a particular unit or service.⁵² The goals of consultation include “ensuring that staff members have a say in the process, that they receive proper notice, and that their interests are taken into consideration.”⁵³ Consultations should be carried out in good faith, and managers should give staff a meaningful opportunity to have their views heard and their interests taken into consideration before a final decision is made.⁵⁴ However, “[c]onsultations are not negotiations, and it is not necessary for the Administration to secure consent or agreement of the consulted parties” if said consent or agreement cannot be reached after meaningful, good faith consultations.⁵⁵ Unless internal procedures require consultation,⁵⁶ there is no principled obligation to consult staff where only one staff member is affected by a decision.⁵⁷ Where staff representatives refuse to participate in consultations, the resulting lack of consultation cannot be attributed to the Administration.⁵⁸

⁵² ST/SGB/274.

⁵³ *Adundo et al.*, UNDT/2012/118.

⁵⁴ *Leboeuf et al.*, UNDT/2014/033, *affirmed by* 2015-UNAT-568.

⁵⁵ *Leboeuf et al.*, UNDT/2014/033, *affirmed by* 2015-UNAT-568.

⁵⁶ *See Tsoneva*, 2013-UNAT-339.

⁵⁷ *Allen*, 2011-UNAT-187.

⁵⁸ *Matadi et al.*, 2015-UNAT-592.