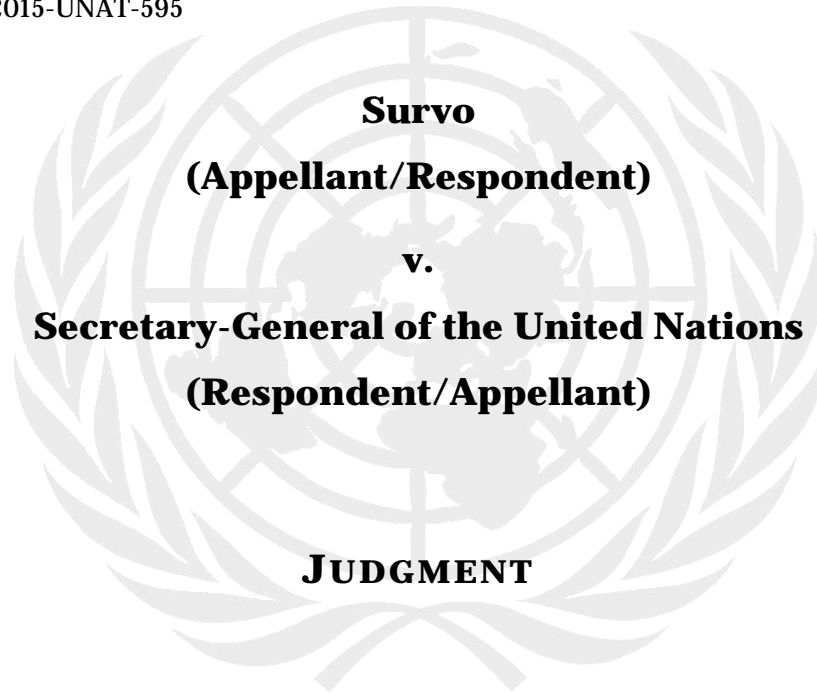




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-595



**Survo
(Appellant/Respondent)**

v.

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

JUDGMENT

Before: Judge Mary Faherty, Presiding
Judge Sophia Adinyira
Judge Inés Weinberg de Roca

Case Nos.: 2015-693 & 2015-695

Date: 30 October 2015

Registrar: Weicheng Lin

Counsel for Mr. Survo: Self-represented

Counsel for Secretary-General: Amy Wood

JUDGE MARY FAHERTY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it two appeals against Judgment No. UNDT/2014/144, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 11 December 2014 in the matter of *Survo v. Secretary-General of the United Nations*. The first appeal, registered as Case No. 2015-693, was filed by Mr. Iipo Survo on 6 February 2015, and the Secretary-General answered on 13 April 2015. The second appeal, Case No. 2015-695, was filed by the Secretary-General on 9 February 2015, and Mr. Survo answered on 13 April 2015.

Facts and Procedure

2. Between June 2003 and September 2010, Mr. Survo was the Chief of the Statistical Information Services Section (SISS) within the Statistics Division of the Economic and Social Commission for Asia and the Pacific (ESCAP) at the P-4 level.

3. In mid-July 2008, a P-5 post titled “Statistical Analyses and Publications Coordinator” was redeployed from another division to the Statistics Division. When the incumbent of that post retired in July 2009, the duties and responsibilities of the P-5 post were changed and the post was thereafter reclassified as Chief, SISS.

4. Before the UNDT, Mr. Survo contended that from when he took up his post in June 2003 to July 2009, when the new P-5 level post was created above his, successive Chiefs of the Statistics Division had attempted, unsuccessfully, to have his own P-4 level post as Chief, SISS, reclassified to the P-5 level.

5. On 2 February 2010, the new P-5 post of Chief, SISS, was advertised on *Inspira*, the United Nations employment website. In May and June 2010, Mr. Survo respectively took the written assessment and interviewed for the post.

6. On 17 June 2010, Mr. Survo was informed that he had not been selected for another position to which he had previously applied, namely Chief of the Statistical Development and Analysis Section (SDAS) at the P-5 level.

7. On 3 September 2010, Mr. Survo was informed that he had not been selected for the Chief, SISS post, but had been rostered for future vacancies with similar functions.

8. On 13 September 2010, the newly selected Chief, SISS, commenced her functions and Mr. Survo went on certified sick leave.

9. On 20 October 2010, Mr. Survo returned to work, and he and his post were transferred to a new division within ESCAP until the end of 2010.

10. On 29 October 2010, Mr. Survo requested management evaluation of the decisions not to select him for the P-5 post of Chief, SISS, and the P-5 post of Chief, SDAS, and requested that the Chief of his Division be investigated for abuse of authority and discrimination with regard to the two selection exercises. Among his submissions, he discussed ESCAP's allegedly ongoing failure to reclassify his post to the P-5 level throughout several budget cycles. By way of remedy, he requested, inter alia, "monetary compensation for the P-5 level work that [he had] been doing with P-4 benefits since June 2003 and related delayed career advancement".

11. On 13 December 2010, the Management Evaluation Unit (MEU) informed Mr. Survo that: (a) his request for review of the selection for the post of Chief, SDAS, was not receivable as he had not requested management evaluation in time and there were no exceptional circumstances that would justify a waiver of the time limits; (b) he had been given full and fair consideration for the post of Chief, SSIS; and (c) his request for review of the non-classification of his post at the P-5 level was rendered moot since his post had been reclassified in July 2009. Alternatively, the MEU noted that his claims related to reclassification of his post "would undoubtedly be time-barred".

12. On 18 March 2011, Mr. Survo filed an application with the UNDT challenging the two decisions not to select him for the P-5 level posts of Chief, SDAS, and Chief, SISS, as well as the "persistent refusal to reclassify [his] P-4 Section Chief post" to the P-5 level for the period from 2003 to 2009, during which period he contends he performed functions at a P-5 level in SISS without due compensation or recognition. By way of remedies, Mr. Survo requested that the UNDT grant him, inter alia, financial compensation for the difference in salary and benefits between the P-4 and P-5 levels since June 2003 to the date of selection of another person for that post, and financial compensation for violations related to the two selection processes.

13. On 15 April 2011, Mr. Survo filed with the UNDT a separate application for suspension of action challenging the Administration's failure to identify for him "a suitable post" prior to September 2010 when the newly selected Chief, SISS, commenced her functions. The case was assigned Case No. UNDT/NY/2011/030 and was subsequently referred to mediation.

14. On 20 April 2011, the Respondent filed his reply in the UNDT proceedings under appeal.

15. On 23 May 2011, Mr. Survo wrote to the UNDT's Registry to check on "the status of [his] case" and enquire what action he should take next. The Registry responded the following day and informed Mr. Survo that in view of the backlog of cases the UNDT had inherited from the former internal justice system, "until [he] receive[s] further directions from the Tribunal, [he] need not take any further action in relation to" his case.

16. On 23 June 2011, after having been informed by the Regional Ombudsman in Bangkok that the parties had reached agreement on the issue that had been the subject of Mr. Survo's suspension of action application in Case No. UNDT/NY/2011/030, the UNDT issued Judgment No. UNDT/2011/109 and closed that case.

17. On 13 December 2013, the Dispute Tribunal informed the parties by Order No. 340 (NY/2013) that the case would be decided on the papers and ordered the parties to file their closing submissions.

18. On 3 January 2014, Mr. Survo filed a motion seeking directions with regard to the production of documents, the scheduling of a case management discussion and asked that the Dispute Tribunal rescind its order for summary judgment.

19. On 30 January 2014, by way of Order No. 22 (NY/2014), the Dispute Tribunal noted that neither party had requested, nor had the Tribunal indicated, that a hearing was required or that the matter would be dealt with by summary judgment. The UNDT further indicated that it was for it to determine whether a hearing was necessary or if a judgment may be rendered based on the papers before it. The UNDT then reaffirmed its previous view, as stated in Order No. 340 (NY/2013), that the closing submissions were to enable the parties to inform it succinctly of the key facts and legal arguments that they presented during the proceedings.

20. On 2 September 2014, after efforts to also resolve this matter through mediation had failed, the parties filed their closing submissions. In his closing submissions, Mr. Survo indicated that he had a list of witnesses to call to testify. He also stated that he had been “sidelined to interim positions” and reiterated that the selection for the P-5 post of Chief, SISS, and his non-selection remained illegal since he had yet to be assigned to a suitable position.

21. On 11 December 2014, the UNDT issued its Judgment. Having regard to the parties’ closing submissions, the UNDT noted that no further documents or additional oral evidence were required and that a case management discussion and/or hearing was not needed. On the merits of the application, the UNDT found that Mr. Survo’s challenge to:

(a) “the persistent refusal to reclassify” his post at the P-5 level from June 2003 to July 2009 was not receivable as he had failed to pursue the procedure to contest the classification of his post outlined in ST/AI/1998/9 (System for the classification of posts) and, therefore, there was no actual administrative decision denying such a request;

(b) his non-selection for the P-5 level post of Chief, SDAS, was not receivable as he had not requested management evaluation thereof in a timely manner; and

(c) his non-selection for the P-5 level post of Chief, SISS, was receivable but without merit, in that there was no evidence that the selection process was marred by bias or otherwise flawed.

22. The UNDT further found that since Mr. Survo performed duties at the P-5 level between 1 August 2009 and 6 September 2010, when the new Chief of SISS was appointed, he thus appeared eligible for special post allowance (SPA) for that period. As Mr. Survo had requested “financial compensation for the difference in salary and benefits between P-4 and P-5 since June 2003” in his MEU request, the UNDT considered that such request amounted to a timely and retroactive request for the payment of SPA. This amounted to “a new legal matter” which the MEU had failed to address. Accordingly, the UNDT remanded this aspect of Mr. Survo’s application to the Administration for a full and fair consideration.

23. The UNDT rejected Mr. Survo’s claims concerning abuse of authority, finding that there was no evidence that Mr. Survo had attempted to use the procedures set out in the Secretary General’s Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment,

including sexual harassment, and abuse of authority) and Chapter XI of the Staff Rules requiring a staff member to deal with a complaint prior to filing an appeal with the Dispute Tribunal.

24. The UNDT also noted that Mr. Survo had filed, without the UNDT's leave, "new documents and a new additional ground of appeal" in his closing submissions. The UNDT held that the new issues were not considered as part of Mr. Survo's appeal against the non-selection decision for the post of Chief, SISS, and/or evidence, as they were not part of the initial application. The UNDT declined to take them into consideration finding, *inter alia*, that it had adequate information before it to enable it to reach a decision on the papers without an oral hearing.

Submissions

Case No. 2015-693

Mr. Survo's Appeal

25. The Judgment contains many factual errors, misrepresentations of Mr. Survo's arguments and instances of incomprehensible language leading Mr. Survo to believe that the Dispute Tribunal did not thoroughly examine or understand his case. Numerous paragraphs in the Judgment demonstrate that the UNDT deliberately diminished and misinterpreted his case for its own convenience. Further, the UNDT erred on questions of fact in paragraphs 1, 8, 16, 19, 21(b) and (c), 22(a), 53, 79 and 80 of the Judgment, and produced a judgment of disappointing quality with "incomprehensible sentences".

26. Mr. Survo alleges a number of procedural errors in breach of the UNDT Statute, including: Article 2(1)(a), insofar as the UNDT did not review relevant Regulations and Rules in force at the time of the alleged non-compliance; Article 9, in that the UNDT did not access required documents and evidence from witnesses; and Article 11(1), on the basis that the UNDT did not state the reasons, facts and law on which the Judgment was based. The Judgment also violates the UNDT's Rules of Procedure (UNDT Rules), namely: Article 9 insofar as the UNDT misused the summary judgement procedure; Article 16, in that the UNDT denied a requested hearing without providing reasons; Article 17, in that the UNDT did not examine oral evidence from witnesses; Article 18, in that the UNDT did not order production of evidence; and Article 19 in that the UNDT did not give directions to the parties.

27. The UNDT also erred because it categorically ignored his evidence and rejected his request to hear witness testimonials that were to contest the Respondent's reply. The UNDT further erred in judging that his clarifications were new submissions which could not be considered, and treated him harshly in rejecting them.

28. The UNDT failed to properly exercise its jurisdiction as it: (a) erred with respect to his claims concerning the classification of his post and his non-selection for the post of Chief of SDAS, and instead impermissibly based its rejection on the MEU's decision that such matters were not receivable; (b) did not adequately consider "the legality of the Chief SISS selection" and, inter alia, examine whether the Administration "explicitly confirmed that [the selected candidate] met the required work experience" or whether the Executive Secretary of ESCAP had presented the Central Review Body with all the necessary information; and (c) did not "examine and conclude anything on the damages that [he] had suffered in terms of his health, reputation and career prospects".

29. The UNDT erred on a question of law because it, inter alia: (a) ignored, without explanation, the relevant jurisprudence and principles that govern United Nations employment; and (b) did not adequately "examine the issues of discrimination and abuse of authority" raised in Mr. Survo's UNDT application.

30. Mr. Survo requests that the Appeals Tribunal remand the case for a hearing and full and proper examination of the evidence and his requested relief by a different UNDT judge. Alternatively, should the Appeals Tribunal choose to review the case, Mr. Survo requests that this Tribunal order production of requested evidence and grant an oral hearing.

The Secretary-General's Answer

31. The UNDT correctly rejected each of the claims set out in Mr. Survo's UNDT application, but exceeded its jurisdiction and erred on a question of law and fact in remanding an aspect of the matter concerning the payment of retroactive SPA to the Administration for consideration, as further argued in the Secretary-General's appeal summarized below.

32. Mr. Survo failed to establish any basis for his appeal as prescribed in Article 2(1) of the Appeals Tribunal Statute (Statute), or to demonstrate any error warranting reversal of the Judgment. While Mr. Survo asserts that the UNDT committed numerous errors of procedure, he fails to substantiate such alleged errors, much less establish how any of such alleged errors

affected the UNDT's decision in the case. For instance, he did not identify what specific documents he asserts the UNDT should have ordered to be disclosed or identify specific witnesses the UNDT should have heard, or offer detail as to what specific evidence the UNDT allegedly ignored. Consequently, his allegations of error should be dismissed. Mr. Survo's complaints concerning the issuance of a summary judgment should also be dismissed as the UNDT did not issue a summary judgment.

33. Mr. Survo also failed to demonstrate that the UNDT failed to properly exercise its jurisdiction in rejecting some of his claims as not receivable. Contrary to his submissions, the UNDT is not vested with the authority to make general proclamations concerning questions of administrative policy; its jurisdiction is limited to reviewing specific administrative decisions and the UNDT correctly exercised its jurisdiction by declining to "use the review of the case" as a general opportunity to establish principles of law.

34. Concerning the "legality of the Chief SISS selection", the UNDT properly discharged its authority by examining whether the relevant policies and procedures had been respected and whether Mr. Survo's candidacy had been given fair and adequate consideration.

35. Mr. Survo's claim that the UNDT erred by not adequately considering the issue of damages must also fail since the UNDT did not find that any of Mr. Survo's rights, procedural or substantive, had been breached or that he had otherwise suffered harm as a result of any act or omission by the Administration. As such, there was no legal basis on which the UNDT could have awarded him compensation.

36. Mr. Survo has failed to demonstrate that the UNDT committed any error of law or fact warranting reversal of the Judgment. Mr. Survo merely states his disagreement with the outcome of the case and impermissibly reiterates arguments that were considered and rejected by the UNDT. Matters relating to allegations of harassment or abuse of authority were not receivable, and consequently, the UNDT did not err by declining to address such matters. Further, the terms and conditions of the settlement agreement referred to by Mr. Survo were not before the UNDT for adjudication in any manner.

37. The Secretary-General requests that the Appeals Tribunal reject Mr. Survo's appeal in its entirety.

Case No. 2015-695**The Secretary-General's Appeal**

38. The Secretary-General contends that the UNDT exceeded its jurisdiction and erred on a question of law by ordering a remedy – namely consideration of payment of SPA – with respect to an issue that was not properly before it, and thus was not receivable. As Mr. Survo had not requested management evaluation of any decision relating to a request for payment of SPA, the UNDT exceeded its competence and erred in law by raising and reviewing the matter *proprio motu*. The UNDT's introduction of a new legal matter goes far beyond its power to interpret a party's application as recognised by the Appeals Tribunal in *Massabni*.¹ Accordingly, the UNDT also erred in ordering a remedy in respect of an issue over which it had no jurisdiction.²

39. Even if Mr. Survo had sought management evaluation of a decision not to pay him SPA, he was not eligible for SPA under Administrative Instruction ST/AI/1999/17 (Special post allowance), which requires that he have performed the functions and responsibilities attaching to either a "vacant" or a "temporarily vacant" post at a level higher than his or her own. Mr. Survo never performed functions and responsibilities attaching to a vacant or temporarily vacant P-5 level post, and the post that was reclassified to the P-5 level in 2009 had been redeployed from another Division and was not the post that Mr. Survo had encumbered. In view of the foregoing, the UNDT exceeded its jurisdiction in ordering a remedy that Mr. Survo had not requested.³

40. The Secretary-General requests that the Appeals Tribunal vacate the UNDT's order for the Administration to consider Mr. Survo's eligibility for the payment of retroactive SPA. The remainder of the Judgment rejecting Mr. Survo's claims should be affirmed.

¹ Citing *Massabni v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-238.

² Citing *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, paras. 25 and 43.

³ Citing *Azzouni v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-162, para. 4; *Iannelli v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-093, para. 14; and *Warren v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-059, para. 10.

Mr. Survo's Answer

41. The Respondent has not disputed that Mr. Survo was asked to perform, and successfully performed, P-5 level tasks for over seven years. The Appeals Tribunal clearly stated in *Chen* that equal pay must be paid for equal United Nations work and that the equal-pay principle overrides administrative and budgetary constraints.⁴

42. Although the Secretary-General appeals on technical grounds, it is undisputed that ESCAP did not follow the rules in continuously failing to reclassify his post over the six-year period that Mr. Survo held the post. As the post was classified at the P-4 level in 2003 when he took up the position, Mr. Survo could not apply for or be granted SPA as per ST/AI/1999/17 in the ensuing period. By reclassifying the post in 2009 at the P-5 level the Respondent confirmed that Mr. Survo had been underpaid from 2003 to 2009 and ESCAP's inaction was deliberate, persistent and came at a personal cost to Mr. Survo. The Secretary-General's appeal confirms a "systematic evasion of accountability" and the Secretary-General cannot deny Mr. Survo's right for due compensation for work already done.

43. As per his appeal in Case No. 2015-693, Mr. Survo requests the Appeals Tribunal to remand the case to the Dispute Tribunal for another hearing before a different judge. Should this Tribunal decide to review the merits of the case, Mr. Survo seeks the same relief indicated in his UNDT application and clarified in his closing submission of 2 September 2014 to the UNDT. Mr. Survo also requests that the Appeals Tribunal order the Secretary-General and ESCAP to retain all records that are relevant to the case, including those records he previously requested.

Considerations*Preliminary matters – request for an oral hearing*

44. As a preliminary matter, Mr. Survo requested an oral hearing. Oral hearings are governed by Article 8(3) of the Appeals Tribunal Statute and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules). Under Article 18(1) of the Rules, a request for an oral hearing may be granted when it would "assist in the expeditious and fair disposal of the case". The Appeals Tribunal rejects Mr. Survo's request for an oral hearing finding that Mr. Survo's appeal brief is sufficient and does not require further clarification.

⁴ Citing *Chen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-107.

Mr. Survo's appeal on the merits

45. Mr. Survo claims that the UNDT, in reaching its findings which were adverse to him:

- (a) Committed errors in procedure such as to affect the decision of the case;
- (b) Failed to exercise the jurisdiction vested in it;
- (c) Erred on questions of law; and
- (d) Erred on questions of fact, resulting in a manifestly unreasonable decision.

Each of the grounds will be considered in turn.

- *Alleged errors of procedure*

46. Mr. Survo asserts that the Dispute Tribunal:

- (a) “[V]iolated [his] rights and the principle of equality of arms” when it declined to order “access to documents, evidence from witnesses and a hearing”;
- (b) Issued a “summary judgment in a complex case”;
- (c) “[W]rongly and contrary to the interest of justice forced [him] to file a closing submission when he and the case were not ready for it”;
- (d) Let Order No. 340 of 13 December 2013 “misguide its subsequent [...] examination of the contested issues” and Mr. Survo’s closing submissions such that the procedural failures complained of “taint[ed] the drafting of the judgment”;
- (e) Failed to afford him the opportunity to respond to the Secretary-General’s reply;
- (f) “[C]ategorically ignored [his] evidence”;
- (g) Wrongly categorised clarifications he made in his closing submissions as “new submissions”;
- (h) Erred in using the MEU’s decision with regard to the SDAS P-5 post “to justify its own lack of independent examination of the receivability” of his challenge to his non-selection for the post; and
- (i) Failed to examine the evidence he presented regarding the SDAS P-5 post when considering his non-selection for the SISS P-5 post.

47. In the course of its Judgment, the UNDT addressed the issue of whether there was a need for further documents or oral evidence in the following terms:⁵

... In the present case, which is not related to a disciplinary decision, based on the extended submissions and evidence filed by the parties before the case was assigned to the undersigned judge, including on receivability issues, the Tribunal considers that no further documents or additional oral evidence is required and a case management discussion and/or a hearing is not needed. The case is to be decided on the papers before it. [...]

48. The UNDT has broad discretion in how it conducts its proceedings. Article 16(1) of the UNDT Rules provides “[t]he judge hearing a case may hold oral hearings”.

49. With regard to “Evidence”, Article 18 of the UNDT Rules states, in part:

1. The Dispute Tribunal shall determine the admissibility of any evidence.
2. The Dispute Tribunal may order the production of evidence for either party at any time and may require any person to disclose any document or provide any information that appears to the Dispute Tribunal to be necessary for a fair and expeditious disposal of the proceedings.

50. Additionally, Article 19 of the UNDT Rules on “Case management” provides:

The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

51. We have consistently held that “the Appeals Tribunal will not interfere lightly with the broad discretion of the UNDT in the management of cases and that the UNDT has a broad discretion to determine the admissibility of, and the weight to be attached to, any evidence as the Judge hearing the case has an appreciation of all of the issues for determination and the evidence before him or her”.⁶

52. Having regard to the scope of the issues which fell to be adjudicated by the UNDT and the consideration given thereto by the UNDT, evident on the face of the record, the Appeals Tribunal is satisfied that the UNDT properly exercised its discretion in matters

⁵ Impugned Judgment, para. 20.

⁶ *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-546, para. 35 and cites therein.

of case management when it decided that neither the submission of further documents nor the calling of witnesses was required.

53. We also reject Mr. Survo's assertion that the UNDT did not state why additional documentation and oral testimony were not needed, given the clear statement in paragraph 20 of the Judgment, quoted above, that it had before it "extended submissions and evidence" filed by the parties. Moreover, the UNDT was entitled to factor into its consideration that there were receivability issues concerning some of Mr. Survo's claims when considering the extent to which further documentation or oral testimony were necessary for a "fair and expeditious disposal of the proceedings".

54. Further, as per our jurisprudence in *Riano*, "[i]n order to establish that the Judge erred [in not admitting evidence], it is necessary to establish that the evidence, if admitted, would have led to different findings of fact and changed the outcome of the case".⁷ In the course of his appeal submissions, Mr. Survo has not identified what specific witnesses or documents should have been permitted or how such evidence, had it been permitted, would have affected the outcome of the UNDT proceedings that rejected certain aspects of his case on receivability grounds, or indeed how such evidence would have led the UNDT to a different outcome with respect to the merits of his non-selection for the SISS P-5 post.

55. We also find no merit in Mr. Survo's categorisation of the UNDT Judgment as a "summary judgment". The UNDT did not issue a summary judgment in respect of his application. Rather, it rendered a judgment based on "the extensive submissions and evidence filed by the parties".

56. Neither are we persuaded by Mr. Survo's argument that he was wrongly forced to file a closing submission when he was not ready. We observe that Mr. Survo's closing submission was a detailed and comprehensive document in which he reprised his arguments in support of his challenges to the administrative decisions he sought to impugn. Due consideration was given to his evidence and submissions. Thus, we reject the argument that his evidence was "categorically ignored". Furthermore, upon perusal of the Judgment, we find no basis to conclude that the UNDT's findings were constrained by its Order of 13 December 2013. We also

⁷ *Riano v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-529, para. 32, citing *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, para. 20. See also *Pacheco v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-281, para. 25.

note that in its Order of 30 January 2014, the issues raised by Mr. Survo in his motion of 3 January 2014 were adequately and reasonably addressed, in accordance with the discretion afforded by the UNDT Rules to the UNDT in matters of case management.

57. Mr. Survo's argument that the UNDT failed to afford him the opportunity to respond to the Secretary-General's reply is also without merit. While we note the contents of the e-mail of 24 May 2011 from the UNDT Registry informing Mr. Survo that no further actions were required by him in relation to his application, subsequent to that date, on 3 January 2014, Mr. Survo filed a motion for directions. Thus the Registry's 24 May 2011 e-mail did not preclude him from taking further steps in relation to his case and there was thus no impediment to his applying to the UNDT to seek to respond to the reply, provided he could satisfy the UNDT that there were exceptional circumstances meriting such a course of action.

58. We find no merit in the submission that the UNDT erred procedurally in finding that arguments he made in his closing submissions about being "side-lined to interim positions" and that he had "yet to be assigned to a suitable position" were new matters that were not previously raised in his UNDT application. We note that the parties were informed on 30 January 2014 that the closing submissions were to consist of a summary of the key facts and legal arguments that the parties presented during the proceedings. We are satisfied that the UNDT was entitled to regard extraneous matters raised by Mr. Survo which fell outside the scope of his UNDT application as not properly before it.

59. Mr. Survo contends that the UNDT placed undue reliance on the MEU's decision in its consideration of the receivability of his challenge to his non-selection for the SDAS P-5 post and that it should have itself examined his argument that time only started running for him to challenge that decision when he learned of the outcome of the SISS P-5 post selection, in view of his claim that he was advised by his supervisor that he would be in line for the P-5 level SISS post.

60. We are satisfied, both from a perusal of the MEU's response and the UNDT Judgment, that the UNDT was cognisant of the case being made by Mr. Survo when it rejected his challenge to his non-selection for the SDAS post as non-receivable. The UNDT properly considered that Mr. Survo was advised of the outcome of the SDAS selection process on 17 June 2010, and that he did not seek management evaluation until 29 October 2010. Having regard to the provisions of Article 8(1)(c) of the UNDT Statute, the provisions of Staff Rule 11.2(a) and (c) and the well-established jurisprudence of the Appeals Tribunal recognising management evaluation

as a mandatory first step in the appeals process and a prerequisite to invoke the UNDT's jurisdiction,⁸ the UNDT was within jurisdiction and committed no error of procedure when it deemed Mr. Survo's challenge to his non-selection for the SDAS post not receivable on the basis that he had not first sought timely management evaluation within the prescribed time limits.

- *Failure to exercise jurisdiction*

61. With regard to the SISS P-5 post, Mr. Survo asserts that the UNDT failed to examine the legality of the selection process in three regards: firstly, it failed to ascertain whether the selected candidate met the minimum criteria; secondly, it failed to determine whether a suitable post had been identified for Mr. Survo; and thirdly, he queries whether the UNDT considered whether the Executive Secretary of ESCAP had presented the CRB with all the necessary information.

62. A reading of paragraphs 64 to 84 of the UNDT Judgment satisfies this Tribunal that there was sufficient evidence and documentation before the UNDT for it to conclude that Mr. Survo's candidacy for the SISS P-5 post received full and fair consideration. Moreover, with regard to the contention that the UNDT did not examine whether the Executive Secretary properly used her delegated authority, the Appeals Tribunal perused Annex II to the UNDT application (MERA6), which consists of Mr. Survo's notes on a meeting with the Executive Secretary on 13 September 2010, as referred to in his appeal brief. However, we did not find anything of sufficient weight in that document to persuade us that the UNDT erred as to jurisdiction.

63. In all the circumstances of this case, we find no merit in the contention that the UNDT failed to exercise its jurisdiction.

- *Alleged errors of law*

64. Mr. Survo argues that the UNDT erred in law in issuing a Judgment that was unreasonable and that failed to address the contested issues. He also contends that the UNDT Judgment contradicted Article 101 of the United Nations Charter and Article 10 of the Universal Declaration of Human Rights, "brushed aside" "the principles and higher legal

⁸ *El-Shobaky v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-564, para. 23, citing *Amany v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-521, *Wamalala v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-300 and *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-299.

framework” of the United Nations and ignored without explanation UNDT and Appeals Tribunal jurisprudence quoted in his closing submissions to the UNDT.

65. We agree with the Secretary-General’s observation that Mr. Survo does not provide details of what law was “brushed aside” by the UNDT in its analysis of his claims. We are satisfied that the UNDT properly found as not receivable his claims regarding the failure to reclassify his post, his non-selection for the SDAS P-5 post and his claims of abuse of authority and discrimination during the SISS P-5 selection process.

66. Insofar as Mr. Survo alleges that the UNDT failed to examine, with regard to the SISS P-5 post, “convincing evidence that the decision not to promote him was totally unfair, unreasonable, illegal, irrational, biased, capricious, arbitrary, and lacked proportionality”, that argument is rejected. We have already stated that a reading of the UNDT Judgment demonstrates that the UNDT was cognisant of the claims made by Mr. Survo in his application and closing submissions. It duly considered those claims against the vacancy announcement for the SISS P-5 post, the official overall evaluations of Mr. Survo and the selected candidate, as made available by the Administration, and the applicable legal principles against which the treatment of Mr. Survo’s candidacy was to be assessed on judicial review.

67. In *Scheepers et al.*, the Appeals Tribunal reprised its jurisprudence on matters of staff selection in the following terms:⁹

... In *Ljungdell*, we stated:

... Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals’ role is not to substitute their decision for that of the Administration.

⁹ *Scheepers et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-556, paras. 39-40, citing respectively *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30 (internal cites omitted) and *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, paras. 23-24.

... In *Abbassi*, we also emphasised that:

... In reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (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.

... The 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.

68. In *Rolland*, we considered the role of the UNDT when reviewing non-selection cases:¹⁰

... The Dispute Tribunal possesses jurisdiction to rescind a selection or promotion process, but may do so only under extremely rare circumstances. Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the Dispute Tribunal shall uphold the selection/promotion.

... All candidates before an interview panel have the right to full and fair consideration. A candidate challenging the denial of promotion must prove through clear and convincing evidence that procedure was violated, the members of the panel exhibited bias, irrelevant material was considered or relevant material ignored. There may be other grounds as well. It would depend on the facts of each individual case.

... [...]

... There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

69. As Mr. Survo has failed to persuade us that the UNDT erred in law in relation to the matters raised by him, this ground of appeal is rejected.

- *Alleged errors of fact*

70. Paragraph 90 of the UNDT Judgment states:

... The Tribunal observes that the case *Survo* [Judgment No.] UNDT/2011/109, where the contested decision was "the Administration's attempt to identify the incumbent

¹⁰ *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, paras. 20-21, 26.

(Applicant) 'a suitable post', which should have been done before the successful candidate assumed duties on 13 September 2010", was successfully resolved through mediation thereby resulting in the Tribunal dismissing the Applicant's application for suspension of action.

71. Mr. Survo asserts that the UNDT erred in fact in wrongly interpreting a prior settlement agreement which he had entered into with the Administration. On our analysis of the UNDT Judgment, we are not persuaded that the UNDT actually interpreted the said agreement, which was in any event confidential and not before the UNDT, much less wrongly interpreted it.

72. Even if the UNDT wrongly laboured under the belief that the settlement had secured Mr. Survo a suitable position, he has failed to persuade us how this error renders the impugned decisions manifestly unreasonable, particularly since three of his claims were rejected on the basis that he failed to invoke the necessary statutory procedures which were necessary to allow the UNDT to assume jurisdiction to hear his claims. Similarly, we fail to see how any such error renders the UNDT's dismissal of his SISS P-5 claim manifestly unreasonable.

73. Mr. Survo also argues that the UNDT failed to take account that the vacancies for the SDAS and SISS P-5 positions were no different from the functions that he had successfully performed for seven years and that his performance should thus have weighed heavily in both selection processes. We are not convinced that any claimed failure on the part of the UNDT in this regard constituted an error of fact, much less one that led to a manifestly unreasonable decision, in view of the fact that the UNDT did not embark on any analysis of Mr. Survo's work over the period from 2003 to 2009.

74. It is also asserted that the UNDT wrongly concluded that Mr. Survo had presented contradictory arguments and that the UNDT erred in concluding that the selected candidate for the SISS P-5 position met the requisite work experience requirements. Other than pointing to the arguments he made in his MEU request, in his UNDT application and closing submissions to the UNDT, all of which were before the UNDT, Mr. Survo has not highlighted any factual error or errors which undermine the UNDT's findings. At paragraph 72 of its Judgment, the UNDT made reference to statements made by Mr. Survo regarding his competitor for the SISS P-5 post. As it is not asserted that the UNDT misrepresented Mr. Survo's statements, in our view the finding that he made contradictory averments was one that was open to the UNDT to make.

75. In his appeal submissions, Mr. Survo also lists a myriad of other matters under the umbrella of “errors on questions of fact” none of which finds favour with this Tribunal, upon consideration thereof.

76. Thus, with regard to the findings challenged by him, Mr. Survo has not established that the UNDT erred on a question of fact such as to render the decision of the UNDT manifestly unreasonable and therefore his appeal on this ground is not upheld.

- *Summary*

77. In summary, Mr. Survo has not established that the UNDT erred in matters of procedure, fact or law or that it failed to exercise its jurisdiction. His appeal is dismissed in all respects.

The Secretary-General's appeal of the SPA issue

78. In the course of its Judgment, the UNDT considered that the second decision being contested by Mr. Survo was to be found in the remedy section of his UNDT application where he requested “[f]inancial compensation for the difference in salary and benefits between P-4 and P-5 since June 2003 to the date of selection of another person for [the SISS P-5] post”.¹¹ The UNDT also noted that in the remedies section of his request for management evaluation, Mr. Survo had sought “monetary compensation for the P-5 level work that [he had] been doing with P-4 benefits since June 2003”.¹²

79. The UNDT considered that the request for compensation related to two time periods, namely “June 2003-end of July 2009 (when the Applicant’s post was reclassified at the P-5 level) and 1 August 2009-6 September 2010 when the new Chief, SISS, was appointed”.¹³ The UNDT determined that Mr. Survo’s request for compensation represented a retroactive request for SPA and concluded that “by including the same request, even though it was inserted in the wrong section, in his 29 October 2010 request for management evaluation, [Mr. Survo had] made a written request for retroactive SPA”.¹⁴ Finding that this request “was not previously considered as a distinct request for SPA” and “[n]ot being part of the facts”, and that it was “not analyzed by the Executive Secretary, ESCAP, [...] or reviewed by the MEU”,¹⁵ the UNDT

¹¹ Impugned Judgment, para. 45.

¹² *Ibid.*, para. 47.

¹³ *Ibid.*, para. 50.

¹⁴ *Ibid.*, para. 51.

¹⁵ *Ibid.*, para. 52.

remanded it to the Administration in order for it to consider Mr. Survo's request to recover retroactive payment of SPA.¹⁶

80. The Secretary-General appeals on the ground that the UNDT exceeded its jurisdiction and erred on a question of law by reviewing and ordering a remedy in respect of a matter that was not receivable.

81. For the UNDT to have jurisdiction to consider the issue of the SPA, it must firstly be satisfied that Mr. Survo had undertaken the mandatory procedural step of requesting management evaluation on the issue, as discussed above at paragraph 60.

82. The question to be decided therefore is whether the UNDT correctly determined that Mr. Survo had requested management evaluation in respect of payment to him of SPA. A review of his management evaluation request does not persuade the Appeals Tribunal that Mr. Survo's management evaluation request encompassed a challenge to a decision in relation to payment of SPA. The management evaluation request specified the following decisions as those under review:

(i) Non-selection for Chief, Statistical Information Services Section [...]

(ii) Non-selection for Chief, Statistical Development and Analysis Section [...]. In addition, I ask to be investigated if (iii) my Division Chief has abused her authority in recruitments i and ii and (iv) ESCAP has discriminated against me, especially in post management and selection for (i).

83. In response to the question as to what staff rights were violated by the decision at issue, Mr. Survo responded: "(i) Fair consideration for two P-5 posts as a 30 day candidate, (ii) freedom of discrimination and abuse of power, (iii) correct classification of my post". In its response, the MEU duly reviewed the decisions not to select Mr. Survo for the SDAS and SSIS posts and considered his claim in respect of the non-classification of his post. The MEU did not address any issue with regard to a request for SPA.

84. We note that the UNDT itself found that the issue of an SPA was not "part of the facts" reviewed by the MEU.¹⁷ The issue of SPA was thus, as the UNDT itself acknowledged, "a new legal matter".¹⁸ Notwithstanding, the UNDT extrapolated from Mr. Survo's desired

¹⁶ *Ibid.*, para. 53.

¹⁷ *Ibid.*, para. 52.

¹⁸ *Ibid.*, para. 53.

remedy of “monetary compensation for the P-5 level work” he asserted he was doing from 2003, that he was contesting before the MEU the issue of payment of SPA for that work. However, we do not find any legal or factual premise upon which the UNDT was entitled to base its conclusion. While the UNDT has the inherent authority, as upheld by the Appeals Tribunal in *Massabni*, “to individualize and define the administrative decision impugned by a party” in a specific case,¹⁹ the UNDT is not at large in this regard. We find that the UNDT had no primary legal or factual basis from which it could conclude that Mr. Survo had properly sought management evaluation of a request for SPA where there had, in fact, not been such a request in the first place. We highlight that the MEU was established by General Assembly resolution 63/228 with a specific mandate to *review* contested administrative decisions, not to make decisions in respect of staff members’ requests in the first instance.²⁰

85. Accordingly, we find that the UNDT erred and exceeded its competence in purporting to review the issue of an SPA payment, in the absence of Mr. Survo ever having first requested SPA and thereafter having properly sought management evaluation of this issue. In all the circumstances, having regard to the statutory criteria which prescribe that management evaluation is a mandatory prerequisite to invoking the jurisdiction of the UNDT, the receipt by the UNDT of this issue and the remedy ordered by the UNDT did not have a valid legal or factual basis.

Judgment

86. Mr. Survo’s appeal is dismissed. The Secretary-General’s appeal is upheld. The UNDT Judgment is affirmed save that part which relates to the issue of the SPA, which is hereby vacated.

¹⁹ *Massabni v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-238.

²⁰ Cf. *Hajdari v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-570, para. 30 (where we held that the UNDT erred in finding that the staff member had validly requested reinstatement by means of additional observations he had made to the MEU in the context of his challenge to the decision that he was not eligible for conversion to a permanent appointment by reason of a previous break in service).

Original and Authoritative Version: English

Dated this 30th day of October 2015 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 18th day of December 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar