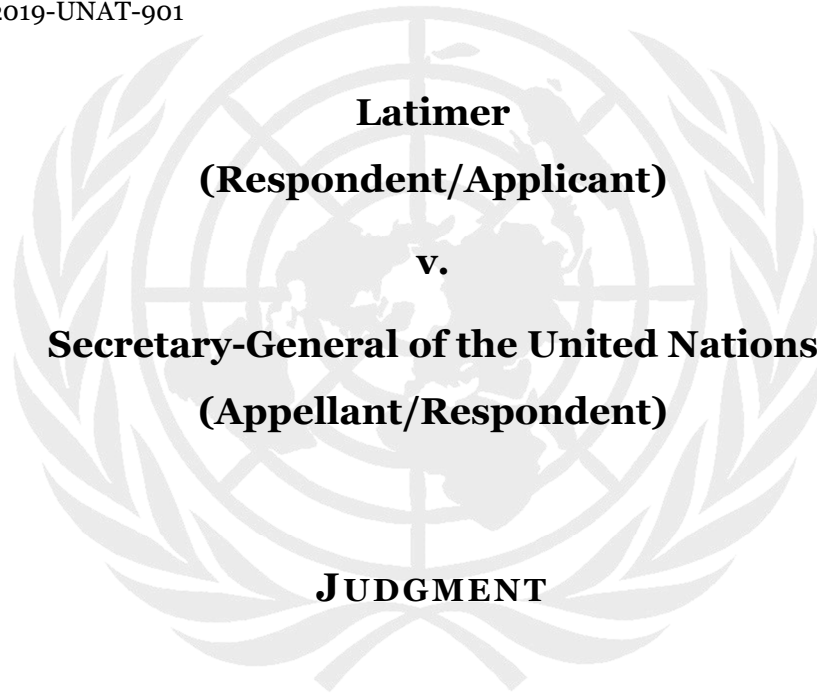




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2019-UNAT-901



**Latimer  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Sabine Knierim, Presiding Judge Martha Halfeld Judge John Raymond Murphy
Case No.:	2018-1192
Date:	29 March 2019
Registrar:	Weicheng Lin

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Counsel for Mr. Latimer:	Self-represented
Counsel for Secretary-General:	Rupa Mitra

**JUDGE SABINE KNIERIM, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/066, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 14 June 2018, in the case of *Latimer v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 13 August 2018, and Mr. Malcolm John Latimer filed his answer on 11 October 2018.

**Facts and Procedure**

2. Mr. Latimer joined the Organization on 30 August 1979. He reached the mandatory retirement age on 31 January 2008. However, he was retained in service from 1 February 2008 to 31 May 2008. After his separation from service, Mr. Latimer was engaged on a series of temporary appointments with the English Translation Service, Department of General Assembly and Conference Management (ETS/DGACM) on a “when actually employed” (WAE) basis.

3. Mr. Latimer’s daughter, Ms. SL, joined the Organization on a temporary appointment on 15 October 2012 until 24 November 2012. Prior to Ms. SL’s appointment, Mr. Latimer was engaged on a WAE appointment. On 5 October 2012, prior to Ms. SL’s offer of appointment, Mr. Latimer resigned from the Organization as requested by the Administration.

4. Ms. SL received another temporary appointment from 7 October 2013 to 22 November 2013. At that time, Mr. Latimer was not a staff member of the Organization.

5. Mr. Latimer was re-appointed on a WAE appointment on 25 November 2013. He received four further WAE appointments, including his most recent appointment, which was from 1 January 2016 to 31 December 2016. On 2 March 2016, Ms. SL accepted and signed an offer of a fixed-term appointment (FTA) and started work in ETS/DGACM on 9 June 2016. On 27 October 2016, ETS/DGACM asked whether Mr. Latimer was available for a WAE appointment for 2017, and he responded in the affirmative that same day.

6. On 17 November 2016, the Chief of ETS/DGACM wrote to Mr. Latimer requesting his resignation pursuant to Staff Rule 4.7(a). Mr. Latimer sent his resignation on the same day mentioning that he had already been a staff member when his daughter was appointed.

7. On 14 December 2016, Mr. Latimer requested a management evaluation of his alleged constructive dismissal. On 3 January 2017, the Management Evaluation Unit (MEU) sent its decision to Mr. Latimer informing him that his request for management evaluation was not receivable, *inter alia*, for the following reasons:

[A]s a retiree, [Mr. Latimer's] continued service was already subject to the restrictions in ST/AI/2003/8/Amend.2 [Retention in service beyond the mandatory age of separation and employment of retirees], which provides that "[r]etention in service of staff members beyond the mandatory age of separation is an exception ... which may be approved by the Secretary-General only when it is in the interest of the Organization," "due to the exigencies of the service concerned". Thus, [Mr. Latimer was] a temporary appointee contracted by the Organization under exceptional circumstances. It was ultimately within the Administration's discretion to decide whether those circumstances required a further exception to Staff Rule 4.7(a), and, given the bright-line prohibition in the Rule against employing family relations, the MEU found nothing patently arbitrary or absurd in not granting such a further exception. Importantly, the MEU observed that, irrespective of [Mr. Latimer's] professional qualifications, the determination of the Organization's interest in maintaining a pool of suitably qualified language staff ultimately does not give rise to any corresponding right on the part of a staff member. Consequently, the MEU would have found no basis to recommend rescission of [Mr. Latimer's] separation.

8. On 9 March 2017, Mr. Latimer filed his application with the UNDT and on 14 June 2018, the UNDT issued Judgment No. UNDT/2018/066. The UNDT found that the request to Mr. Latimer to resign constituted a constructive dismissal and was therefore receivable. The UNDT found that the decision was based on Staff Rule 4.7(a) which in itself is discriminatory and the Administration failed to apply and interpret Staff Rule 4.7(a) together with Staff Rule 4.7(c) and in accordance with higher norms, namely Article 101 of the United Nations Charter (Charter), Article 23 of the Universal Declaration of Human Rights, Article 26 of the International Covenant on Civil and Political Rights and Article 6 of the International Covenant on Economic, Social and Cultural Rights.

9. Moreover, the decision was based on a wrongful interpretation of Section 5.1 of ST/AI/2003/8/Amend.2. The Executive Officer (EO)/DGACM who issued the request for Mr. Latimer's resignation was of the view that Staff Rule 4.7(a) applied to Mr. Latimer, thereby ignoring the 12 January 2016 decision by the Acting Director of the Documentation Division (DD) of DGACM that Mr. Latimer had the right to be employed, in the interest of the Organization, at the same time as his daughter, being therefore exempted from the application of Staff Rule 4.7(a).

Even if the interpretation by the Organization was to be considered correct, the application of Staff Rule 4.7(a) had previously been waived in favor of Mr. Latimer.

10. Moreover, the UNDT noted that Staff Rule 4.7(a) did not apply to staff members, but to the relatives of staff members. Since, in the present case, both Mr. Latimer and his daughter were already staff members within the same unit, ETS/DGACM, Staff Rule 4.7(a) did not apply. Rather, the law that applied to the employment of both Mr. Latimer and his daughter was set out in Staff Rule 4.7(c) which would have prohibited either of the two being assigned to a position in the department or unit as a superior or subordinate in the line of authority to the other, and prohibited the participation of either one in the process of reaching or reviewing an administrative decision affecting the status or entitlements of the staff member to whom he or she is related.

11. The UNDT concluded that the contested decision consisting in Mr. Latimer's constructive dismissal was unlawful. The UNDT ordered rescission of the termination of his WAE contract and in-lieu compensation in the amount of USD 10,000. In addition, the UNDT awarded compensation equivalent to the salary corresponding to the period from 17 November 2016 to 31 December 2016, but no more than 125 days according to the relevant limit set out in ST/AI/2003/8/Amend.2. The UNDT further ordered that Mr. Latimer be considered eligible for future WAE contracts within the Secretariat. Finally, the UNDT made a number of observations and recommendations, including to immediately amend Staff Rule 4.7 to remove its "discriminatory content" as well as relevant provisions in ST/AI/273 (Employment of spouses) and other pertinent administrative instructions and guidelines.

### **Submissions**

#### **The Secretary-General's Appeal**

12. The request to Mr. Latimer to resign was lawful. Contrary to the UNDT's finding, the Acting Director of the DD/DGACM did not decide that Mr. Latimer had "the right to be employed in the interest of the Organization at the same time as his daughter". Staff Rule 4.7(a) was not waived in favor of Mr. Latimer. Rather, the Acting Director of the DD/DGACM correctly stated that the fact that Mr. Latimer was a retired staff member who was part of the WAE pool used by the ETS/DGACM did not preclude his daughter from being recruited following her success at the 2015 Language Competitive Examination.

13. On a WAE contract, an individual is only a staff member during the times that he or she is actually employed. Mr. Latimer's WAE contract for 2016 stated that the appointment would be effective only those days he was actually called upon to service a meeting and that only during the days of his assignments, he would be considered a staff member. The Acting Director's understanding was correct because neither Mr. Latimer nor his daughter was offered or accepted their respective appointments while the other was a staff member. As the UNDT rightly noted, when Mr. Latimer signed his offer for a WAE contract of 22 December 2015, his daughter, Ms. SL, was not yet employed by the Organization and indeed had not received an offer. On the dates for which Ms. SL was offered her appointment, accepted the offer and started working, Mr. Latimer was not actually employed and was thus not a staff member. Accordingly, the recruitment of Ms. SL while her father was on a WAE contract was not in violation of Staff Rule 4.7.

14. The UNDT improperly ruled that since Mr. Latimer and his daughter were already staff members within the same unit, Staff Rule 4.7(a) was not applicable to either of them. Staff Rule 4.7(a) *did* apply to them. However, the question that arose was whether Mr. Latimer could have been engaged for employment under his WAE contract once his daughter had begun working as a staff member on 9 June 2016. Mr. Latimer performed work, and therefore was a staff member, on certain days in March 2016 after his daughter had accepted the offer, and also after his daughter had reported to work in June 2016. Employing Mr. Latimer, once his daughter had become a staff member was in violation of Staff Rule 4.7(a) and Mr. Latimer was aware of that. On 1 January 2016, he had signed his acceptance of the WAE contract offer, which expressly required him to acknowledge the provisions of Staff Rule 4.7(a). His appointment was conditioned upon his continuing confirmation that he had no relationship with any staff member of the United Nations Secretariat that would contravene Staff Rule 4.7(a). Once his daughter became a staff member in June 2016, Mr. Latimer's eligibility for continued employment changed. The Administration was therefore entitled to enforce the terms of the WAE contract.

15. The Administration also had a duty to rectify its mistake of employing Mr. Latimer, in contravention of Staff Rule 4.7(a), after his daughter had become a staff member in the ETS. The fact that it only did so after Mr. Latimer had already worked 48 of the 103 days after his daughter started working operated to his benefit. In addition, it was within the Secretary-General's discretion under Articles 97 and 101 of the Charter to decide that the interests of the Organization called for the retention of Ms. SL, who had recently passed the Competitive Language Examination in 2015 and who could have a long career with the Organization, over the retention of her father,

who had already been employed exceptionally and regularly during the more than eight years following the date he had reached the mandatory retirement age in 2008.

16. The UNDT further misinterpreted Staff Rule 4.7. The plain language of Staff Rule 4.7(a) does not contradict the provisions of the instruments cited by the UNDT. The right to work and to be protected against discrimination is not violated simply because the Secretary-General places certain limitations, such as anti-nepotism restrictions, on staff members' working conditions. Such limitations on employment conditions are not violations of the right to work and freedom of employment. Rather, they are well within the scope of the Secretary-General's authority under the Charter and the Staff Regulations.

17. Furthermore, the UNDT failed to carefully consider the language of the different parts of Staff Rule 4.7. While Staff Rule 4.7(a) limits the conditions under which an individual who is not a staff member may be given an appointment, Staff Rule 4.7(c) relates to limitations to be imposed on the positions to which an already-existing staff member can be assigned and limitations as to what actions they can perform in carrying out their official duties. The distinctions are better understood in light of the history of this Staff Rule. As of 2 September 2010, the limited exception in Staff Rule 4.7 under which a person could be appointed even though he or she bore one of the close family relationships listed in Staff Rule 4.7(a) was removed from Staff Rule 4.7(a). However, the Rule having previously provided for such an exception, the remainder of the Rule as articulated in Staff Rule 4.7(c) was still required and applicable to staff members who had been so appointed.

18. The UNDT also revealed a lack of clarity on the manner in which the Staff Regulations and Rules function together as well as the General Assembly's role in such functioning. The UNDT erred in stating that the Staff Rules could not limit in part or whole or extend the area of application of the Staff Regulations. It further erred in considering that it was relevant that there was no Staff Regulation established by the General Assembly with specific reference to employment/recruitment of staff members of the same family and/or family relationships which was to be implemented by the Secretary-General through Staff Rules. Finally, it erred in noting that the phrase "except where another person equally well qualified cannot be recruited" was eliminated without the General Assembly amending the existing relevant Staff Regulations or adopting new Staff Regulations regarding appointments in that sense.

19. Under the Charter, the General Assembly establishes the Staff Regulations which set out the broad principles of human resources policy. The Secretary-General is required by the Staff Regulations to provide and enforce the Staff Rules, consistent with these principles, as he considers necessary. Such Staff Rules and amendments are provisional until the full text has been reported to the General Assembly and the General Assembly has taken note of it. The provisional rules and amendments reported by the Secretary-General, taking into account such modifications and/or deletions as may be directed by the General Assembly, enter into full force on 1 January following the year in which the report is made to the General Assembly. In accordance with the aforementioned framework, the amended provisional Staff Rule 4.7 was presented to the General Assembly in 2010. The General Assembly took note of it and in doing so, made no finding that the amendment to Staff Rule 4.7 was inconsistent with the Staff Regulations and did not direct that it be modified or withdrawn. The UNDT failed to take these points into consideration. Therefore, in ruling that the contested decision was unlawful, the UNDT erred in law and fact resulting in a manifestly unreasonable judgment.

20. The UNDT's award of compensation was unlawful. The UNDT erred in finding that the contested decision was unlawful and therefore wrongly ordered rescission of the contested decision and compensation. If the Appeals Tribunal were to consider that the UNDT correctly ordered rescission of the contested decision and alternative compensation, the Secretary-General contends that the UNDT erred in law and exceeded its jurisdiction in making a separate award of compensation without any evidence or showing of any kind that Mr. Latimer would have earned anything at all during the period in question under his WAE contract. Nor did the UNDT make any finding of moral harm. The purpose of rescission, or payment of in-lieu compensation, is to place the injured staff member back into the position he or she would have been in had there not been any violation of his or her rights. There was thus no basis to provide an additional award once the compensation in the alternative was set.

21. Finally, the UNDT erred in law and exceeded its scope of judicial review under Article 2 of its Statute in making observations and recommendations, including expressing its expectation that policy documents be changed. The Secretary-General asks that those observations and recommendations be stricken from the Judgment, regardless of the outcome of the remainder of his appeal.

22. The Secretary-General requests that the Appeals Tribunal vacate the Judgment in its entirety.

**Mr. Latimer's Answer**

23. The Secretary-General's interpretation of Staff Rule 4.7, in his appeal, is inconsistent with his interpretation in 2012. While, in his appeal, the Secretary-General contends that on a WAE contract, an individual is only a staff member during the times that he or she is actually employed, the Secretary-General, in 2012, effectively interpreted the mere possession of a WAE as conferring staff member status. The Executive Office of DGACM, invoking Staff Rule 4.7(a), demanded that Mr. Latimer resign from his WAE contract for the period of 1 April to 31 December 2012, before it could proceed with his daughter's recruitment on a short-term contract for the period of 15 October to 23 November 2012, notwithstanding the explicit statement in Mr. Latimer's WAE that, under his appointment, he was only a staff member on the days he was actually employed and the fact that Mr. Latimer's employment ceased on 5 October 2012 so that their periods of actual employment did not overlap and Staff Rule 4.7(a) did not apply.

24. The interpretation by the Executive Office in 2012 created the understanding and legitimate expectation among the parties directly involved (the ETS and the DD as well as Mr. Latimer and his daughter) that in offering his daughter an appointment during the period of validity of Mr. Latimer's 2016 WAE contract, at which time in accordance with the 2012 interpretation, Mr. Latimer was already a staff member, the Executive Office had understood the essential need for experienced temporary staff in the DD to process the workload and was effectively waiving the provisions of Staff Rule 4.7(a). The consequential representations by the ETS and the DD, in consonance with the decision to offer Mr. Latimer's daughter a contract, that her recruitment was permissible at the time Mr. Latimer held a WAE contract, that his eligibility for continued employment subsequent to her recruitment would not be impaired, and that she could be brought on board while he was employed, induced both to rely on the representations made, orally and in part in writing, with the result that his daughter renounced her career options at specialized agencies in Geneva in the belief that their respective situations were safeguarded.

25. The UNDT therefore correctly stated that Staff Rule 4.7 had been waived in Mr. Latimer's case. The self-evident corollary of the fact that Mr. Latimer's daughter could be recruited while Mr. Latimer held a WAE contract and could begin work while he was a staff member, as previously defined by the Executive Office, is that Mr. Latimer's eligibility for employment was unaffected by her recruitment, as was informally conveyed by the DD and the ETS. His employment was, therefore, not a mistake requiring correction.



26. In accordance with the foregoing, the WAE contractual requirement to provide updated information on family relationships was redundant. Moreover, the Executive Office was fully aware of the day-to-day staffing table of the ETS and the on-board status. The assertion that Ms. SL's recruitment ended Mr. Latimer's eligibility for continued employment is therefore a misconstruction.

27. Contrary to the Secretary-General's contention, the UNDT correctly found that an interpretation of the plain language of Staff Rule 4.7(c) could only be that paragraph (a) was not absolute, so that family members might be appointed subject to the limitation in paragraph (c).

28. Moreover, should the General Assembly find that a provisional rule is inconsistent with the intent of the Staff Regulations and Rules, it may direct that the rule be modified. When Staff Rule 4.7 was amended in 2010, the General Assembly did not direct that the amended Staff Rule 4.7 be withdrawn or modified. Since the General Assembly did not limit the application of the caveats in Staff Rule 4.7(c) to staff in service at that time or order the removal of the caveats, it was its intention for exceptions to paragraph (a) still to be permitted. Therefore, contrary to the Secretary-General's contention that Staff Rule 4.7(c) has only historical applicability, paragraph (c) only has a continuing *raison d'être* if exceptions to paragraph (a) may be made.

29. The Secretary-General has failed to substantiate his assertion that the UNDT erred in its application of Article 101 of the Charter and the provisions governing the right to work and equality before the law enshrined in the human rights instruments cited by the UNDT.

30. As to the UNDT's award of compensation, the Secretary-General's contentions are flawed. Rescission of the constructive dismissal and restitution under the 2016 WAE contract were materially impossible and notwithstanding the Secretary-General's contention that the UNDT had made no finding of harm, it was obvious that Mr. Latimer had suffered considerable harm as a result of the dismissal: the accepted offer for the 2017 WAE contract was not honored and Mr. Latimer was effectively debarred from accepting work in lieu while the termination of his contract made it necessary for him, as a decades-long G-4 visa holder, to leave the United States at very short notice.

31. Turning to the award of compensation corresponding to the unworked portion of the 2016 WAE contract, the Secretary-General's claim that this separate award of salary had no basis as there was no evidence of any kind that Mr. Latimer would have earned anything at all under the

remainder of the contract is a misstatement of the facts, ETS having already made an agreed offer for Mr. Latimer to work until 16 December 2016.

32. The in-lieu compensation in the amount of USD 10,000 awarded by the UNDT is in fact less than what would have been payable as salary had the 2016 WAE contract not been rescinded and is far below the amount of salary which Mr. Latimer could reasonably expect to receive had the 2017 WAE contract been honored or had the dismissal not debarred Mr. Latimer from seeking alternative employment.

33. Mr. Latimer requests that the Appeals Tribunal dismiss the Secretary-General's appeal and affirm the UNDT Judgment.

### **Considerations**

34. The UNDT held that the Administration's request to Mr. Latimer to resign amounted to a constructive dismissal which was unlawful because, on the one hand, Staff Rule 4.7(a) was discriminatory in itself and inconsistent with higher norms, including Article 101 of the Charter, and on the other hand, Staff Rule 4.7(a) provided no legal basis to revoke Mr. Latimer's 2016 WAE appointment. The UNDT further found that the non-execution of Mr. Latimer's 2017 WAE appointment was unlawful.

35. The UNDT rescinded the contested decision, set in-lieu compensation in the amount of USD 10,000 and awarded compensation consisting of Mr. Latimer's salary corresponding to the period from 17 November 2016 to 31 December 2016 and no more than 125 days according to ST/AI/2003/8/Amend.2. The UNDT further granted Mr. Latimer's request to be considered eligible for future WAE contracts within the United Nations Secretariat to compensate him for the non-execution of his 2017 WAE contract.

36. The Secretary-General appeals and requests that the Appeals Tribunal vacate the UNDT Judgment in its entirety.

*The 2016 WAE appointment**The UNDT's review of Staff Rule 4.7(a)*

37. The UNDT found that Staff Rule 4.7(a) in itself was discriminatory and inconsistent with higher norms, namely Article 101 of the Charter, Article 23 of the Universal Declaration of Human Rights, Article 26 of the International Covenant on Civil and Political Rights and Article 6 of the International Covenant on Economic, Social and Cultural Rights. The Secretary-General appeals this UNDT's finding on the ground that the UNDT had no jurisdiction to review the legality of Staff Rule 4.7.

38. Pursuant to Staff Regulation 12.3, “[t]he full text of provisional staff rules and amendments shall be reported annually to the General Assembly. Should the Assembly find that a provisional rule and/or amendment is inconsistent with the intent and purpose of the Regulations, it may direct that the rules and/or amendment be withdrawn or modified”. According to Staff Rule 12.4, “[t]he provisional rules and amendments reported by the Secretary-General, taking into account such modifications and/or deletions as may be directed by the General Assembly, shall enter into full force and effect on 1 January following the year in which the report is made to the Assembly”.

39. As previously held, the Tribunals do not have jurisdiction or competence to review whether or not General Assembly resolutions are constitutionally inconsistent with the Charter. Neither the UNDT nor this Tribunal is a constitutional court.<sup>1</sup> The Secretary-General correctly argues that the Staff Rules are vetted by the General Assembly and in the case of amended Staff Rule 4.7, the General Assembly implicitly approved it by not directing that Staff Rule 4.7 or its amendment be withdrawn or modified. In light of the foregoing, the UNDT exceeded its jurisdiction and erred in law in venturing into a review of the legality of Staff Rule 4.7.

*The UNDT's interpretation of Staff Rule 4.7(a)*

40. Staff Rule 4.7 (Family relationships) provides, in relevant part, as follows:

(a) An appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member.

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<sup>1</sup> *Lloret-Alcaniz et al. v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-840, para. 98. See also *Oglesby v. United Nations Joint Staff Pension Board*, Judgment No. 2019-UNAT-914, para. 37.

(c) A staff member who bears to another staff member any of the relationships specified in paragraphs (a) and (b) above:

(i) Shall not be assigned to serve in a post which is superior or subordinate in the line of authority to the staff member to whom he or she is related;

(ii) Shall not participate in the process of reaching or reviewing an administrative decision affecting the status or entitlements of the staff member to whom he or she is related.

41. The UNDT held that Staff Rule 4.7(a) was not applicable to individuals who are already staff members, but to their relatives interested in becoming staff members. Since in the present case, both Mr. Latimer and his daughter were already staff members within the same unit, the ETS/DGACM, Staff Rule 4.7(a) did not apply. Rather, the law that applied to the employment of both Mr. Latimer and his daughter was set out in Staff Rule 4.7(c) which prohibited either of the two being assigned to a position in the department or unit as a superior or subordinate in the line of authority to the other, and prohibited the participation of either one in the process of reaching or reviewing an administrative decision affecting the status or entitlements of the other.

42. We find no error in the UNDT's finding. At the time of Mr. Latimer's 2016 WAE appointment, his daughter was not employed by the Organization. Accordingly, Staff Rule 4.7(a) did not apply to him and his appointment was not unlawful. We are not seized with determining whether or not the appointment of Mr. Latimer's daughter was unlawful. However, once Mr. Latimer's daughter *had been* appointed, lawfully or not, Staff Rule 4.7(c) applied. Staff Rule 4.7(a) only precluded the Secretary-General from *granting* Mr. Latimer an appointment, but did not provide any basis for the Administration's request to Mr. Latimer to tender his resignation from an ongoing appointment.

43. In light of the foregoing, we uphold the UNDT's finding, although partly for different reasons, that the Secretary-General's request to Mr. Latimer to resign from his 2016 WAE appointment was unlawful.

*Relief ordered*

44. Having concluded that the contested decision was unlawful, we uphold the UNDT's order rescinding the revocation of Mr. Latimer's 2016 WAE appointment. However, in Mr. Latimer's circumstances, we consider the award of USD 10,000 as in-lieu compensation to be excessive and decrease it to USD 2,000.

45. Turning to the UNDT's award of compensation for loss of salary for the period 17 November to 31 December 2016, there is no evidence on record that Mr. Latimer would have indeed been "actually employed" during that period. In the absence of any such evidence, the UNDT erred in awarding compensation.

*The 2017 WAE and future WAE appointments*

46. The UNDT, relying on the Appeals Tribunal's jurisprudence in *Sprauten*,<sup>2</sup> found that Mr. Latimer had a valid WAE appointment for 2017 and ordered that Mr. Latimer be considered eligible for future WAE contracts within the United Nations Secretariat to compensate him for the non-execution of his 2017 appointment. While the Secretary-General has not appealed this part of the UNDT Judgment, our review, as will be explained below, has nonetheless discerned an error of law and excess of jurisdiction,<sup>3</sup> and the Judgment's finding and order cannot stand.

47. The Appeals Tribunal is satisfied that the Administration correctly applied Staff Rule 4.7(a) when it decided not to grant Mr. Latimer a WAE appointment for 2017 as, at the relevant time, his daughter was a staff member of the Organization. The UNDT erred in relying on *Sprauten* where we stated: "[A] contract is formed by an unconditional agreement between the parties on the terms and conditions for the appointment, before issuance of the letter of appointment, if all the conditions of the offer are met by the candidate."<sup>4</sup> In *Al Hallaj*, the Appeals Tribunal held that where the Administration has issued an offer of appointment and where the conditions of the appointment have been unconditionally accepted and fulfilled, a quasi-contract is formed which in turn creates obligations for the Administration, such as<sup>5</sup>

behaving in keeping with the principle of good faith (to elucidate the other party on the relevant obligations, to provide assistance to her, to protect her legitimate expectations, etc.), and acting fairly, justly and transparently in its dealings with her. These aspects and expressions of the principle of good faith supplement, and at the same time, concretize the terms of the emerging contract of employment. They constitute in their specific application an inextricable part of the parties' compliance with the 'terms of appointment'.

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<sup>2</sup> *Sprauten v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-111.

<sup>3</sup> See *Gebremariam v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-584.

<sup>4</sup> *Sprauten v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-111, para. 25.

<sup>5</sup> *Al Hallaj v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-810, para. 39 (internal citation omitted).

48. However, the present case is distinguishable from *Sprauten* and *Al Hallaj* in that no offer of appointment had been issued to Mr. Latimer. There was merely an informal e-mail exchange dated October 2016 between Mr. Latimer and the Administration regarding a potential 2017 WAE appointment in which the Administration inquired whether Mr. Latimer would be available for a 2017 WAE appointment with 3 January 2017 as a likely start date, which Mr. Latimer confirmed. As no offer of appointment had been issued and no other conditions for the appointment had been addressed and agreed on, no valid contract, or quasi-contract, was concluded. Moreover, Mr. Latimer no longer met the conditions for an appointment as his daughter had become a staff member of the Organization. The UNDT therefore erred in finding that Mr. Latimer had a valid WAE contract for 2017. Since the Administration lawfully refused to award Mr. Latimer a WAE appointment for 2017, there was no basis to award any remedies on that ground.

49. As for future WAE appointments, Mr. Latimer's eligibility will depend on whether or not his daughter remains employed by the Organization. For as long as she is a staff member of the United Nations, Staff Rule 4.7(a) will apply and the Administration will be precluded from granting an appointment to Mr. Latimer. In ordering that Mr. Latimer be considered eligible for future WAE appointments, the UNDT erred in law and also exceeded its jurisdiction as no such remedy is available under Article 10(5) of the UNDT Statute.

*The UNDT's observations on Staff Rule 4.7(a)*

50. The Secretary-General contends that the UNDT erred in law and exceeded its jurisdiction in making "observations" at the end of its Judgment regarding the need to amend Staff Rule 4.7.

51. This Tribunal finds that since the UNDT exceeded its competence and jurisdiction in reviewing the legality of Staff Rule 4.7, it also exceeded its jurisdiction when making observations and recommendations for an amendment to the Staff Rule.<sup>6</sup> The UNDT's jurisdiction is clearly set out in Article 2 of its Statute. Making recommendations for legislative amendments is a clear excess of jurisdiction. We therefore grant the Secretary-General's request to strike these observations from the Judgment.

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<sup>6</sup> *Ngoma-Mabiala v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-361.

**Judgment**

52. The Secretary-General's appeal is granted, in part. The UNDT's order of rescission of the contested decision<sup>7</sup> is upheld and the in-lieu compensation awarded is decreased to USD 2,000. The UNDT's orders of compensation for loss of salary<sup>8</sup> and of eligibility for future WAE appointments<sup>9</sup> are vacated, and paragraphs 124 to 128 are to be stricken from the UNDT Judgment.

Original and Authoritative Version: English

Dated this 29<sup>th</sup> day of March 2019 in New York, United States.

*(Signed)*

Judge Knierim Presiding

*(Signed)*

Judge Halfeld

*(Signed)*

Judge Murphy

Entered in the Register on this 29<sup>th</sup> day of May 2019 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar

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<sup>7</sup> Impugned Judgment, para. 123(a).

<sup>8</sup> *Ibid.*, para. 123(b).

<sup>9</sup> *Ibid.*, para. 123(c).