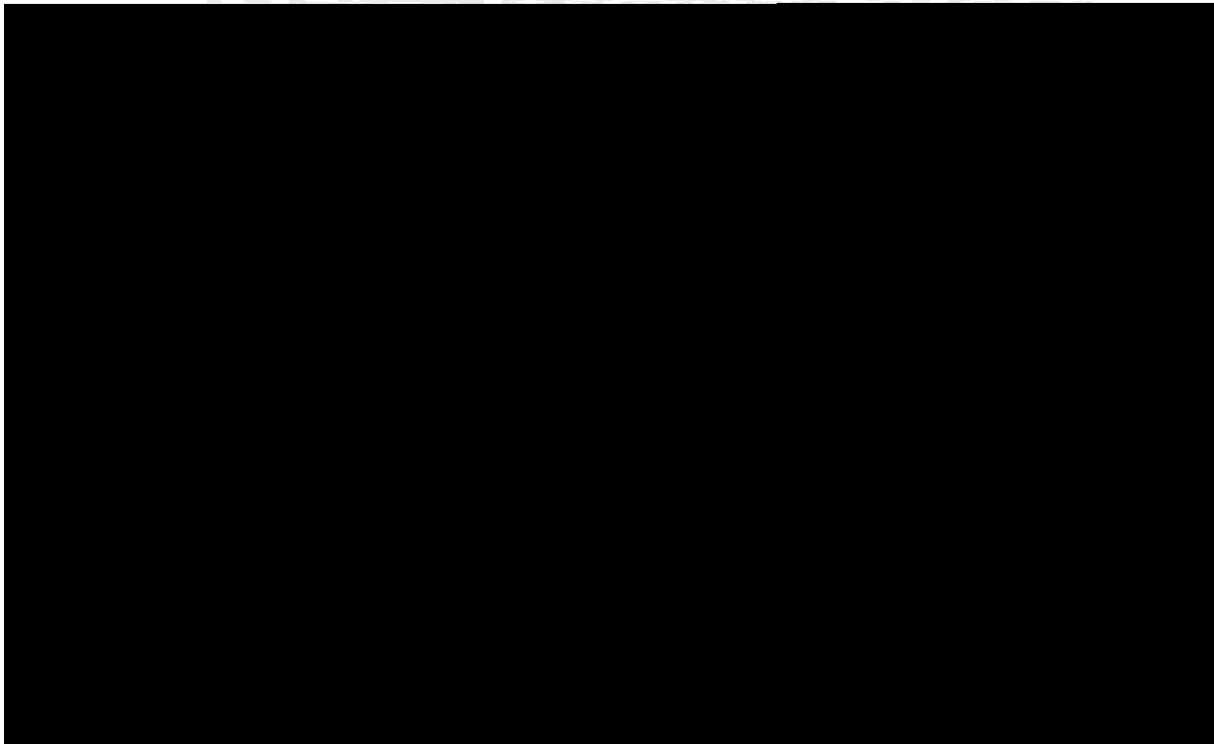




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Judgment No. 2018-UNAT-850



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Counsel for Secretary-General: Wambui Mwangi

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1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/084, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 31 October 2017, in the case of *Zama v. Secretary-General of the United Nations*. Mr. Fidelis Chi Zama filed the appeal on 8 January 2018, and the Secretary-General filed his answer on 19 March 2018.



2. Mr. Zama began his service with the United Nations Population Fund (UNFPA) on 24 December 1979 and in 1996, he was granted a permanent appointment. On 22 October 2009, Mr. Zama was assigned as the Country Representative of UNFPA in Kenya. This posting was at the D-1 level, and he held the position in Kenya until he was posted to UNFPA's Sub-Regional office in Johannesburg, South Africa, on 5 April 2012 as the Technical Adviser on Population and Development.

3. In early March 2011, a shortage of condoms was raised as a public health concern in Marsabit County, Kenya. UNFPA, with its partner Kenya Red Cross, arranged to have condoms delivered to Isiolo to alleviate the concerns that were raised. For his part, Mr. Zama wrote to UNFPA's Director of the Africa Regional Office, Mr. Makinwa, and informed him of the temporary measure that was adopted by UNFPA Kenya to address the concerns in Marsabit. Mr. Zama was commended for his role and thereafter Mr. Makinwa constituted and dispatched a fact-finding team to investigate the condom shortage issue. The

copy of the final report shown to him. On 16 January 2012, Mr. Zama provided Mr. Makinwa with a detailed response to Mr. Makinwa's letter of 6 January 2012.

6. In March 2012, when the 2011/2012 reporting year was ending, Mr. Zama was rated poorly in his performance appraisal by Mr. Makinwa, who also directed Mr. Zama to complete his own input by 16 March 2012.

7. On 29 March 2012, before his performance appraisal was finalised and while matters raised in the appraisal were still being disputed, Mr. Zama was contacted by UNFPA's Chief of Recruitment, Ms. Serina Choo. Ms. Choo informed Mr. Zama that senior management had decided to reassign him before the end of his four-year tenure as Country Representative. She told Mr. Zama that in the alternative, he could opt to take an early retirement package of USD 150,000. Mr. Zama refused the early retirement package offer.

8. In April 2012, Mr. Zama received paperwork pertaining to his reassignment to Johannesburg. The post of country representative which Mr. Zama was encumbering at the time was then advertised the following month.

9. On 30 May 2012, Mr. Zama filed papers to rebut the unfavourable appraisal he was given for the 2011/12 reporting cycle.

10. Mr. Zama commenced his new posting in Johannesburg on 7 January 2013. The Technical Adviser position that he was assigned to was at the P-5 level, but Mr. Zama was to be paid at his personal D-1 level.

11. On 24 October 2013, the UNFPA Representative for the East and South African Regional Office (ESARO), Dr. Onabanjo, informed all ESARO staff members of a restructuring exercise that was about to co

then wrote to Mr. Zama and invited him to participate in the job matching exercise. Mr. Zama was particularly asked to consider three positions, which had been previously discussed with him.

13. The job-matching exercise for professional staff closed on 25 November 2013. Mr. Zama did not participate in the said job-matching exercise. The results of the job-matching exercise were communicated to the Executive Director of UNFPA on 4 December 2013 by memorandum. The said memorandum also stated that Mr. Zama refused to participate in the exercise.

14. Thereafter, the abolition of the Technical Adviser post which Mr. Zama had encumbered since his reassignment to the Sub-Regional office in Johannesburg was approved on 7 January 2014. On 15 January 2014, the DHR informed Mr. Zama that his post had been abolished. Mr. Zama was invited to use the six-month lead time to apply and

reviewed this for impact to the lawfulness of

Under-Secretary-General and, from this, should have drawn a negative inference against UNFPA. If UNFPA had taken action on Mr. Zama's request for management evaluation, it is reasonable to project that his pre-mature reassignment would have been overturned, and thus he would have remained in the Kenya Country Office and not been subject to the restructuring in South Africa.

22. Third, Mr. Zama argues that the UNDT failed to consider his testimony that the then incumbent of his former position of Country Representative of UNFPA in Kenya was the son-in-law of the then Secretary-General, which supported that the motive for his reassignment was ill intentioned against him. In addition, Mr. Zama argues that the UNDT used his testimony against him by exaggerating the substance. In finding Mr. Bernasconi's testimony that he had informed Mr. Zama that the latter would be paid at the D-1 level for a P-5 post credible, the UNDT failed to consider that Mr. Bernasconi did not have the authority for making such an offer and therefore it was unreasonable for the UNDT to trust this testimony.

23. Fourth, Mr. Zama argues that the UNDT erred in finding that UNFPA met its obligations as it failed to consider established facts such as the three instances where UNFPA invited him to take an early separation package, which contradicts the good faith obligation of UNFPA to find him a suitable post. UNFPA and Mr. Zama are not on equal standing in the discharge of their obligations of good faith and the powers of UNFPA were oppressively exercised over Mr. Zama by way of the following: the questionable reassignment from D-1 Resident Representative in the Kenya Country Office to the post of P-5 in Johannesburg, South Africa as a Technical Advisor; the abusive use of Mr. Zama's performance appraisal; the delay in the performance appraisal rebuttal process for over a year instead of three months; the use of funds to finance a condom mission report which was withheld from Mr. Zama; the use of the same report withheld from Mr. Zama by the rebuttal panel which later revealed that the original terms of reference had been falsified and the aspects relating to accountability by the Copenhagen Procurement Office had been deleted.

24. These all serve as facts establishing an improper motive to terminate his permanent appointment. UNFPA did not meet its obligations to place Mr. Zama on a suitable post even though his attributes fit the UNFPA operations world-wide: He has over thirty years' experience within UNFPA at both Headquarters and in the field, 13 years of which he served as a UNFPA Country Representative; he has obtained confirmed managerial competencies in complex humanitarian/post conflict settings and is bilingual in both English and French.

25. Lastly, Mr. Zama notes that it took the UNDT 22 months to issue its Judgment and such delay harmed his ability to obtain relevant after-service benefits and justice delayed is justice denied.

26. Mr. Zama requests that the Appeals Tribunal overturn the UNDT Judgment and grant his case on the merits or remand the case to the UNDT.



27. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss the appeal in its entirety. In support of his request, the Secretary-General asserts that the UNDT properly determined that whether the reassignment was justified was not properly before it. The UNDT correctly concluded that UNFPA had fulfilled its obligations under the Staff Regulations and Rules and UNFPA's legal framework on abolition of posts involving staff members with permanent appointments, and that the framework required those affected to apply for suitable posts. Mr. Zama received documentation on the restructuring, which included a detailed guideline on the process, an agreed separation plan, information about a job fair, and information informing him and all affected staff members that they must apply to available positions. More specifically, the UNFPA human resources specialist met with Mr. Zama and invited him to apply for three specific posts at the P-5 level and to apply to suitable posts at the job fair. He was also assured that he would receive the D-1 salary. Based on the evidence, the UNDT correctly found that UNFPA discharged its obligation under the legal framework.

28. The Secretary-General further argues that the UNDT correctly found that Mr. Zama failed to fulfil his own obligations to cooperate given his refusal to apply to vacancies or show interest as required by the legal framework and the jurisprudence of the Appeals Tribunal. The UNDT correctly found that Mr. Zama acted to the contrary—he refused to apply to posts brought to his attention and made it clear that he was not interested in the available posts. Having found no substantive legal or factual defects nor procedural violations, the UNDT correctly affirmed the contested decision. The Appeals Tribunal should therefore affirm the UNDT Judgment.

29. The Secretary-General argues that Mr. Zama failed to identify any error by the UNDT as required by the Appeals Tribunal Statute. In

the UNDT and his appeal is an attempt to reargue his case. Mr. Zama's appeal is therefore not receivable before the Appeals Tribunal.

30. Lastly, the Secretary-General notes that Mr. Zama claims there was a 22-month delay by the UNDT in rendering its Judgment. However, Mr. Zama has not provided any evidence of harm.

31. The Secretary-General requests that the Appeals Tribunal dismiss the appeal and affirm the UNDT Judgment.



The 29 March 2012 reassignment decision

32. Most of Mr. Zama's submissions on appeal deal with the 29 March 2012 decision to

The 21 April 2014 termination decision

35. It follows that the only relevant issues with regard to the lawfulness of the 21 April 2014 termination decision are (i) whether the decision to abolish Mr. Zama's post was ill-motivated and was connected to the 2012 reassignment in a sense that Mr. Zama's post in South Africa was chosen for abolishment because of his management of the condom crisis in Kenya; and (ii) whether the Administration, during the restructuring process, fulfilled its duties towards Mr. Zama as a staff member on a permanent appointment.

36. The UNDT did not err in holding that there was no nexus between the 2012 reassignment and the abolition of Mr. Zama's

38. The relevant legal and administrative framework then in effect is the following:

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(a) A termination within the meaning of the Staff Regulations and Staff Rules is a separation from service initiated by the Secretary-General.

(b) Separation as a result of resignation, abandonment of post, expiration of appointment, retirement or death shall not be regarded as a termination within the meaning of the Staff Rules.

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(c) The Secretary-General may, giving the reasons therefor, terminate

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(ii) No termination under staff rule 9.6 (c) (v) shall take place until the matter has been considered and reported on by a special advisory board appointed for that purpose by the Secretary-General. The special advisory board shall be composed of a Chairman appointed by the Secretary-General on the nomination of the President of the International Court of Justice and four members appointed by the Secretary-General in agreement with the Staff Council.

(c) Staff regulation 9.3 (b) and staff rule 9.6 (d) do not apply to

Staff Rule 9.6(e) further provides:

“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

Actions by DHR or relevant managers in the field:

7.2.12 In addition, the following steps may

added that “[i]t was also understood that, as for the post he was encumbering, he would have retained the same personal grade as D1 also on those positions. And [Mr. Bernasconi] also explicitly told him this. This is also a practice UNFPA follows as we have other staff currently on a different personal grade than their post grade and this can be checked against in the Monthly Global Staff Tables generated from Atlas.” During the hearing before the UNDT, Mr. Bernasconi reconfirmed that he had invited Mr. Zama to apply to the P-5 positions and had explicitly told him that he would retain the D-1 grade. He also reconfirmed that he had the full authority to make such a suggestion to Mr. Zama. Mr. Zama has not presented any arguments which would cast doubt on the credibility of Mr. Bernasconi and the truthfulness of his presentation of the facts.

41. UNFPA had no obligation to add Mr. Zama to a list of applicants or to shortlist him for an available post. The UNDT correctly pointed out that, while the staff member’s duty under paragraph 7.2.11 of the PPPM to apply to available posts is mandatory, paragraph 7.2.11 of the PPPM grants discretion to the Administration whether to “[d]raw the attention of such staff members to specific posts that are available and solicit an application to the post from the staff member” and/or to “add the staff member in question to a list of applicants or to a shortlist for an available post even if the staff member did not submit an application for that post”. As Mr. Zama had been expressly told and invited to apply for certain positions but refused to do so, the Administration could reasonably assume that Mr. Zama was not interested in participating in the selection process for these positions and that there was no need to add him to the list of applicants.

42. Contrary to Mr. Zama’s allegations, the offer of a separation package in the context of the restructuring process does not show bad faith on the part of the Administration. Mr. Bernasconi confirmed that an agreed separation programme was an option offered to all staff members affected by the restructuring process, conditions and eligibility being spelled out in the specific guidelines.

Alleged delay in the issuance of the UNDT Judgment

43. Article 2(1) of the Appeals Tribunal Statute reads:

The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:

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