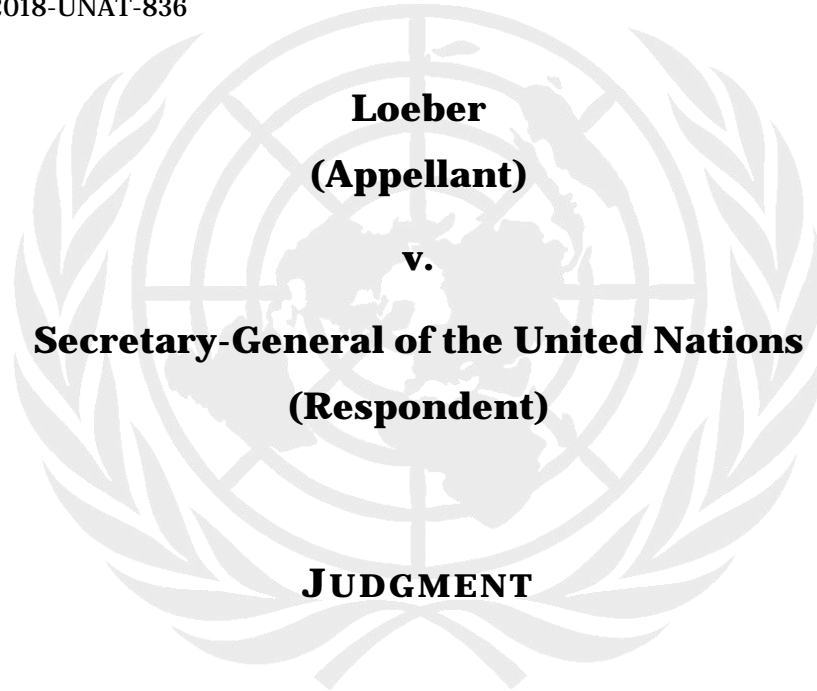




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-836



**Loeber
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge John Murphy Judge Richard Lussick
Case No.:	2017-1125
Date:	22 March 2018
Registrar:	Weicheng Lin

Counsel for Mr. Loeber:	Edward Patrick Flaherty
Counsel for Secretary-General:	Rupa Mitra

JUDGE MARTHA HALFELD, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/074, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 12 September 2017, in the case of *Loeber v. Secretary-General of the United Nations*. Mr. John Henry Frank Loeber filed the appeal on 11 November 2017, and the Secretary-General filed an answer on 12 January 2018.

Facts and Procedure

2. The following facts are uncontested:¹

... [Mr. Loeber] was selected for the post of Chief of Section (Procurement of Goods), PMCS, [within the Office of the United Nations High Commissioner for Refugees (UNHCR)] effective 2 March 2014, under a two-year fixed-term appointment (“FTA”) due to expire on 1 March 2016.

... Between May and June 2014, the Head, PMCS, started implementing a change in the reporting lines within the team and strengthening the management responsibilities of the Senior Supply Officer, a P-4 staff member working under [Mr. Loeber’s] supervision.

... [Mr. Loeber] did n[o]t agree with these changes and tensions arose in the team.

... In September 2014, the *Fritz Institute* was commissioned to undertake a reevaluation of the supply chain at UNHCR, as a follow-up to a similar study undertaken in 2008 and in light of increasing demands on the Organization resulting from multiple emergencies as well as from an increase in the number of displaced persons.

... On 8 December 2014, [Mr. Loeber] filed a complaint for harassment by the Head, PMCS, with the Inspector General’s Office (“IGO”), UNHCR, copied to the Ethics Office, UNHCR. He subsequently asked the IGO to put the complaint on hold, since he thought the matters would be resolved through managerial actions. At the hearing on the merits, he admitted that he never asked the IGO to take the matter up again, and that it had been overcome by events.

... A meeting took place in Budapest, in December 2014, between the Director, [Division of Security and Supply “DESS”], the Head, PMCS, and [Mr. Loeber], during which some of the concerns raised by [Mr. Loeber] relating to the management decisions by the Head, PMCS, as well as the concerns raised by the Head, PMCS, with respect to the impact of [Mr. Loeber’s] management style on staff were discussed.

¹ Impugned Judgment, paras. 3-35.

The Director, DESS, encouraged the two managers to improve their communication. It was also decided that any reorganization of the team should await the recommendations of the Fritz report.

... The report of the *Fritz Institute* was presented in March 2015. It stressed the dramatic change that the Organization had undergone since the 2008 report, noting, for instance, that income and expenditure in response to a wide range of ongoing and protected emergencies had almost doubled.

... On 26 March 2015, the Head, PMCS, ([Mr. Loeber's] direct supervisor) performed [Mr. Loeber's] annual e-pad and considered his performance as "successfully meet[ing] expectations".

... On 4 June 2015, a meeting was held, *inter alia*, between the High Commissioner, UNHCR, the Assistant High Commissioner for Operations, UNHCR, the Head, DESS, the Head, PMCS, and the Head, Supply Management and Logistics Service ("SMLS"), UNHCR. In an email dated 11 June 2015, entitled "Note on HC's [High Commissioner's] meeting on the Supply Chain, 4 June 2015", addressed to the members of the meeting and others, it is stated, *inter alia*, that:

DESS also requested to strengthen its staff in Budapest, for an additional cost of 800,000 USD. 20% of all audit recommendations in UNHCR were on procurement and procurement therefore needed to be transformed into a more robust service ([Headquarters ("HQ")] section and Field section). The HC noted that this would be acceptable for 2016 as these concerns are valid and this function needs strengthening.

... The Head, DESS, sent a memorandum dated 16 June 2015 to the High Commissioner, entitled "Follow up to the Fritz Institute Review of the Supply Chain". In that memo, the Director, DESS, noted four "priority actions and decision-making points for consideration by the High Commissioner". One of them concerned "the transformation of procurement into a more robust service by reconfiguring the service into a HQ section and a Field section". To that memorandum, the Head, DESS, annexed further explanations on the proposed restructuring, including an organigram on the proposed DESS new structure. The High Commissioner signed the memorandum off on 25 June 2015.

... The Head, PMCS, [Mr. Loeber's] supervisor, informed the latter during a meeting on 18 June 2015 of the intention to propose to the Budget Committee the restructuring of two services within DESS: PMCS and SMLS. This implied the proposal to discontinue [Mr. Loeber's] position and that of Chief of Section (Procurement of Services), and the creation of two P-5 level posts of Chief of Section (Procurement Field Support, on the one hand, and Procurement HQ, on the other hand); this was confirmed to [Mr. Loeber] in writing by letter dated 22 June 2015.

... In a memorandum dated also 18 June 2015 and entitled *Follow up to the Fritz Institute Review of the Supply Chain*, the Director, DESS, submitted the structuring proposal to the Secretary of the Budget Committee. It was received by the Budget Committee on 19 June 2015. During a meeting with staff of both services held on 19 June 2015, the Heads of PMCS and SMLS presented the restructuring proposal, and responded to questions raised by staff, including [Mr. Loeber].

... In an email of 29 June 2015 to the Deputy High Commissioner and others, [Mr. Loeber] expressed his concerns and criticism about the submission to the Budget Committee with respect to the new/modified posts at SMLS/PMCS. He noted, particularly, that the new posts proposed as Section Chief HQ Procurement and Field Procurement were not grounded in the *Fritz report*, which was however used “to implement subliminal changes desired by PMCS leadership”.

... At its 10 July 2015 session, the Budget Committee approved the proposed PMCS restructuring, including the discontinuation of the position encumbered by [Mr. Loeber], effective 1 March 2016. [Mr. Loeber] was informed of that decision by the Head, PMCS, in a letter dated 24 July 2015, which [Mr. Loeber] signed on 27 July 2015.

... On 28 August 2015, [Mr. Loeber] filed a request for management evaluation with the Deputy High Commissioner of the decision to abolish his post; in his request, he also asked to be provided with a copy of the Budget Committee Decision of 10 July 2015. [Mr. Loeber] received no response with respect to such request.

... [Mr. Loeber’s] request for management evaluation contained *inter alia* rather strong statements with respect to the Head, PMCS. For instance, [Mr. Loeber] referred to him as a liar, and that he had displayed “serious breach of ethics and deficiencies in professional conduct” and “harassment”. He also mentioned having commented on “a range of very serious procurement shortcomings” at Headquarters, “in breach of basic public procurement principles”.

... On 27 August 2015, the vacancy announcement for the D-1 post of Head, SMLS, was published with an application deadline of 17 September 2015. [Mr. Loeber] applied for the position.

... In the UNHCR September 2015 compendium, two P-5 posts were published in the newly called Procurement Service (“PS”), which was composed of two sections: the Procurement HQ Section and the Procurement Field Support Section. One of the P-5 posts published in September 2015 was that of Chief of Section (Procurement Field Support), whereas the other was that of Chief of Section (Procurement HQ). [Mr. Loeber] did not apply to either of these positions.

... On 11 November 2015, the D-1 post of Head, SMLS, was re-opened for applications with a new deadline for application[s] set for 17 November 2015.

... By email of 2 December 2015 from a Senior Resource Management Associate, Resource Management Unit, Office of the Director, DESS, [Mr. Loeber] was invited for an interview for the post of Head, SMLS, on 9 December 2015.

... By follow up email of 3 December 2015, [Mr. Loeber] was informed of the composition of the Interview Panel (“the Panel”), which consisted of:

- a. The Director, DESS ([Mr. Loeber’s] second reporting officer, and the Hiring Manager for the position);
- b. The Head, Procurement Service ([Mr. Loeber’s] first reporting officer);
- c. The Head, SMLS; and
- d. Mr. L., Office of the Director, Division of Human Resources Management (“DHRM”).

... By email of 4 December 2015, [Mr. Loeber] expressed his disagreement with the first three Panel members, and requested that a new Panel be constituted. He stressed that the three Panel members were directly involved in the decision to “terminate” the post of Chief, Procurement of Goods, PMCS, which he was still encumbering at the time of the interview. He also referred to his request for management evaluation filed on 28 August 2015.

... [Mr. Loeber] summarized his concerns as follows:

- a. With respect to the Head, PMCS, he stated that he was “informed about the planned termination on 18 June 2015 and signed the termination letter of 24 July 2015. Due to the serious occurrences set out in the 28 August 2015 Management Evaluation request, [he] maintain[ed] that the termination undersigned by [the Head, PMCS] [was] unrightful;
- b. Concerning the Head, SMLS, he stated that he “supported the termination. In the convocation of 18 June 2015, in which [he] was informed about the planned termination, [he] objected to it and asked [the Head, SMLS] whether the termination was also supported by DESS/SMLS. As Head of SMLS, he confirmed this to [[Mr. Loeber]]”;
- c. Finally, with respect to the Director, DESS, [Mr. Loeber] noted that she “held a final information meeting on 22 July 2015 with [him], in the presence of a representative from Human Resources, on the termination of [his] position. In the meeting it was clear that [the Director, DESS] supported or directed the termination of [his] position. During this meeting, [he] expressed [his] continued disagreement with the termination of the post he encumbered, which resulted in the above-mentioned request for management evaluation submitted in August 2015. It appears also that since the July 2015 meeting, [the Director, DESS] ha[d] generally avoided contact with [Mr. Loeber], though being [his] Second level supervisor, be it on a

personal level, by telephone or email. Further, on the occasion of an event in Geneva in the afternoon of 3 September 2015, [the Director, DESS] met [[Mr. Loeber]] greeting with apparent disdain. Under these circumstances, conducting an objective interview appears impossible”;

... He expressed his view that based on the above, and the issues he had raised in his request for management evaluation, the three Panel members had a direct conflict of interest in the D-1 post recruitment process.

... The Senior Resource Management Associate, Resource Management Unit, Office of the Director, DESS, responded to [Mr. Loeber], in the following terms:

I take note of your comments. On the procedural side, we ensured the presence of DHRM in the senior level interviews and of [Mr. L.] D1, Director's Office, DHRM in this particular case. The direct manager of the post, [Director, DESS], has to be in accordance to the procedures. The presence of technical senior managers as [the Head, SMLS] and [the Head, PS] was also needed. You might wish perhaps to liaise with [Mr. S.] in the Legal Affairs Section [LAS] for advice or eventually suggest LAS participation in the interviews.

... By another email of the same day, the Senior Resource Management Associate, informed [Mr. Loeber] that his email of 4 December 2015 had been shared with the Panel members.

... By email of 9 December 2015, [Mr. Loeber] informed the Administration that since he understood that the Panel had remained unchanged, and in light of the reasons given by him in the email of 4 December 2015—reiterated on 8 December 2015—he confirmed that he would not participate in the interview. [Mr. Loeber] stressed, however, that he upheld his application for the position.

... The Panel proceeded with the interviews with the other candidates, as they were advised by the DHRM that there were no grounds for a recusal and that they should remain as panel members.

... On the DHRM shortlisting matrix, it is stated under the “manager’s view” that although [Mr. Loeber] was highly qualified and experienced in procurement, the available information did not indicate any full time field assignments working in the management and logistical aspects of supply delivery; hence, he was not considered to be a suitable candidate. The matrix further notes the following:

As there were only 4 internal candidates, all four were invited to an interview to give each an opportunity to expand on his/her experience beyond what was available in the fact sheets and motivation letters. [[Mr. Loeber]] declined the interview due to the composition of the panel, indicating that he considered three members of the four[-]member panel to have a conflict of interest in relation to his application.

... The selected candidate was a female candidate.

... [Mr. Loeber] was separated from the Organization on 2 March 2016.

... After his separation from the Organization, [Mr. Loeber] indicated the Head, PMCS, as a referee for, at least, two other positions for which he applied at [United Nations Stabilisation Mission in Haiti “MINUSTAH”] and [The United Nations Relief and Works Agency for Palestine Refugees in the Near East “UNRWA”]. The Head, PMCS, had also positively recommended [Mr. Loeber] to Ms. G., who was looking for a procurement officer to fill a post at the Food and Agriculture Organization of the United Nations (“FAO”), while he was still in the employment of the UNHCR.

... On 4 March 2016, [Mr. Loeber] was informed about his non-selection for the contested post. He requested management evaluation of his non-selection on 24 April 2016, but did not receive a response to his request. He subsequently filed [an] application [before the UNDT].

3. On 12 September 2017, the UNDT issued its Judgment and rejected Mr. Loeber’s application in its entirety. The UNDT found that Mr. Loeber’s candidature received full and fair consideration. In particular, the UNDT found that the professional disagreements between Mr. Loeber and his supervisors and the performance issues taken together with Mr. Loeber’s strong comments made in his request for management evaluation about the Head, PMCS, would have rendered it reasonable and sound management for the Head, PMCS to recuse himself from the interview panel. The UNDT found, however, that because Mr. Loeber refused to be interviewed, it was impossible for the UNDT to assess whether the presence of the Head, PMCS on the panel prejudiced Mr. Loeber and whether the Head, PMCS was actually biased against Mr. Loeber such that as a panel member he would have negatively interfered with his candidature. The UNDT found it was reasonable for the Director, DESS to remain on the panel and that there was no evidence to support that the Head, SMLS was biased against Mr. Loeber. The UNDT noted that upon Mr. Loeber’s request for their recusal, the Administration gave a satisfactory reason for not replacing the panel members and invited Mr. Loeber to contact LAS, which provided Mr. Loeber with a procedural safeguard in the event he wished to contest the selection process after undergoing the interview. To the contrary, Mr. Loeber did not pursue that suggestion and willingly decided not to go to the interview. In conclusion, the UNDT found that the presumption of regularity of the decision not to select Mr. Loeber prevailed. He did not participate in the interview preventing the UNDT from assessing any bias and impact of the panel composition on the selection outcome.

Submissions**Mr. Loeber's Appeal**

4. Mr. Loeber submits that the UNDT erred in fact and law and requests the Appeals Tribunal to vacate the UNDT Judgment, rescind the selection decision, and order a new recruitment exercise with a different panel composition. Mr. Loeber also requests the following:

a) monetary compensation in the amount of 50 per cent of the difference between two years' gross salary at the D-1 position and seven months' gross salary for the period of March to September 2016 during which Mr. Loeber held the P-5 position within UNHCR as Chief of PMCS;

b) 17 months' gross salary for the period of October 2016 to February 2018 at the P-4 position as Chief of Unit, Procurement Officer at MINUSTAH, including not benefitting from Value Added Tax (VAT) reimbursement under this position in the amount of USD 24,062.17 and his loss in pension contributions totalling USD 2,050;

c) moral damages compensation; and

d) reimbursement of legal costs not less than CHF 5,000.

5. Mr. Loeber argues that the UNDT erred in fact in concluding that the tensions between himself and the Head, PMCS based on changed reporting lines between May and June 2014 and reassigning his duties to his subordinate P-4 staff member was a mere professional disagreement. The reduction in Mr. Loeber's tasks affected his ability to perform the duties in his job description resulting in a very difficult working relationship with the Head PMCS, adversely impacted ranking of staff and accountability, and damaged his reputation, which culminated in him filing a harassment complaint against the Head, PMCS. The situation had not changed by December 2015. The complaint itself is evidence that his relationship with the Head, PMCS had deteriorated to such an extent that the Head, PMCS could not reasonably have been deemed impartial at an interview on 9 December 2015—during this same time period. The UNDT failed to connect the removal of Mr. Loeber's tasks to the abolition of his post and non-renewal of his contract. The UNDT also failed to consider that the Head, PMCS opposed Mr. Loeber's selection to the post he encumbered from 2014 to 2016. Contrary to the UNDT's finding, the changes of

reporting line and reassignment of his tasks to the P-4 staff member were not taken to improve the workflow and motivation of the team, but rather to motivate only the P-4 staff member, as the Head, PMCS and Director, DESS admitted at the hearing. Mr. Loeber likewise argues that the UNDT failed to note that the Director, DESS was informed of the progressive withdrawal of his tasks, had initiated the restructuring process which led to his post abolition, and was aware of his opposition to the restructuring. The Head, SMLS was also aware of Mr. Loeber's criticism of overpriced warehouse charges, which the Head, SMLS had overseen and consequently, the Head, SMLS supported the discontinuation of his post and could not have been impartial. The UNDT further erred in finding that the restructuring process was no evidence of bias on the part of the Head PMCS, because it was a genuine process within the discretionary power of the Organization. To the contrary, the restructuring process was irregular and unlawful. Based on the foregoing, the UNDT erred in concluding that the Head PMCS, Director, DESS, and Head, SMLS did not have bias against him.

6. Mr. Loeber also argues that the UNDT erred in paragraph 31 of the impugned Judgment by incorrectly implying that his chance of success was not dependent upon the assessment by the interview panel as the DHRM shortlist matrix indicated that he was not a suitable candidate because he lacked full time field assignments. This was not required in the job description and the Head, PMCS confirmed at the hearing that he was qualified for the post.

7. Mr. Loeber argues that the UNDT erred in law. The UNDT found that his comments against the Head, PMCS in the management evaluation request, called into question the latter's impartiality and it would have been sound judgment for the Head, PMCS to recuse himself. Mr. Loeber argues that the Head, PMCS was clearly biased and this rendered the interview panel irregular *ab initio* which in turn rendered the selection process irregular, whether he participated in the interview or not. The UNDT also erred in finding that the Head, PMCS was not biased because he served as a referee on his application subsequent to his separation. The issue is not what the Head, PMCS said or did over a year after the interview date but whether the Head, PMCS had bias at the time of the interview. Moreover, the Head, PMCS had no choice in the matter as he was required to list him as a reference as he was his latest supervisor. The UNDT erred in concluding he was selected to the post in MINUSTAH due to the Head, PMCS's recommendation. This is erroneous as he was selected because he was already on a peacekeeping roster. Lastly, the UNDT erred in law in concluding that it was correct not to replace the panel members, finding that the invitation to Mr. Loeber to contact legal affairs was sufficient.

The Appeals Tribunal's jurisprudence, in *Aliko*², however, indicates that the selection process conducted by an interview panel may be rescinded when the staff member has not received full and fair consideration or when the members of the panel exhibited bias.

The Secretary-General's Answer

8. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss the appeal in its entirety as the UNDT correctly concluded that Mr. Loeber's candidature received full and fair consideration. The presumption of irregularity is satisfied thereby shifting the burden of proof to Mr. Loeber, who must show through clear and convincing evidence that he was not given full and fair consideration. Mr. Loeber failed to produce any evidence to this effect as the Panel indicated in the shortlist matrix that it assessed his experience against the position's requirements and found him not suitable because he did not demonstrate experience in the supply and logistics aspects of managing supply chains. The interview was a compulsory procedural step in the recruitment process and he unilaterally decided not to participate. Based on the foregoing, the UNDT correctly found that Mr. Loeber was given full and fair consideration.

9. The Secretary-General further argues that Mr. Loeber has not established any errors of fact to warrant a reversal of the impugned Judgment. Mr. Loeber does not identify a defect in the UNDT's finding that the change of reporting lines amounted to a professional disagreement, but merely disagrees with the UNDT's analysis that such did not lead to a conclusion of perceived bias. Mr. Loeber likewise does no more than disagree with the relative weight the UNDT placed on the facts relied upon in its conclusions about the Head, SMLS and Director, DESS. Mr. Loeber also fails to identify a reversible error in the UNDT Judgment noting that the shortlisting matrix indicated that he lacked field related experience and was not considered suitable. The UNDT in addressing the merits was not required to assess whether he was in fact suitable for the position. The UNDT Judgment did not turn on this issue, but, on whether he was afforded full and fair consideration. Similarly, Mr. Loeber does not identify a defect in the UNDT's finding that the restructuring process was not unlawful. The UNDT issued a separate judgment on this issue, which Mr. Loeber appealed.

² *Aliko v. Secretary General of the United Nations*, Judgment No. 2015-UNAT-540.

10. Lastly, the Secretary-General argues that Mr. Loeber has not identified any errors of law. Mr. Loeber wrongfully characterizes the UNDT as finding that the Head, PMCS had actual bias, when the UNDT merely held that the impartiality of the Head, PMCS was “open to question on reasonable grounds”. In addition, the Secretary-General argues that the interview panel was an intermediary step in the selection process that resulted in a final administrative decision. The Appeals Tribunal’s jurisprudence is clear that such intermediary steps may be challenged only in the context of an appeal against the outcome. Mr. Loeber claims he needs to only show that the panel could or would have been biased against him, if he had undergone the interview. The Appeals Tribunal’s jurisprudence, however, clearly states “a candidate challenging the denial of promotion must prove through clear and convincing evidence that the procedure was violated, members of the panel exhibited bias, irrelevant material was considered, or relevant material ignored”.³ Mr. Loeber’s argument that “(...) at least two members (...) were biased against [him] and their assessment alone could have switched the balance and led to a negative result for [him]” is speculation and conjecture. Mr. Loeber claims that the UNDT erred in concluding that adequate steps had been taken by the Administration to address his concerns with the panel composition. The UNDT took account of the assurance from the Administration that a D-1 level official from the Director’s Office would participate in the interview and that Mr. Loeber was advised to contact the legal office to request the presence of a legal officer. The UNDT found these steps reasonable in the circumstances. Mr. Loeber fails to identify any error and merely disagrees with the UNDT’s conclusion.

Considerations

11. Mr. Loeber has consistently asserted that three of the four panel members were biased against him mainly because they had been directly implicated in the progressive undermining of his functions which eventually led to the unlawful abolition of his post and his separation from the position of Chief, PMCS. Mr. Loeber’s first-level supervisor signed his separation letter. His second-level supervisor took no action in response to Mr. Loeber’s allegations, supported the separation, and allegedly avoided contact with Mr. Loeber and responded to his greeting with apparent disdain after a meeting in December 2014. The Head, SMLS also supported the separation.

³ *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, para. 21.

12. The present case does not deal with the abolishment of Mr. Loeber's post or his subsequent separation from service. Although these issues form the necessary background of the present case, they are the subject of another case, addressed in UNDT Judgment No. UNDT/2017/073. There is no doubt that the Administration has broad discretion in restructuring exercises, even if that includes abolition of posts, provided that it is not intended to deliberately exclude a particular person or motivated by extraneous reasons. In the present case, there is no evidence whatsoever that the restructuring exercise was not genuine.

13. Therefore, *incidenter tantum* and for the exclusive purposes of the present case, the presumption of regularity of administrative acts applies and we hold that the post was correctly abolished.

14. In non-selection matters, our jurisprudence has established that:⁴

... the factors to be considered are: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; (2) whether the staff member was given fair and adequate consideration, and (3) whether the applicable Regulations and Rules were applied in a fair, transparent and non-discriminatory manner. The Tribunal's role is not to substitute its decision for that of the Administration.

15. In the present case, we find no reason to differ from the UNDT's conclusion. Indeed, the applicable procedural requirements were followed and the evidence does not supersede the presumption of regularity of the administrative decision. Moreover, Mr. Loeber was afforded full and fair consideration, until the time he declined to participate in the interview to which he was invited. We find that the UNDT correctly found that Mr. Loeber failed to establish any bias by the members of the Panel, the onus of which is his.

16. Although it is clear that Mr. Loeber was unhappy with the restructuring process and that there were tensions in his work environment, the mere existence of a harassment complaint does not render the allegations of harassment true, particularly when all the parties admit that Mr. Loeber had agreed to put that complaint on hold, while awaiting simple managerial resolution.

⁴ *Savado v. Registrar of International Tribunal for the Law of the Sea*, Judgment No. 2016-UNAT-642, para. 40 (internal citations omitted).

17. Indeed, the Administration cannot be bound or paralyzed by any accusations or allegations against its bodies or authorities. Once any suspicion arises, the relevant rules apply and an investigation may be carried out. However, evidence must be produced to support allegations of possible misconduct. In the absence of such evidence, the allegations will be disregarded for the intended purposes. In the case at hand, despite the seriousness of the accusations, the complaint was put on hold at the request of the negotiating parties.

18. Furthermore, there is no challenge to the UNDT's finding that the Head, PMCS had not been informed about the harassment complaint, in light of its confidentiality; therefore, the Head, PMCS could not have admitted to any conflict of interest due to the content of the complaint.⁵ As to the content of the request before the Management Evaluation Unit (MEU), the Head, PMCS, explained during the hearing before the UNDT that he had been asked to give his view on the accusations of dishonesty and lying, which he rebutted with documentary evidence.

19. Moreover, he also justified that, from the five D-1 level staff positions serving at UNHCR at the time of the interview, only two had expertise in supply or logistics, which was a requirement to be a panel member: himself and the Head, SMLS, against whom Mr. Loeber objected. The Appeals Tribunal also takes note that, despite the existence of professional disagreements, particularly about the reorganization, the exchange between Mr. Loeber and his direct supervisor was courteous and professional, as revealed by the e-mails in the case file.

20. Regarding the Head, DESS, she was the direct supervisor of the post Mr. Loeber was applying for and, therefore, her presence was expected on the panel. As she informed in her evidence, the composition of the Panel had taken into account the purpose of the post and the close professional relations the person to be selected would need to have with the panel members. And, contrary to Mr. Loeber's contention, there had been a previous explanation as to why the members of the Panel would continue in their role, since the Organization replied to his objection also stating that they had built some protection for him during the interview, including the presence of a D-1 staff member from the Director's Office, DHRM, in order to ensure objectivity of the assessment.

⁵ Impugned Judgment, paras. 61 and 62.

21. One further detail is to be considered: there appears to be a contradiction between what Mr. Loeber stated before the UNDT as one of the reasons as to why he had not applied for the P-5 level posts (not having been encouraged to apply by his immediate supervisor) and the fact that he did apply for the D-1 level post, despite the absence of encouragement.

22. This Tribunal recalls its Judgment in *Chhikara*, wherein this Tribunal held that the staff member had not received full and fair consideration due to procedural irregularities, some occurring at the interview assessment.⁶ However, *Chhikara* is distinguishable from the present case. Here, Mr. Loeber did not participate in the interview process and the UNDT found that Mr. Loeber was given full and fair consideration for the post in question, as the UNDT found no irregularity or bias of the Panel.⁷

23. In view of the foregoing, we find that, although highlighted by the UNDT that it would have been sound management to replace the Head, PMCS with another panel member,⁸ which incidentally would have obviated the need for further discussions,⁹ there is ultimately no reasonable apprehension of bias on the part of the panel members.

Special procedure

24. The Appeals Tribunal notes that, although Mr. Loeber does not use the term discrimination in his appeal, his argumentation is grounded on alleged bias or discrimination against him. During the hearing before the UNDT, Mr. Loeber also mentioned the term “retaliation”, possibly due to the procurement efficiency criticism he had made. The same argument seems to be the reason why he initially filed the complaint for harassment, which was put on hold with his concurrence.¹⁰ In his appeal, Mr. Loeber made the connection between the removal of his tasks and the subsequent abolition of his post and separation from service.

⁶ *Chhikara v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-723.

⁷ Impugned Judgment, para. 70.

⁸ *Ibid.*, para. 64.

⁹ With the benefit of hindsight, the Director, DESS, also declared before the UNDT that she regretted not having acted in this way.

¹⁰ During the hearing before the UNDT, Mr. Loeber acknowledged having taken the decision to await managerial action, as “it was reasonable”. He also claimed that the complaint was superseded by the discontinuation of the post and that this is the reason he did not ask for the special proceedings to continue.

25. In matters of discrimination, harassment, including sexual harassment, and abuse of authority, the Secretary-General's Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) applies. The rationale of this special instrument has fundamental importance within the Organization. As we have stated in *Faust*:¹¹

... the Appeals Tribunal understands that the special procedural provisions adopted by ST/SGB/2008/5 are purposely conceived to "treat the situation with sensitivity and confidentiality" (Section 5.8), in order to achieve the main objective clearly stated at the beginning of ST/SGB/2008/5, which advocates dignified and respectful treatment of both the aggrieved individual and the alleged offender.

... The Organization attaches importance to addressing complaints of prohibited conduct, as evidenced by the detailed procedures set out in ST/SGB/2008/5. Under the formal procedures, if the complaint appears to have been made in good faith and there are sufficient grounds to warrant a formal fact-finding investigation, the responsible official shall promptly appoint an investigation panel (...) This investigation takes time and must respect certain special rules, as indicated in ST/SGB/2008/5. This is not a matter of discrimination by the rules, but rather of equity, that is to say that the Organization shall treat different issues differently while respecting the principle of proportionality.

26. The present case appears therefore to be grounded on the same factual circumstances as the initial harassment complaint or the development thereof, thus configuring a disguised attempt to resume the complaint filed pursuant to ST/SGB/2008/5. The evidence presented should have been submitted via the procedures provided in ST/SGB/2008/5. Mr. Loeber, however, came to justice, having skipped such procedures.

Relevant evidence

27. Assuming, *arguendo*, that evidence could have been produced outside the framework designed by ST/SGB/2008/5, what would have been relevant in the present case is not so much to verify what the panel members did *after* the interview (e.g., provide positive recommendations of Mr. Loeber), but rather to assess what occurred *before* the interview took place (as the alleged bias existed at the time of the interview), mainly whether the fact that some of Mr. Loeber's functions were removed from his daily routine and transferred to another staff member with the hidden intention of depriving him of his functions.

¹¹ *Faust v. Secretary General of the United Nations*, Judgment No. 2016-UNAT-695, paras. 48-49.

Mr. Loeber asserted at his hearing before the UNDT that there was an ulterior motive behind the restructuring, namely that it was a “mask to get rid of [him]”. However, the evidence produced before the UNDT does not justify such a conclusion.

28. In this light, Mr. Loeber has failed to provide evidence that he was the target of the restructuring exercise or that it was done for extraneous reasons. This Tribunal concludes for the exclusive purposes of this case, as previously highlighted, that the restructuring exercise was carried out *bona fide*.

Non-attendance at the interview

29. A special aspect of this case must be highlighted. Mr. Loeber chose voluntarily not to participate in the interview. Mr. Loeber claims that he was not required to do so, as the composition of the Panel was irregular, compromising its impartiality. He did not agree with the justification provided by the Administration, as in his view his concerns were not properly considered. As he stated during the UNDT hearing, for him, either there should have been a change in the composition of the Panel or an alternative Panel should have been created to interview him.

30. Mr. Loeber chose not to participate in the interview due to his belief that the Panel was biased against him. However, he has failed to present sufficient evidence of such bias. Furthermore, in failing to participate in the necessary recruitment procedures, he is estopped from contesting this aspect and without standing to contest the selection outcome.

31. Moreover, he did not collaborate in mitigating the conflict, not only because he did not ask for his initial complaint – which is the basis for the *imbroglio* – to continue, so as to be resolved according to the applicable rules and in the interests of the Organization, but also because he wanted different treatment from the other candidates, in upholding his application, with an alternative panel.

32. The Appeals Tribunal finds no reason to overturn the thorough and well-reasoned impugned decision.

Judgment

33. The appeal is dismissed and Judgment No. UNDT/2017/074 is hereby affirmed.

Original and Authoritative Version: English

Dated this 22nd day of March 2018 in Amman, Jordan.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Lussick

Entered in the Register on this 23rd day of May 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar