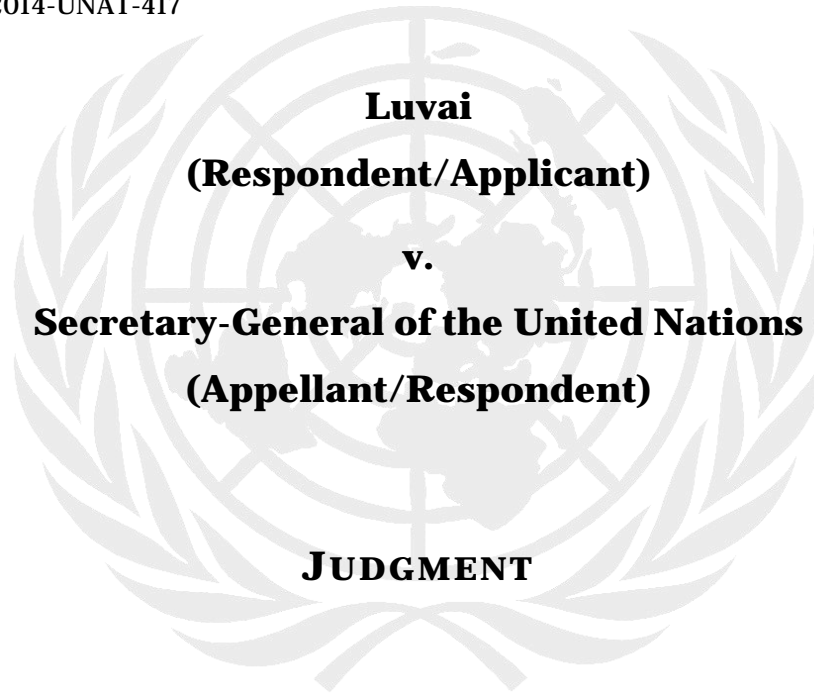




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-417



**Luvai
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Mary Faherty, Presiding
Judge Luis María Simón
Judge Rosalyn Chapman

Case No.: 2013-469

Date: 2 April 2014

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Self-represented

Counsel for Appellant/Respondent: John Stompor

JUDGE MARY FAHERTY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/035, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 28 February 2013 in the case of *Luvai v. Secretary-General of the United Nations*. The Secretary-General appealed on 30 April 2013, and Mr. Moses Jaika Luvai answered on 30 June 2013.

Facts and Procedure

2. The Dispute Tribunal made the following findings of fact, which are not contested by the parties¹

... The Applicant is a Senior Security Officer at the rank of a Sergeant, GS-5, with the United Nations Office at Nairobi's Department of Safety and Security ("UNON/DSS").

...

... The Applicant's official fire arm was revoked by the Chief, UNON/DSS in October 2006 on grounds of his performance. Since the revocation of his official firearm the Applicant had been attending weapons qualification training without a firearm.

... On 23 March 2010, a vacancy announcement ("VA 1") was advertised for six G-6 posts for Security Lieutenant within UNON/DSS. On 19 April 2010, two vacant posts were advertised for the same post for Security Lieutenant G-6 UNON/DSS ("VA 2") [.]

... The Applicant applied for the posts in both VA 1 and VA 2. UNON/DSS decided that, given the identical requirements for the two vacancy announcements and in the interest of saving time and resources, the recruitment process of the two posts should be merged.

... A total of 11 candidates including the Applicant were shortlisted, all the shortlisted candidates were internal applicants at the G-5 level serving as Security Sergeants within UNON/DSS and seeking promotion to the G-6 level.

... The 11 shortlisted candidates were interviewed on 27 May 2010. The interview panel comprised of the Deputy Chief of UNON/DSS, Mr. Roger Lewis, Mr. Donald Zimmer, Safety and Security Officer at the United Nations Human Settlement Programme and Mr. Elsaid Karara, Security Coordinator UNON/DSS.

... Following the interview, the panel recommended all the 11 shortlisted candidates including the Applicant as demonstrating the requisite qualifications, experience, and

¹ The following text is taken from Judgment No. UNDT/2013/035, paras. 1-28.

competencies for the G-6 Security Lieutenant posts. The interview panel considered the ability to carry a fire arm as a desirable skill for the post of Security Lieutenant.

... On 25 June 2010, the Programme Case Officer (“PCO”) submitted the list of the 11 candidates to the Secretary of the Central Review Panel (“CRP”), Mr. Sousa Jossai for endorsement.

... By a memorandum dated 13 September 2010 the CRP endorsed the list of recommended candidates and indicated that it was satisfied that UNON/DSS had properly applied the relevant evaluation criteria and the prescribed procedures under Administrative Instruction ST/AI/2002/6. The names of eight candidate selected from the list of 11 endorsed by the CR[P were] sent to UNON’s Director, Division of Administrative Services.

... On 16 September 2010, the eight candidates selected to fill in the eight vacant posts were notified of their selection. The Applicant was not one of the eight selected candidates.

... The Applicant sought management evaluation of the decision not to select him for the post of Security Lieutenant on 21 November 2010. By letter dated 13 January 2011, the [Management Evaluation Unit (MEU)] informed the Applicant of its decision to uphold the decision of the Secretary-General not to select him for the Security Lieutenant post.

... On 8 March 2011 while the Applicant was on leave, the Information Communication Technology Service (“ICTS”) informed the Chief, UNON/DSS that obscene and pornographic materials had been discovered in the Applicant’s private folder on the network shared hard drive.

... The Chief UNON/DSS, on 9 March 2011, instructed the ICTS to suspend the Applicant’s access to his Lotus Notes e-mail account until a preliminary investigation was initiated to verify the allegation that the Applicant had misused the United Nations information technology assets.

... Upon his return from leave on 28 March 2011, the Applicant raised a query with the ICTS help desk concerning his inability to access his Lotus Notes e-mail account. By email dated 29 March 2011 the ICTS service desk informed him that on the instructions of the Chief, UNON/DSS, his Lotus Notes had been disabled because it was discovered that he had used his email account to exchange pornographic material.

... On 15 April 2011, UNON/DSS referred the matter of the Applicant’s alleged misuse of the ICTS resources to the Special Investigation Unit of the Security and Safety Section at the United Nations International Criminal Tribunal for Rwanda (“SIU/ICTR”) for investigation.

... The Applicant filed his Application in case UNDT/2011/020 on 28 April 2011. The Respondent filed a reply to this Application on 19 July 2011.

... On 2 May 2011, the Applicant wrote to the Chief, Africa Section, Investigation Division, Office of Internal Oversight Services (“ID/OIOS”) inquiring whether ID/OIOS had carried out any investigations before the suspension of his Lotus Notes account. The ID/OIOS responded the same day and informed him that it had not carried out any investigation in respect to him and that the OIOS intake committee had referred the matter back to UNON/DSS for appropriate action.

... The Applicant sought management evaluation of the decision to suspend his access to his Lotus Notes account on 29 March 2011. On 14 July 2011 the management evaluation unit communicated its decision upholding the decision to suspend his access to Lotus Notes.

... SIU/ICTR issued its fact-finding report on the [Applicant’s] alleged misuse of the UN ICTS resources on 12 August 2011. The SIU/ICTR issued an addendum to the same fact-finding investigation report on 28 September 2011.

... The SIU/UNICTR investigation reports concluded that the statements and type of the photographic and video materials gathered in the course of investigations were found within the Applicant’s private folder. The materials found were obscene and pornographic and a clear violation of section 4.1 of ST/SGB/2004/15, (Use of information and communication technology resources and data).

... The Applicant filed the second Application contesting the closure of his Lotus Notes account, case UNDT/NBI/2011/057 on 9 September 2011.

... A motion for production of documents was filed by the Applicant on 12 September 2011. The Applicant prayed that the [Dispute] Tribunal order the Respondent to produce the following documents: the report of the investigation that was conducted [by] SIU/ICTR with regards to the closure of his Lotus Notes account; an investigation report on a 7.2 mm bullet allegedly found in the office of Mr. Jorum Mkunde and; an investigation report on matters addressed by Mr. Jones Atogo in a 26 May 2006 memorandum to Mr. David Venness relating to certain concerns within the ranks of the Security and Safety Services of UNON.

... On 10 October 2011 the [Dispute] Tribunal issued a ruling on the motion for production of documents. The [Dispute] Tribunal ordered the Respondent to produce all the documents prayed for by the Applicant [.]

... The Respondent made an ex-parte production of documents and an application to maintain confidentiality of the same on 18 October 2011. The Applicant asked the [Dispute] Tribunal to make the said documents available to him in the interest of justice. The [Dispute] Tribunal allowed the production of documents to be done in an ex-parte basis as per the Respondent’s request.

... The Respondent produced two documents, that is, the Report of the SIU/UNICTR and the report of the investigation by DSS Compliance, Evaluation and Monitoring Mission to UNON. The Respondent submitted that he was unable to find any report on the 7.2 mm bullet that was allegedly found in Mr. Mkunde's office.

3. In Judgment No. UNDT/2013/035, the Dispute Tribunal held that Mr. Luvai's claim against the 2006 decision to revoke his licence to bear an official firearm that he had submitted to the MEU for management evaluation on 29 March 2011, like all of his other claims, was receivable, as it was interlinked with the selection process and did not stand alone. The UNDT noted that the MEU had dealt with the firearm qualification issue as part of Mr. Luvai's submissions on his non-selection decision. On the merits, the Dispute Tribunal determined that Mr. Luvai's candidacy for the Security Lieutenant posts had not been fairly and fully considered at the selection stage, that he was a victim of harassment in the workplace, that the Chief of UNON/DSS had abused and exceeded his authority by revoking Mr. Luvai's firearm licence without providing reasons for his decision and by not restoring his access to Lotus Notes after the investigations had been completed and no further action had been taken on the matter. It also determined that the Chief of UNON/DSS, the Assistant Chief of Security UNON and the Human Resources Officer, UNON, had abused their authority by usurping the powers of the Medical Director and declaring Mr. Luvai mentally unstable.² Consequently, the UNDT ordered that Mr. Luvai's licence to bear a firearm be reinstated, that his access to Lotus Notes be restored and that he be awarded six months' net base salary for the violation of his right to full and fair consideration in the selection process and for being subjected to harassment and abuse of authority.

Submissions

The Secretary-General's Appeal

4. The Secretary-General submits that the UNDT exceeded its jurisdiction in reviewing the 2006 decision to revoke Mr. Luvai's licence to carry a firearm. Mr. Luvai's failure to file a

² In his oral testimony at the Dispute Tribunal, Chief of Security of UNON/DSS stated that before the withdrawal of his firearm, Mr. Luvai was sent to counselling, which was not successful. The Human Resources Officer, UNON and the Assistant Chief of Security, UNON informed the Chief of Security of UNON that Mr. Luvai demonstrated instability. The Chief of Security then decided that Mr. Luvai may regain his weapon if he could show mental stability and an understanding of the Organization's policy on the use of force.

timely request for administrative review rendered his claim regarding the 2006 decision not receivable and deprived the UNDT of jurisdiction to reach the merits of the claim. The Secretary-General maintains that a party who failed to raise any claim within the applicable deadlines should not be able to revive the claim by appending it to a claim regarding a more recent decision. If the UNDT's assertion of jurisdiction over time-barred claims were to be confirmed, time limits would essentially be rendered meaningless. Such an approach would allow any decision – no matter how old – to be contested since any staff member could quite easily link a previous administrative decision with a subsequent administrative decision. In this connection, the Secretary-General also submits that in ordering the reinstatement of Mr. Luvai's licence to carry a firearm, the Dispute Tribunal exceeded its jurisdiction by substituting its judgment for that of the Administration.

5. The Secretary-General also submits that the UNDT erred in concluding that the decision not to select Mr. Luvai for the advertised posts was unlawful. Contrary to the UNDT's conclusion, there was a reasonable basis for the Director-General of UNON to select candidates other than Mr. Luvai. His authorization to carry a firearm had been revoked. Moreover, he had not completed a UN firearm qualification course. It was therefore reasonable for the Administration to take into account Mr. Luvai's lack of such authorization and requisite training.

6. The Secretary-General further submits that the Dispute Tribunal erred in concluding that the decision to disable Mr. Luvai's e-mail account was unlawful. Contrary to the UNDT's conclusions, the Administration had blocked Mr. Luvai's access to his e-mail account not only to ensure the integrity of the investigation into his alleged misuse of information communication technology (ICT) resources but also to prevent him from engaging in the prohibited activity of using the ICT resources to obtain, store or distribute pornography. The Secretary-General notes that this was not the first incident of misuse of ICT resources on the part of Mr. Luvai. He had previously been found to be using ICT resources to store obscene materials. Moreover, the use of a United Nations e-mail account was not necessary for Mr. Luvai's conduct of his work. The denial of access to his United Nations e-mail account did not deprive Mr. Luvai of information related to his official duties.

7. Finally, the Secretary-General submits that the Dispute Tribunal exceeded its jurisdiction and erred on questions of law and procedure in conducting a *de novo* investigation into harassment and abuse of authority, concluding that the Chief of

UNON/DSS had subjected Mr. Luvai to harassment and abuse of authority, and finding that the Deputy Chief of UNON/DSS and the Human Resources Officer had abused their authority in respect of Mr. Luvai.

8. The Secretary-General requests that the Appeals Tribunal order the redaction of the names of the Chief of UNON/DSS, Deputy Chief of UNON/DSS and Human Resources Officer from the UNDT Judgment under appeal. He maintains that the naming of these staff members was not necessary to the conclusions of the UNDT Judgment, and was prejudicial to them. He further requests that this Tribunal not refer to these staff members by name.

9. The Secretary-General also requests that this Tribunal annul the UNDT Judgment in its entirety.

Mr. Luvai's Answer

10. Mr. Luvai submits that the Dispute Tribunal correctly concluded that it had jurisdiction to review the 2006 decision to revoke his authorization to carry a firearm as it was interlinked with the selection process and did not stand alone. In his view, the Dispute Tribunal did not exceed its jurisdiction in ordering the reinstatement of his authorization to carry a firearm.

11. Mr. Luvai also submits that the Dispute Tribunal did not err in concluding that the decision not to select him for the advertised posts was unlawful and in ruling that his candidacy was not given full and fair consideration.

12. Mr. Luvai further submits that the UNDT correctly concluded that disabling his access to his United Nations e-mail account and keeping it disabled after an investigation had been completed was unlawful and that the UNDT correctly ordered the restoration of his access.

13. Lastly, Mr. Luvai contends that it is not correct for the Secretary-General to imply that the Dispute Tribunal had embarked on a *de novo* investigation. He recalls that it was the Secretary-General who introduced the names of the Chief of Security of UNON/DSS, Deputy Chief of Security of UNON/DSS and the Human Resources Officer to the Dispute Tribunal.

14. Mr. Luvai prays that this Tribunal deny the Secretary-General's request for confidentiality. In his view, the UNDT's discussion about these three staff members concerns their official duties and does not involve the disclosure of any personal and sensitive information.

Considerations

Did the Dispute Tribunal exceed its jurisdiction in reviewing the 10 October 2006 decision to revoke Mr. Luvai's firearm licence?

15. The Dispute Tribunal ruled that Mr. Luvai's claim regarding the revocation of his firearm licence, as detailed in his UNDT application dated 28 April 2011, was "not an independent claim" and that it was "interlinked" with his challenge of the decision not to select him for VA 1 and VA 2. Accordingly, the UNDT determined that Mr. Luvai's claim regarding the revocation of his firearm licence was receivable.

16. To put this issue into context, some factual background is necessary. On 10 October 2006, Mr. Luvai was notified of the decision to revoke his firearm permit in the following terms:

Reference paragraph D number 7 & 8 (Use of Firearm) of the Policy Governing the use of Physical Force and the Use of Firearms by United Nations Security Officers (see attached), your authorization to carry service weapon (Glock) Serial Number GRK 675 is revoked effective 10 October 2006 until further notice.

In your current functions as the Deputy Team Leader, you are not authorized to issue, receive or handle service weapons for Security personnel at anytime.

In line with the above, you are to hand in your weapons permit to the Armorer, after receipt of this memo.

17. On any reading of this communication, it was an administrative decision capable of challenge by Mr. Luvai by way of a request for administrative review. Indeed, it is noted that on the same day he received this communication, his counsel wrote to the Chief of DSS requesting, *inter alia*, reasons for the revocation and seeking unconditional reinstatement of Mr. Luvai's authority to carry his assigned weapon. However, no further steps were taken by the staff member at that time.

18. Former Staff Rule 111. a, applicable at the relevant time, provided that “[a] staff member wishing to appeal an administrative decision ... shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed”. That Staff Rule also provided that “such letter must be sent within two months from the date the staff member received notification of the decision in writing”.

19. The jurisprudence of the Appeals Tribunal has consistently affirmed that the steps of management evaluation, or administrative review under the former internal justice system, “are required to be exhausted before the jurisdiction of the UNDT can be invoked”³ In *Ajdini*, the Appeals Tribunal stated that the “UNDT has no jurisdiction to waive deadlines for management evaluation or administrative review”,⁴ reflecting the provision of Article 8(3) of the UNDT Statute which provides that the Dispute Tribunal “shall not suspend or waive the deadlines for management evaluation”. Accordingly, it follows that the 10 October 2006 decision would not, on a stand-alone basis, have been receivable by the Dispute Tribunal in 2011. The question to be decided is whether the events of September 2010 (Mr. Luvai’s non-selection for the two vacant posts) gave rise to a circumstance where the Dispute Tribunal could regard the revocation of the firearms permit as sufficiently interlinked to those events such as to admit Mr. Luvai’s complaint about its revocation.

20. On 21 November 2010, Mr. Luvai sought management evaluation of the decision not to select him for VA 1 and VA 2 in the following terms:

1. Refusal to select Sergeant Moss Jaika Luvai to fill one of the 7 Vacant Security Lieutenant Posts (Vacancy Announcement Numbers 10-SEC-UNON-424103-R-NAIROBI and 10-SEC-UNON-424422-R-NAIROBI); and
2. Selection of officers who were either recently recruited, junior in rank and/or had been recently selected/promoted during an earlier set of *irregular* Vacancy Announcements. (Emphasis in original)

21. Contrary to what is decided at paragraph 65 of the UNDT Judgment, there was no reference in the request for management evaluation that Mr. Luvai was not selected for the posts in question because he did not possess a licence to bear firearms and was therefore considered as not capable of handling a firearm. Rather, Mr. Luvai cited irregular recruitment practices and/or retaliation for prior challenges he had made regarding his non-

³ *Planas v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-049, para. 23.

⁴ *Ajdini et al. v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-108, para. 5.

selection for other vacancies as the basis for his non-selection for the posts in issue in this appeal.

22. In its response of 13 January 2011, the MEU stated as follows:

You contend that the failure to select you for one of the Posts came in retaliation for the fact that you previously challenged irregular vacancy announcements, and “as a show of impunity well-grounded in the fact that the Chief of the Security has the capacity of influencing the decisions of both the recruitment process and the Internal Justice System of the United Nations.” You assert that no explanation was given as to your unsuitability for any of the Posts. You contend that the candidates selected were either recently recruited, junior in rank and/or had been recently selected/promoted during an earlier “irregular” selection process. You argue that the SSS violated the princip[le] of preference for members of the international career service in filling vacancies, and failed to disclose any superior qualifications possessed by the selected candidates over your own.

In its comments on your request, SSS contended that it meticulously followed the requirements of the staff selection process and accorded you the full measure of your right to receive full and fair consideration for the Posts. SSS argued that your seniority did not in any way entitle you to preferential treatment in the selection decision for the Posts. SSS pointed out that you put forward no evidentiary support for your speculation of a conspiracy to prevent your promotion, and that your contention in this regard had no factual basis. It further contended that you were assessed and found to possess the qualifications and competencies for the Posts and, on the basis of that assessment, the interview panel placed you on a list of recommended candidates. The CRP subsequently endorsed you as one of the candidates possessing the competencies and other requirements for the Posts and you were rostered for similar posts accordingly.

It further stated:

Having regard to the documents provided to it by the Administration, the MEU noted that, contrary to the assertions in your request, you were not found to be unsuitable for the Posts. Rather, you were among the candidates recommended and endorsed by the CRP. Examining the selection process to review whether your right to the full and fair consideration of your candidacy was observed following the CRP endorsement, the record shows that, in deciding which candidates would be better suited for the Posts, SSS evaluated the candidates on job performance during their tenure with the Organization, compared their strengths and weaknesses, their skill sets, and UN core values and competencies. The distinguishing factor in the selection process came down to the desirable skills of the VAs, and specifically, “certified knowledge or sound experience in the handling of firearms.” The eight selected candidates had passed the

United Nations firearm qualification course, while you had not. Recalling that this skill was only considered as desirable rather than required, the MEU nevertheless considered this was a reasonable basis on which to choose from the eleven suitable candidates to fill the eight vacant posts.

23. While it is certainly the case that the MEU response alluded to Mr. Luvai's firearm qualifications, there is nothing in the letter of 13 January 2011 that could reasonably be said to be a response to a request for management evaluation either of the events of 10 October 2006 or of any action taken in 2010 which linked his non-selection for the posts in question to the firearm licence revocation. To that point in time Mr. Luvai had not raised this issue with the MEU.

24. Mr. Luvai's application to the Dispute Tribunal was filed on 28 April 2011. At paragraph 3 thereof he described the contested decision as "(t)he decision not to promote me to the rank of Lieutenant".

25. Under the heading "Facts of the Case", he gave the following details: "[O]n or immediately before the annual weapons qualifications exercise, the Respondent through the Applicants supervisor, Mr. Peter Marshall, Chief Security Officer, withdrew his official firearm a Glock 19 serial number GRK-675". This was a reference to the revocation order of 10 October 2006.

26. Mr. Luvai went on to state:

The removal of the firearm from the Applicant was done without any reasonable ground and not in good faith since there was no disciplinary matter pending against him nor had the Applicant mishandled the weapon or misused his authority as a UN Officer.

The Respondent acted maliciously, unjustifiably and unfairly by requiring the Applicant to undergo a weapons qualifications training without a firearm, a basic requirement for any UN Security operation as provided for in the UN Staff Rules and prohibition of discrimination, harassment and abuse of office guidelines contained in ST/SGB/2008/5 ...

27. At paragraph 67 of its Judgment, the Dispute Tribunal stated that "[i]t is obvious that the MEU dealt with the firearm qualification issue as part of the Applicant's submissions on his non-selection decision".

28. However, having reviewed the contents of the request for management evaluation and the response of the MEU thereto, the Appeals Tribunal is satisfied that there was nothing in Mr. Luvai's request of 21 November 2010 which suggested that he was challenging a decision made some four years previously. His request of 21 November 2010 is clear and unambiguous. It clearly identifies the disputed management decision as the failure to select him to fill the advertised vacancies and the selection of officers who were either unsuitable or themselves previously selected or promoted on an irregular basis. Indeed, much of Mr. Luvai's management evaluation request comprises a critique of prior selection processes which were, incidentally, the subject matter of a prior application to the UNDT by Mr. Luvai.⁵ We find that no reasonable or objective analysis of Mr. Luvai's submissions to management, prior to his application to the UNDT, regarding his non-selection for the posts in issue could lead to a conclusion that the revocation of his firearm licence was sufficiently linked to the non-selection decisions such as to deem the matter a receivable issue for the UNDT. Accordingly, we find that the UNDT erred in fact and law in deciding otherwise and that, in purporting to adjudicate on the revocation of Mr. Luvai's firearm licence, the UNDT acted in excess of its competence.

Did the UNDT exceed its jurisdiction in ordering the reinstatement of Mr. Luvai's firearm licence?

29. The Secretary-General argues that in directing the Administration to restore Mr. Luvai's licence to bear a firearm the UNDT exceeded its jurisdiction. In paragraphs 103-124 of the UNDT Judgment, reference is made to the UNON/DSS Chief's testimony about his particular involvement in the decision taken in 2006 and the actions undertaken by the Administration before the decision to revoke the licence was issued. The UNDT found that "the Chief, UNON/DSS abused his authority by revoking [Mr. Luvai's] firearm licence without providing reasons for his decision" and found that "the Chief, UNON/DSS, the Assistant Chief of Security UNON and the Human Resources Officer, UNON abused their authority by usurping the powers of the Medical Director and declaring [Mr. Luvai] mentally unstable".

⁵ See *Luvai v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-014, which disposed of Mr. Luvai's appeal from Judgment No. UNDT/2009/074 under the same title.

30. These findings were predicated on the UNDT's determination that it had jurisdiction to consider the revocation of the firearm permit, a determination that this Tribunal has found to be in excess of the Dispute Tribunal's jurisdiction. Thus, in as much as the UNDT did not have the statutory authority to receive the issue of the firearm permit revocation, it similarly lacked jurisdiction to make any determination on its restoration. Accordingly, the appeal on this ground is upheld.

Did the UNDT err in concluding that the decision not to select Mr. Luvai for the vacancies was unlawful?

31. It is established in the jurisprudence of this Tribunal that with regard to promotion cases, every stage of the selection procedure is subject to judicial review, in order to ascertain (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.⁶

32. We have also stated that “[t]he Secretary-General has a broad discretion in making decisions regarding promotions and appointments. In reviewing such decisions, it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process”.⁷ In *Andrysek* we held that a candidate for promotion “has a right to full and fair consideration, not to a promotion”.⁸

33. An analysis of the selection record establishes that Mr. Luvai's application for promotion was received; that he passed the written test and that he was one of eleven candidates who were shortlisted for interview which duly took place on 27 May 2010 in front of a three-person interview panel.

34. A perusal of the evaluations prepared by the interview panel, which were later used by the Administration for the purpose of selecting the successful candidates, shows that Mr. Luvai was found not to have passed “[a] UN firearm qualification course”, a skill which at least nine of the other candidates were acknowledged as possessing.

⁶ *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, para. 23.

⁷ *Ibid*, para. 24.

⁸ *Andrysek v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-070, para. 17.

35. However, by 25 June 2010 and 2 September 2010 respectively, he was one of eleven candidates identified at the 30-day mark for transmission to the CRP for review. With respect to the first advertised vacancy, on 9 July 2010, he was evaluated by the CRP as one of eleven candidates suitable for selection or placement on the roster.

36. On 13 September 2010, he was likewise approved as meeting the requirements for the other advertised vacancy, either for selection or placement on the roster. It is common case that his name was duly placed on the roster for two years.

37. The Dispute Tribunal determined that Mr. Luvai was unfairly treated at the *interview* stage because the interview panel failed to consider the material issues regarding Mr. Luvai's firearm qualification and that this failure impacted unfavourably on his selection chances. This decision was arrived at on the basis of contradictions between evidence given by Mr. Luvai's superiors and the written record, in particular, Management's response to the MEU.

38. The Appeals Tribunal is satisfied that the UNDT erred manifestly in concluding that Mr. Luvai was unfairly treated at the *interview* stage, in circumstances where, as the record demonstrates, the interview panel recommended him as one of eleven candidates to be considered for selection notwithstanding that he had "not passed a UN firearms qualification course", *which was in fact the case*. Thus, while it was a material issue for the interview panel that Mr. Luvai could not satisfy this desirable skill, the panel did not however impede his progress to the next stage of the selection process.

39. The UNDT also impugned the process on the ground that Mr. Luvai's candidacy was not fairly considered at the *selection* stage.

40. The selection of duly qualified candidates for promotion is a power vested in the Administration. With regard to the circumstances of the present case, we are not satisfied that, as required by our jurisprudence,⁹ Mr. Luvai has demonstrated by clear and convincing evidence that he was denied a fair chance of promotion. We do not regard the contradiction of Mr. Luvai having been placed on the roster notwithstanding, it would appear, reservations about his performance as sufficient for the UNDT to trespass upon the discretion that is vested in the Secretary-General.

⁹ *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122.

41. Absent any evidence of consideration of irrelevant material or the omission of relevant factors or bias or discriminatory conduct on the part of the decision-maker, it was within the discretion of the Secretary-General to select those candidates who had passed the requisite recent firearm qualification course, and we accept the argument that the authorization to carry a firearm and to have up-to-date firearms training are factors to which the Secretary-General could have due regard, in addition to considering a candidate's employment record within the Organization. Furthermore, we are satisfied that Mr. Luvai has failed to establish that his non-selection was motivated by bias or discriminatory or retaliatory conduct.

42. Accordingly, we determine that in holding that Mr. Luvai's non-selection was unlawful, the UNDT erred manifestly in fact and in law and the appeal on this ground is upheld.

Did the UNDT err in concluding that the decision to suspend Mr. Luvai's Lotus Notes e-mail account was unlawful?

43. The Secretary-General's Bulletin on "Use of information and communication technology resources and data" (ST/SGB/2004/15) provides the statutory basis upon which access to information and communication technology (ICT) resources is made available to staff members, including provision for the regulation of personal use by staff.

44. Section 4.1 states:

Authorized users shall be permitted limited personal use of ICT resources, provided such use:

- (a) Is consistent with the highest standard of conduct for international civil servants (among the uses which would clearly not meet this standard are use of ICT resources for purposes of obtaining or distributing pornography, engaging in gambling, or downloading audio or video files to which a staff member is not legally entitled to have access).

45. Section 4.3 provides:

Personal use is a privilege that may be modified or withdrawn at any time, depending on the needs of the Organization. Authorized users shall bear full responsibility and liability in connection with their personal use of ICT resources and the Organization shall not bear any responsibility or liability in respect thereof.

46. Under Section 6.1, the Organization retains “all rights in ICT resources and ICT data and in any work product of an authorized user using ICT resources or ICT data” and “the right to block or restrict access to any ICT resource or ICT data, at any time and without notice, when necessary for maintaining or restoring the technical integrity or performance thereof or for any other appropriate purpose, including prevention of any of the activities prohibited under section 5 of this bulletin”.

47. Among the myriad of prohibited actions under Section 5 is the prohibition on users “knowingly, or through gross negligence, using ICT resources or ICT data in a manner contrary to the rights and *obligations* of staff members”. (Emphasis added)

48. The Organization’s powers of investigation into suspected breaches of the code of conduct for users, as set out in the bulletin, are contained in Section 8 which, *inter alia*, provides: “At any time there is reason to believe that there has been use which interferes with the operation of ICT resources or technical disruption of ICT resources, ITSD or a corresponding office away from Headquarters may initiate monitoring or an investigation.”

49. In the present case, a Section 8 investigation was duly initiated on 15 April 2011, following the discovery of pornographic material on Mr. Luvai’s shared drive and it was duly conducted by SIU/ICTR, who reported on its fact-finding on 12 August 2011.

50. Mr. Luvai’s challenge to the suspension of his access to ICT resources in March 2011 was filed with the UNDT on 9 September 2011, approximately one month after the SIU/ICTR reported.

51. Hearings into his two UNDT applications were conducted between 11 October 2011 and 18 September 2012, and it was duly ascertained by the UNDT that, as of September 2012 and notwithstanding the factual findings of the SIU/ICTR, the Administration had not referred the Investigation Panel’s findings to the Assistant Secretary-General for Human Resources Management, pursuant to paragraph 3 of administrative instruction ST/AI/371 entitled “Revised disciplinary measures and procedures”.¹⁰

¹⁰ Paragraph 3 of ST/AI/371 reads: If the preliminary investigation appears to indicate that the report of misconduct is well founded, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management, giving a full account of the facts that are known and attaching documentary evidence, such as cheques, invoices,

52. Commenting on this, the Dispute Tribunal opined that “if the withdrawal of [Mr. Luvai’s] access to Lotus Notes was imposed only to secure the integrity of the investigation, the proper procedure would have been to restore access upon the completion of the investigation. Surprisingly, this is not the case and so from August 2011 when the investigations were concluded to date [Mr. Luvai’s] access to Lotus Notes has not been restored while no disciplinary action was commenced against him.”¹¹ The UNDT formed its view that the access had only been suspended to protect the integrity of the investigation on the basis of an entry in the SIU/ICTR report to that effect.

53. In this appeal, the Secretary-General contends that the Dispute Tribunal “erred in concluding that the decision to disable [Mr. Luvai’s] UN e-mail account was unlawful” and that it erred in ordering that the access be restored.

54. Contrary to the general thrust of the Secretary-General’s claim, the UNDT did not specifically declare the initial suspension of Mr. Luvai’s access to Lotus Notes unlawful, rather, a careful reading of the Judgment shows that the Dispute Tribunal took issue with the absence of a referral under ST/AI/371, a circumstance the Dispute Tribunal considered as empowering it to restore Mr. Luvai’s access to Lotus Notes. Did the UNDT err in doing so? We are satisfied, given the particular circumstances of this case, that it did. We accept the Secretary-General’s argument that the Administration is entitled to take measures under Section 6.1(b) of ST/SGB/2004/15 to ensure compliance with the “highest standard of conduct for international civil servants”, as provided for in Section 4.1(a).

55. The Administration has a vested interest in ensuring those standards are maintained and was thus entitled to take preventive action in March 2011 without notice to Mr. Luvai once it had established a *prima facie* infringement of Section 4.1(a). The fact that it commenced parallel procedures under Section 8 did not divest the Administration of its powers under Section 4. Nor do we consider the absence of any disciplinary follow-up to the 12 August 2011 SIU/ICTR report as a sufficient basis for interfering with the Administration’s discretion, post August 2011, to continue the suspension, particularly in circumstances where it has not been established that Mr. Luvai was at risk of being adjudicated as not being able to perform his duties as a security officer in the absence of access to his e-mail account.

administrative forms, signed written statements by witnesses or any other document or record relevant to the alleged misconduct.

¹¹ Judgment No. UNDT/2013/035, para. 101.

56. It may well be that in the future Mr. Luvai may initiate a request to his employer for the restoration of his e-mail access and depending on the management response thereto it remains open to him to request management evaluation of the response and indeed to challenge any negative decision by application to the UNDT.

57. The Secretary-General's appeal is upheld on this ground.

Did the UNDT exceed its jurisdiction and err on a question of law and procedure in determining, in the manner it did, that Mr. Luvai was a victim of harassment in the workplace and that his superiors abused their authority?

58. The Secretary-General maintains that the UNDT acted in excess of its jurisdiction and committed errors of law and procedure in conducting a *de novo* investigation into Mr. Luvai's complaints of harassment and abuse of authority. We are satisfied to uphold the Secretary-General's appeal on this ground. We do so for the following reasons: In *Messenger*, the Appeals Tribunal held: "It is clear that the UNDT is not clothed with jurisdiction to investigate harassment complaints under Article 2 of the UNDT Statute. However, for the purpose of determining if the impugned administrative decisions were improperly motivated, it is within the competence of the UNDT to examine allegations of harassment. This is different from a *de novo* investigation into a complaint of harassment."¹²

59. Before the UNDT, Mr. Luvai cited the revocation of his firearm licence in 2006, the withdrawal of his access to his Lotus Notes e-mail account and his non-selection for the two vacant posts "as just a few examples of the ways he has been harassed and intimidated". The Dispute Tribunal concluded that there was "more than a preponderance of evidence to show that [Mr. Luvai] had over several years been humiliated, abused, belittled and demeaned in a way that must not be tolerated in a standard-setting organization such as the United Nations" and found that Mr. Luvai's workplace had thus been rendered hostile by named individuals.

60. The UNDT pronounced on Mr. Luvai's claim of harassment on the revocation of his firearms licence, an action which, as we have stated, remained unchallenged by him until he appended it to his complaint to the UNDT about his non-selection. Both of his management evaluation requests and his two ensuing applications to the UNDT contained generalized allegations of harassment pertaining to the two administrative decisions under scrutiny. As

¹² *Messenger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123, para. 25.

we have set out above, we are satisfied that the generalized nature of his harassment claims, insofar as Mr. Luvai's non selection for the vacancies in question and the removal of his Lotus Notes e-mail account are concerned, does not meet the standard set by the jurisprudence of this Tribunal.¹³ The documentary record does not establish that Mr. Luvai's allegation, that his Lotus Notes access was suspended to hamper his first application to the UNDT, has any credible basis, in circumstances where his Lotus Notes account was suspended because of the presence in March 2011 of pornographic material on his shared drive.

61. We are satisfied that the UNDT's assessment and conclusions regarding Mr. Luvai's harassment complaints went far beyond the permitted judicial review of such complaints as laid down in the UNDT Statute and clarified by the Appeals Tribunal in *Messinger*.

62. If Mr. Luvai has been subject to acts of harassment and abuse of authority "over several years", then he had, and continues to have, a contractual entitlement to request that his allegations are addressed. That entitlement, and the procedural path he is obliged to take to bring his complaint to his employer, is set out in the Secretary-General's Bulletin ST/SGB/2008/5 on the "Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority".

63. This is an involved and protracted procedure given the egregious nature of the actions and practices which must be enquired into and in order to protect the rights of both the complainant and the alleged offender until resolution is achieved. In particular, the formal procedures contained in ST/SGB/2008/5 establish the officials' responsibility for receiving complaints and authorizes them to set up fact-finding panels. Section 5 of the Bulletin describes a panel as comprising at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct. Provision is made for interviews with the aggrieved individual, the alleged offender and any other relevant individual. Moreover, there is provision for an internal appeal by either the aggrieved individual or the alleged offender.

¹³ *Majbri v. Secretary-General of the United Nations*, Judgment No.2012-UNAT-200; *Rolland v. Secretary-General of the United Nations*, Judgment No 2011-UNAT-122, as to the evidentiary burden necessary to sustain such claims.

64. The investigation mechanism and conclusions provided for by ST/SGB/2008/5 can never be the preserve of the Dispute Tribunal or indeed the Appeals Tribunal, given the respective statutory remit of both. We refer, in particular, to the specific nature of judicial review reserved to the UNDT under its Statute with regard to management and disciplinary measures (which necessarily includes power to review how management has responded or not responded, as the case may be, to a complaint of harassment or abuse of power). On appeal, it falls to this Tribunal to review the conduct of the Dispute Tribunal's judicial review.

65. Thus, in harassment and abuse of authority cases, between ST/SGB/2008/5 and the jurisdiction which is vested in both Tribunals, there is a continuum of substantial and procedural protection for both complainants and alleged offenders which must be respected. It was not respected in this case. We are satisfied that the UNDT's findings and directions vis-à-vis Mr. Luvai's harassment and abuse of power allegations offended against the aforesaid continuum to such extent that the UNDT exceeded its jurisdiction and erred in law and procedure in making findings of harassment and abuse of authority. We uphold the appeal on this ground.

The Secretary-General's request for confidentiality and redaction

66. The Secretary-General submits that the naming of the Chief of Security, Deputy Chief of Security and the Human Resources Officer in the UNDT Judgment was unnecessary and in the particular circumstances of this case prejudicial to them, in light of the UNDT's findings of harassment and abuse of authority without due process being afforded to the individuals concerned. Redaction of their names is sought from the UNDT Judgment.

67. The principle of openness and transparency, which must underpin an organization such as the United Nations, means that the Appeals Tribunal is not minded to grant the relief sought by the Secretary-General. However, comfort can be taken from the fact that this Tribunal has found the UNDT to have acted in excess of its jurisdiction and unfairly with regard to the harassment and abuse of authority findings it made against the individuals concerned.

Judgment

68. The Judgment of the UNDT is set aside in its totality.

Original and Authoritative Version: English

Dated this 2nd day of April 2014 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Simón

(Signed)

Judge Chapman

Entered in the Register on this 13th day of May 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar