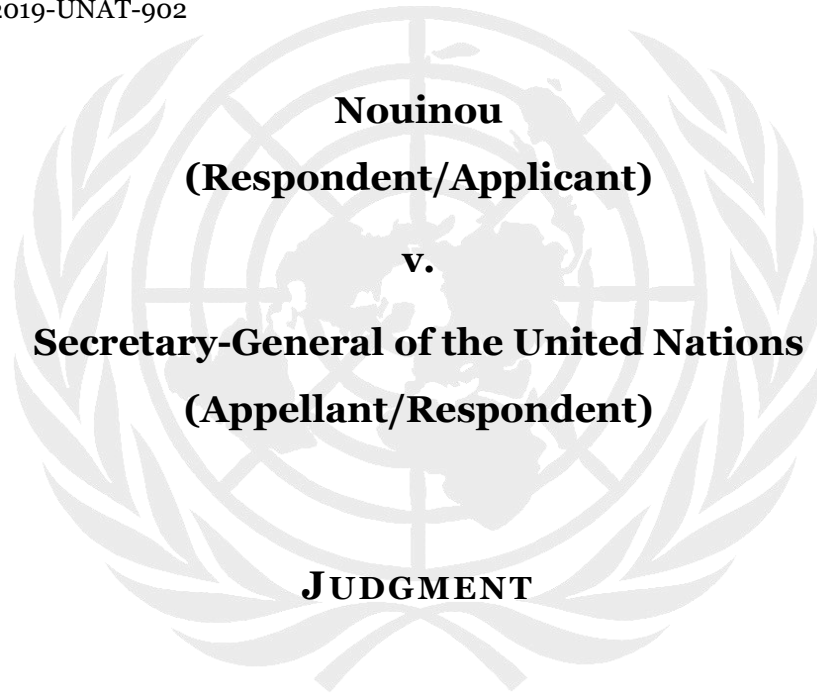




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-902



**Nouinou
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Richard Lussick Judge Deborah Thomas-Felix
Case No.:	2018-1194
Date:	29 March 2019
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant: Self-represented

Counsel for Appellant/Respondent: John Stompor

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/070, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 26 June 2018, in the case of *Nouinou v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 27 August 2018, and Ms. Fátimazöhra Nouinou filed her answer on 29 October 2018.

Facts and Procedure

2. The following facts are uncontested:¹

... The Applicant has been working for the United Nations since 2001 and has served in several departments before joining [the Investigations Division in the Office of Internal Oversight Services (ID/OIOS)].

... On 18 January 2013, the Applicant was appointed as Administrative Assistant, G-4, with the Inspection and Evaluation Division in OIOS (“IED/OIOS”), on a temporary appointment. On 15 May 2013, she was reassigned to ID/OIOS. The Applicant’s Personnel Action (“PA”) issued in connection with her reassignment indicates that the source of funding of her reassignment was extra-budgetary (or from the OIOS’s Reimbursement Support Account (hereafter referred to as “OIA account”).

... On 29 October 2013, the Applicant was granted a fixed-term appointment for one year. On 29 October 2014, her appointment was renewed for two years, until 28 October 2016.

... On 23 July 2014, OIOS received funds for four years to be placed in the OIOS Trust Fund for Enhancing Professional Capacity (“the Trust Fund”), to cover the existing posts and ... it was confirmed with the Executive Office that “the existing staff members [would] get two-year appointments and the new staff [would] get one-year appointments”.

... In December 2014, the Office of Programme Planning, Budget and Accounts (“OPPBA”) advised the Executive Office of OIOS (“EO/OIOS”) that there were insufficient resources in the OIA Trust Fund to fund all planned activities. OPPBA issued allotment advice that would allow ID/OIOS to fund the Applicant’s salary and that of another General Service (“GS”) staff member, which was funded by the same trust fund only through 31 August 2015. In March 2015, ID/OIOS identified some unused funds which could be used to fund the two appointments through December 2015.

¹ Impugned Judgment, paras. 4-32.

... In October 2015, ID/OIOS submitted its 2016 cost plan to OPPBA. In this cost plan, ID/OIOS identified additional unused resources which would allow OIOS to fund the Applicant's position through June 2016.

... In November 2015, the Applicant had a discussion with the Deputy Director of ID/OIOS [in Vienna] ("DD, ID/OIOS[Vienna]") (...), then Officer-in-Charge ("OIC") of ID/OIOS. Following the meeting, she wrote separately to the EO/OIOS and the DD, ID/OIOS/Vienna, alleging that the latter had stated that he had approved her contract extension [only] for a further six months when her appointment was valid until 28 October 2016. On 19 November 2015, the then Executive Officer of OIOS, as requested by the DD, ID/OIOS/Vienna, informed the Applicant that ID/OIOS would hono[u]r her appointment until 28 October 2016 but that any further extensions would be subject to available funding.

... In March 2016, the Deputy Director of the Nairobi Office ("DD, ID/OIOS/Nairobi"), then OIC of ID/OIOS, reassigned some of the Applicant's responsibilities to other ID/OIOS staff.

... On 30 March 2016, the Applicant submitted a request for protection against retaliation to the Ethics Office. She alleged therein that the DD, ID/OIOS/Vienna and the DD, ID/OIOS/Nairobi had retaliated against her. Specifically, the Applicant alleged that the DD, ID/OIOS/Vienna had attempted to terminate her appointment and that he was operating through the DD, ID/OIOS/Nairobi to remove her work responsibilities.

... On 18 April 2016, the Applicant requested a management evaluation with the Management Evaluation Unit ("MEU") of several decisions taken by the DD, ID/OIOS/Nairobi, as OIC of ID/OIOS, in relation to the reassignment of her functions. The Applicant alleged therein that the DD, ID/OIOS/Vienna and [the] DD, ID/OIOS/Nairobi were retaliating against her for having made a previous complaint against the DD, ID/OIOS/Vienna.

... On 26 May 2016, the Applicant submitted a complaint to the Assistant Secretary-General for Human Resources Management ("ASG/OHRM"), alleging that the DD, ID/OIOS/Vienna had attempted to manipulate her contract and that the DD, ID/OIOS/Nairobi had retaliated against her.

... On 2 June 2016, the Under-Secretary-General for Management ("USG/DM") informed the Applicant that, following the management evaluation, the Secretary-General had decided to uphold the contested decisions in relation to the reassignment of her functions.

... On 22 June 2016, the Director of the Ethics Office in the United Nations Secretariat informed the Applicant that the Ethics Office had determined that there was no *prima facie* case that her engaging in protected activities had been a contributing factor in causing [the] alleged retaliation.

... On 3 August 2016, the EO/OIOS requested the newly appointed Director of ID/OIOS (formerly the DD, ID/OIOS/Nairobi) to advise as to whether he would recommend the extension of the Applicant's appointment beyond 28 October 2016. On 4 August 2016, the Director of ID/OIOS advised the EO/OIOS that there was no funding available to renew the Applicant's appointment and that this should be communicated to her.

... On 30 August 2016, the Applicant wrote to the OiC of the EO/OIOS, requesting him to confirm that her appointment would be renewed in order for her to register for Russian language classes.

... The Applicant's last two-year fixed-term contract as Assistant to the Director of ID/OIOS was effective from 29 October 2014 until 28 October 2016 as results from the letter of appointment issued on 13 August 2014 and signed by the Applicant on 8 September 2014.

... On 7 September 2016, the OiC of the EO/OIOS and the Director of ID/OIOS met with the Applicant and informed her that her fixed-term contract with ID/OIOS would not be extended and, on the same day, she received an official notification from the EO/OIOS, referring to the procedures concerning her separation from ID/OIOS upon expiration of her fixed-term appointment, effective at close of business on 28 October 2016.

... On 7 September 2016, the Applicant filed a request for management evaluation with MEU. She also filed on the same day (7 September 2016) a second request for protection against retaliation to the Ethics Office in relation to the decision not to renew her appointment.

... On 8 September 2016, the Applicant filed an application for suspension of action with the Dispute Tribunal regarding the non-renewal decision.

... On 9 September 2016, the Dispute Tribunal (Judge Alexander W. Hunter, Jr.) rendered its decision regarding the 8 September 2016 application for suspension of action regarding the decision not to renew her fixed-term appointment and rejected the application.

... On 16 September 2016, the Director of the Ethics Office informed the Applicant that the Ethics Office did not find any *prima facie* case of retaliation.

... On 3 October 2016, at 9:50 a.m., [the Counter-Terrorism Committee Executive Directorate (CTED)] informed the Applicant that she was selected for a temporary position at the G-4 level. On the same day, at 11:42 a.m., the Applicant informed CTED that she was "thrilled" to join CTED and be part of the team. Later the same day, at 5:22 p.m., the Applicant was informed by CTED that, according to the information available in UMOJA, she had a fixed-term appointment through 28 October 2016 and that CTED would request ID/OIOS "to release her on assignment from the [EO]/OIOS to CTED" until 31 December 2016.

... On 4 October 2016, the Applicant received the management evaluation decision informing her that the Secretary-General had decided to uphold the decision not to renew her contract beyond 28 October 2016 due to a lack of funding.

... On 5 October 2016, at 1:07 p.m., CTED informed the Applicant that the EO/OIOS had stated that her “fixed-term appointment expiring on 28 October 2016 [would] not be extended” and that CTED would have “to re-appoint her on a temporary contract, since [she was] selected against a [temporary job opening]”. Later the same day, at 1:15 p.m., the Applicant informed the Under-Secretary-General of OIOS (“USG/OIOS”), the Assistant Secretary-General of OIOS (“ASG/OIOS”) and the EO/OIOS that CTED had selected her for a G-4 level position, that she accepted the offer and that CTED would contact OIOS to request her release on assignment as she had a fixed-term appointment and since (...) CTED position was temporary. At 6:08 p.m. on the same date, the Applicant wrote to the USG/OIOS that “since [she] had been informed that the reason for not renewing [her] contract with ID/OIOS was a lack of funds, she would highly appreciate [it] if [the USG/OIOS] could consider granting CTED’s request since this could be helpful for [her] protecting [her] fixed-term contract by extending it to at least the end of the period of the short-term CTED [contract until] 31 December 2016 especially [since] that [would] cost OIOS nothing because [she would] be paid by CTED”.

... On 12 October 2016, at 11:13 a.m., CTED informed the Applicant that, since she could not be released on assignment, it had no other option than to rescind the offer for the position. At 11:30 a.m. on the same date, the Applicant informed CTED that she was prepared to terminate her fixed-term appointment with ID/OIOS to work with CTED on a temporary basis and that she “really want[ed] the position”. Later the same day, at 1:05 p.m., she requested the USG/OIOS to extend her contract under zero-dollar incumbency. On the same day, at 3:09 p.m., the Applicant informed CTED that she had contacted OHRM and was told that, in relation to sec. 5.1 of ST/AI/2010/4/Rev.1 (Administration of temporary appointments) and the 31-day break-in-service rule, the hiring department or office can request, if needed, a shorter break-in-service or a waiver of the break-in-service between the fixed-term and the temporary appointment and that CTED could hire her on assignment if OIOS would extend her fixed-term appointment. Later the same date, at 4:07 p.m., CTED informed the Applicant that it would not accept staff members on fixed-term, continuing or permanent appointments on assignment for this position as it only lasted through 31 December 2016, at which time the Applicant would have to be re-absorbed by OIOS, and recommended for her to discuss with [the] USG/OIOS to have her appointment extended accordingly.

... On 13 October 2016, on behalf of the USG/OIOS, her Special Assistant forwarded the Applicant a response to her 12 October 2016 request, stating that the office was not in a position to extend her appointment beyond 28 October 2016. On the same day, the Applicant asked the USG/OIOS to reconsider her decision. The Applicant also wrote to CTED to inform them that her contract would not be extended beyond 28 October 2016 and that OIOS therefore could not release her on assignment. Later on the same day, the

Administration and Information Office of CTED informed the Applicant that “[...] decisions are made by CTED’s senior management and it is [the Office’s] responsibility to allow them to have a further discussion and [that the Office would] revert”.

... On 14 October 2016, the Applicant filed a request for management evaluation of the decision of the USG/OIOS to refuse “to extend [her] two-year fixed-term contract for two months—under a zero-dollar incumbency—to reassign [her] on a short-term position with (...) CTED until 31 December 2016”.

... [On 17 October 2016, the Applicant went on certified sick leave.] On 19 October 2016, the Applicant filed an application for suspension of action registered under Case No. UNDT/NY/2016/054. By Order No. 251 (NY/2016) issued on 26 October 2016, the [Dispute] Tribunal rejected the application for suspension of action, noting that the contested decision was implemented, since (...) CTED [had] selected another candidate and that the Applicant’s contract with ID/OIOS was extended from 29 October 2016 until 11 November 2016 pursuant to sec. 4.9 of ST/AI/2013/1[Corr.1] (Administration of fixed-term appointments) related to certified sick leave. The Applicant’s fixed-term contract continued to be extended pursuant to sec. 4.9 of ST/AI/2013/1[Corr.1] until 1 September 2017 when the Applicant effectively separated from the Organization.

... On 10 November 2016, the Applicant filed the (...) application [with the UNDT] and the Respondent’s reply was filed on 14 December 2016.

3. On 20 February 2017, the UNDT issued Order No. 33 (NY/2017), instructing the parties to, *inter alia*, make further submissions and produce additional documents, specifically requesting the information on the funding situation of the OIA account (from which Ms. Nouinou’s post was funded). In the impugned Judgment, the UNDT noted the Secretary-General’s failure to provide the requested information and concluded that there was no clear evidence that in September 2017, when Ms. Nouinou was effectively separated from the Organization, the situation of the OIA account was the same as in December 2016.

4. Between 12 September 2017 and 8 October 2017, she was appointed on a temporary contract in the Executive Office of the Secretary-General.

5. On 26 June 2018, the UNDT issued Judgment No. UNDT/2018/070, granting Ms. Nouinou’s application in part. The UNDT held that the abolition of Ms. Nouinou’s post and the consequent decision not to renew her fixed-term appointment were unlawful. The UNDT considered that the information related to the OIA account as being the source of funding for Ms. Nouinou’s post until 2016 was contradicted by the fact that since November 2014, OIOS used funds from the OIOS Trust Fund for all the existing posts in 2014, including Ms. Nouinou’s.

Consequently, the UNDT concluded that the lack of funds in OIA was not relevant and could not constitute a reason for the abolition of her post.

6. The UNDT found that Ms. Nouinou had a legitimate expectation for renewal of her fixed-term appointment that was created by the written confirmation of 23 July 2014 that OIOS would receive funds for four years, to be placed in the OIOS Trust Fund to cover the existing posts and that it was confirmed with the Executive Office that the existing staff members would get two-year appointments and the new staff would get one-year appointments. As a result, Ms. Nouinou's contract was renewed for two years, until October 2016, and it was expected to be renewed for another two years, since the funding of the existing posts, including Ms. Nouinou's post, had been secured for four years until 2018.

7. The UNDT further held that Ms. Nouinou's fixed-term contract was terminated following the abolition of her post and, as such, Ms. Nouinou had the right to be retained in service on a preferred or non-competitive basis and the Organization had failed to comply with its obligation to retain her in service in any of the available suitable posts in which her service could have been effectively utilized, pursuant to Staff Rules 9.6(c)(i), 9.6(e)(iii) and Section 11.1 of Administrative Instruction ST/AI/2010/3 (Staff selection system).

8. As for the Administration's decision not to reassign Ms. Nouinou under a zero-dollar incumbency for two months to CTED, where she had been selected for a short-term position until 31 December 2016, the UNDT found that this decision also failed to comply with the mandatory provisions of Staff Rules 9.6(e)(iii) and 9.6(f) and Section 11.1(b) of ST/AI/2010/3; and the decision was unlawful because it breached Ms. Nouinou's right to be reassigned on a non-competitive basis to any available suitable vacant post, under a fixed-term or temporary appointment, or to any other post for which she was competitively selected.

9. Accordingly, the UNDT ordered the rescission of the decision to abolish Ms. Nouinou's post, the consequent decision not to renew her two-year fixed-term appointment, and the refusal to reassign her to CTED. As an alternative to the rescission of the decisions, the UNDT ordered that Ms. Nouinou be paid USD 10,000. The UNDT further ordered, regardless of whether or not the decisions were rescinded, that compensation be paid to Ms. Nouinou, taking into account the periods of her unemployment and potential unemployment from 1 September to 28 October 2018, and compensation in the amount equal to her and the Organization's contributions that would have been paid to the United Nations Joint Staff Pension Fund

(UNJSPF) for this period. The UNDT further ordered three months' net base salary as compensation for moral damages for harm to Ms. Nouinou's dignity and to career potential.

10. As noted above, the Secretary-General appealed the impugned Judgment on 27 August 2018 and Ms. Nouinou filed her answer on 29 October 2018.

11. On 14 January 2019, Ms. Nouinou filed a motion for leave to file additional pleadings and on 25 January 2019, the Secretary-General filed his response to the motion. By Order No. 339/Corr.1 (2019), the Appeals Tribunal denied Ms. Nouinou's motion.

Submissions

The Secretary-General's Appeal

12. The UNDT erred in fact and law in concluding that the abolition of Ms. Nouinou's post was unlawful. Contrary to the UNDT's findings, Ms. Nouinou was not encumbering an established post. Rather, she was serving in a position that was funded through an extra-budgetary account, the OIA account, which had been established to receive cost reimbursement for the services that OIOS was providing to the United Nations Funds and Programmes (Funds and Programmes). The frequency of OIOS' cost disbursement work for the Funds and Programmes had been reduced causing the OIA funds to deplete and, as a result, OIOS had to discontinue Ms. Nouinou's position. The OIA account was the consistent source of funding for Ms. Nouinou's position from 15 May 2013, when she was reassigned to ID/OIOS, until its depletion on 30 June 2016, at which point General Temporary Assistance (GTA) funds were exceptionally used to honour Ms. Nouinou's fixed-term contract from 1 July 2016 through its date of expiration on 28 October 2016.

13. The UNDT further erred in finding that the lack of funds in the OIA account was not relevant and could not constitute a valid reason for the abolition of Ms. Nouinou's post in September 2016. The UNDT based its findings on an e-mail addressed to the Deputy Director, ID/OIOS dated 23 July 2014 in which the Administrative Management Officer, ID/OIOS, discussed a four-year contribution from Norway to the United Nations in support of OIOS' activities. That contribution, however, was not related to the OIA account. Moreover, contrary to the UNDT's findings that there was no clear evidence that, in September 2017, when Ms. Nouinou effectively separated from the Organization, the situation of the OIA account was the same as in December 2016, the situation of the OIA account in September 2017 was not

relevant to the decision not to renew Ms. Nouinou's fixed-term appointment since Ms. Nouinou was informed of that decision in September 2016.

14. The UNDT erred in fact and law in concluding that Ms. Nouinou had a legitimate expectancy for her two-year fixed-term appointment to be renewed after 28 October 2016 and the decision not to renew Ms. Nouinou's fixed-term appointment was unlawful. The UNDT based this finding on the above-referenced e-mail dated 23 July 2014 regarding the four-year contribution from Norway which was not related to the OIA account from which Ms. Nouinou's position was funded. Ms. Nouinou was informed on 19 November 2015 that her appointment would be honoured through its expiration date on 28 October 2016, but that any further extension would be subject to availability of funding. Unless the Administration has made an express promise that gives a staff member an expectancy that his or her appointment will be extended, or unless it abused its discretion, or was motivated by discriminatory or improper grounds in not extending the appointment, the non-renewal of a staff member's fixed-term appointment is not unlawful. In the present case, there was no express promise to Ms. Nouinou that her fixed-term appointment would be renewed beyond 28 October 2016.

15. Furthermore, contrary to the UNDT's conclusion, the decision not to renew Ms. Nouinou's appointment was in accordance with the relevant provisions of the applicable human resources framework and the established jurisprudence of the Appeals Tribunal. Pursuant to the United Nations Charter and the Staff Regulations, the Secretary-General has broad discretion in matters of staff selection and appointment. The Appeals Tribunal has also recognized that the Secretary-General enjoys broad discretion in relation to decisions on internal management, such as non-renewal of appointments, and that, consequently, such matters are subject to limited review by the Tribunals. As noted above, the reason for OIOS' decision not to renew Ms. Nouinou's fixed-term appointment was that the OIA account that had financed her position was depleted as of 30 June 2016. The Appeals Tribunal has found the lack of funding is a valid reason for the non-renewal of a staff member's appointment.

16. The UNDT erred in fact and law in concluding that Ms. Nouinou's fixed-term appointment was terminated. The UNDT found that the legal nature of the contested decision was a termination since the abolition of Ms. Nouinou's post was initiated before the expiration of her contract. On that basis, the UNDT applied the legal framework for the termination of an appointment to the decision not to renew Ms. Nouinou's appointment. In the present case,

Ms. Nouinou's appointment was not terminated. Rather, her appointment was not renewed, and it expired in accordance with its terms.

17. The UNDT erred in fact and law in concluding that it was unlawful not to renew Ms. Nouinou's fixed-term appointment for two months so that she could be reassigned to CTED where she had been selected for a short-term position until 31 December 2016. OIOS was under no obligation to renew Ms. Nouinou's fixed-term appointment for two months so that she could be reassigned. Ms. Nouinou's reassignment would not have been in accordance with the OIOS guidelines for temporary jobs and secondments, according to which the minimum duration of an assignment outside of OIOS at the same duty station must be six months

18. Finally, even if the Appeals Tribunal were to determine that the UNDT's findings had not been made in error, the UNDT erred in law and exceeded its jurisdiction in making its awards for loss of employment in addition to the amount of compensation that it ordered be paid as an alternative to the rescission of the contested decisions and to the specific performance ordered. The purpose of compensation is to place a staff member in the same position in which he or she would have been, had his or her rights been respected. There was no legal basis for the UNDT to order payment of additional compensation for loss of employment once it had set an amount of compensation to be paid in lieu of rescission. Yet, the UNDT erroneously ordered the payment of additional amounts beyond what it had ordered in lieu of rescission.

19. Further, the sum of USD 10,000 awarded as compensation in lieu of rescission and the additional compensation in the amount of six months' net base salary for loss of employment exceeds the amount of net base salary that Ms. Nouinou would have received had she been continuously employed by the Organization. The sum is equivalent to Ms. Nouinou's net base salary for a period of more than eight months. Ms. Nouinou, however, had been unemployed for a period of less than seven months at the date of the Secretary-General's answer. Thus, the sum of these awards of compensation would result in Ms. Nouinou's unjust enrichment. Additionally, the UNDT erroneously awarded compensation in the amount of what would have been both the Organization's and Ms. Nouinou's contributions to the UNJSPF during a period of six months. A staff member's contributions to the UNJSPF are deducted from the staff member's salary. Thus, as Ms. Nouinou had been awarded six months' net base salary without any deductions, the UNDT's award of compensation in the amount of what would have been Ms. Nouinou's contributions to the UNJSPF would also result in unjust enrichment.

20. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment.

Ms. Nouinou's Answer

21. Ms. Nouinou submits that the Secretary-General has failed to show any error by the UNDT warranting the reversal of the Judgment. Instead, the Secretary-General merely disagrees with the outcome of the case, which does not constitute valid grounds for filing an appeal.

22. The UNDT did not err in finding that the decision to abolish Ms. Nouinou's post was unlawful. It correctly concluded that since Ms. Nouinou's post was no longer funded from the OIA account as of November 2014, the lack of funds in the OIA account was not relevant and could not constitute a valid reason to abolish her post in June 2016. The availability of funds in the OIA account was not a condition of Ms. Nouinou's employment contract. The OIA account had been established and used in the past as an accounting mechanism to receive cost reimbursement for OIOS services provided to the Funds and Programmes. However, at no time had Ms. Nouinou ever been employed on such work. Therefore, the Secretary-General cannot claim that the fact that the OIA account had depleted constituted a valid excuse for abolishing her post and not renewing her fixed-term appointment.

23. The UNDT correctly concluded that Ms. Nouinou had a legitimate expectation that her fixed-term appointment would be renewed. While the Secretary-General reiterates the general legal principle that the non-renewal of a staff member's fixed-term appointment is not unlawful, unless the Administration has made an express promise that gives a staff member an expectation that his or her appointment will be extended, the Secretary-General fails to consider the specific exceptions to the general rule, namely cases where the Administration abused its discretion, or was motivated by discriminatory or improper grounds in not extending the appointment. In the present case, the evidence is clearly indicative of an abuse of OIOS' discretion and the actions towards Ms. Nouinou were motivated by discriminatory or improper grounds. In particular, OIOS retaliated against Ms. Nouinou for having made a complaint against the Deputy Director of ID/OIOS, alleging that he had attempted to manipulate her contract.

24. The UNDT correctly concluded that the decision not to renew Ms. Nouinou's fixed-term appointment for two months under a zero-dollar incumbency so that she could be released and reassigned to CTED was unlawful. By refusing to renew Ms. Nouinou's fixed-term appointment for two months at no cost, OIOS obstructed Ms. Nouinou's attempt to take up an alternative

position in CTED when there was no legitimate reason to do so; such refusal is indicative of malice intent.

25. Moreover, Ms. Nouinou was employed on a fixed-term appointment. Therefore, OIOS could have legitimately and legally served notice of termination at any time, particularly when the OIA account was depleted in 30 June 2016. Instead, OIOS withheld information from Ms. Nouinou that it had decided to terminate her appointment, when there was clearly no legitimate reason not to advise her sooner. Again, such failure on OIOS' part to immediately inform Ms. Nouinou was based on a retaliatory motive.

26. The UNDT properly exercised its jurisdiction in awarding compensation. The award ordered was not excessive under the circumstances and it did not result in unjust enrichment.

27. Ms. Nouinou requests that the Appeals Tribunal dismiss the Secretary-General's appeal by way of summary judgment.

Considerations

28. The Secretary-General appeals the UNDT's findings that the contested decisions to abolish Ms. Nouinou's post, the consequent decision not to renew her two-year fixed-term appointment, and the refusal to re-assign her for two months under a zero-dollar incumbency to CTED until 31 December 2016, where she had been selected for a short-term position until 31 December 2016, were unlawful.

Preliminary issue

Oral hearing

29. Ms. Nouinou filed a request for an oral hearing. Oral hearings are governed by Article 8(3) of the Appeals Tribunal Statute (Statute) and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules). The factual and legal issues arising from this appeal have already been clearly defined by the parties and there is no need for further clarification. In addition, we do not find that an oral hearing would "assist in the expeditious and fair disposal of the case", as required by Article 18(1) of the Rules. Accordingly, the request for an oral hearing is denied.

Merits

30. Based on the review of the record and the applicable legal instruments and authorities, we hold that the UNDT made numerous errors of fact and law in reaching the above conclusions and its Judgment should be reversed for the reasons set out below.

31. At the outset, we note that the UNDT made a grave error of law in terms of the basic legal position, which defined the subject of the litigation before it and correspondingly the appeal, when it found that “the legal nature of the contested decision is a termination since the abolition of post was initiated before the expiration of the contract”² and based on this false conclusion applied the legal framework for termination of a fixed-term appointment to the instant case which concerns non-renewal of a contract. In this regard, the UNDT stated:³

... The Tribunal considers that the Applicant was officially notified on 7 September 2016 of the decision to abolish her post starting from 28 October 2016, resulting in the non-renewal of her contract after this date. On 7 September 2016, the Applicant filed a request for management evaluation of the decision, which was notified to her on that date not to renew her contract. The Tribunal considers that, in the request for management evaluation, she clearly referred to the contested decision as being the decision not to renew her contract which was determined and therefore was the consequence of the abolition of her post starting on 28 October 2016. This reason of non-renewal of the Applicant’s contract was confirmed in the management evaluation response, which stated that “[...] the decision not to renew [the Applicant’s] appointment was the natural consequence of the lack of identification of additional funding since November 2015” and concluded that the Applicant’s contract “was not renewed due to lack of funds”. The Tribunal considers that it results that the legal nature of the contested decision is a termination since the abolition of post was initiated before the expiration of the contract. The Tribunal further considers that the fact that the date of the implementation of the decision to abolish the Applicant’s post was postponed and finally coincided with the expiration date of the Applicant’s contract is not changing the legal nature of the termination decision.

32. This legal conclusion is wrong. As correctly contended by the Secretary-General, it disregards the clear language of Staff Rule 9.6(b) which provides that “[s]eparation as a result of resignation, abandonment of post, expiration of appointment, retirement or death shall not be regarded as a termination within the meaning of the Staff Rules” as well as ST/AI/2013/1/Corr.1, pursuant to which “[a] fixed-term appointment expires on the expiration date specified in the

² *Ibid.*, para. 122.

³ *Ibid.*

letter of appointment”. It is a matter of record that the decisions contested by Ms. Nouinou before the UNDT were, *inter alia*, the decisions not to renew her two-year fixed-term contract ending on 28 October 2016, and not to renew the above contract for two months (until 31 December 2016) so that she could be reassigned to CTED. These were also among the decisions in respect of which she requested management evaluation on 7 September 2016 and 14 October 2016, respectively. There was no administrative decision to terminate Ms. Nouinou’s contract prior to its expiration. It is clear from these provisions and our jurisprudence that the separation as a result of termination initiated by the Secretary-General in cases of abolition of posts or reduction of staff (Staff Rule 9.6(a) and (c)) differs substantially from the separation as a result of expiration of a fixed-term appointment, which takes place automatically, without prior notice, on the expiration date specified in the letter of appointment.⁴

33. Before reviewing the other grounds of the Secretary-General’s appeal, this Tribunal will consider *sua sponte* the issue of receivability of Ms. Nouinou’s application before the UNDT in terms of the abolition of her post.⁵

34. It is well settled jurisprudence that an international organization necessarily has the power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts, and the redeployment of staff.⁶ The Appeals Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However, even in a restructuring exercise, like any other administrative

⁴ *Koumoin v. Secretary General of the United Nations*, Judgment No. 2011-UNAT-119, para. 20. Comp. also *Kule Kongba v. Secretary General of the United Nations*, Judgment No. 2018-UNAT-849, para. 24 and *Liu v. Secretary General of the United Nations*, Judgment No. 2016-UNAT-659, para. 17.

⁵ *Ali v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-773, para. 17, citing *Chahrour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-406, para. 28; *Christensen v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-335, para. 20; *Kapsou v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-170, para. 26.

⁶ *Loeber v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-844, para. 18, citing *De Aguirre v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-705; *Khalaf v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-678; *Matadi et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-592; *Bali v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-450; *Simmons v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-425; *Pacheco v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-281; *Gehr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-236; *Liverakos v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-206; *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123; and *Dumornay v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-097.

decision, the Administration has the duty to act fairly, justly, and transparently in dealing with staff members.⁷

35. The Appeals Tribunal has consistently held that the key characteristic of an administrative decision subject to judicial review is that the decision must produce direct legal consequences affecting a staff member's terms and conditions of appointment. The administrative decision must have a direct impact on the terms of appointment or contract of employment of the individual staff member.⁸

36. Specifically, the Appeals Tribunal held in *Lee* that:⁹

... [E]ven if the General Assembly had adopted such a resolution, that decision would not have changed anything. Both the Secretary-General's budgetary proposal and the General Assembly's adoption by resolution of the budget proposal are merely acts prefatory to or preceding an administrative decision that would "produce[] direct legal consequences" to Ms. Lee's employment. Although Ms. Lee cannot challenge the discretionary authority of the Secretary-General to restructure the Organization or to abolish her post, she may challenge an administrative decision resulting from the restructuring once that decision has been made.

37. By applying the above to the present case, we find that the UNDT made an error in concluding that Ms. Nouinou sought management evaluation of the decision to abolish her post in June 2016 and in finding that the application challenging that decision was receivable *ratione materiae*.

38. First, such a decision was not reviewable as it had no direct impact on Ms. Nouinou's terms of appointment or contract of employment.¹⁰ It merely constituted an act leading up to the final decision not to renew her fixed-term appointment, which was taken later on 7 September 2016. The latter, following on from the abolition, was the administrative decision subject to judicial review.

⁷ *Loeber v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-844, para. 18.

⁸ *Ibid.*, para. 19, citing *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481; *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058.

⁹ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 51 (footnote omitted).

¹⁰ *Loeber v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-844, para. 25.

39. Second, Article 8(1)(c) of the UNDT Statute requires that, for a claim to be receivable, the applicant must have “previously submitted the contested administrative decision for management evaluation, where required”.

40. The UNDT concluded that Ms. Nouinou had complied with this requirement regarding her challenge to the abolition of her post, stating:¹¹

... The Tribunal considers that the Applicant was officially notified on 7 September 2016 of the decision to abolish her post starting from 28 October 2016, resulting in the non-renewal of her contract after this date. On 7 September 2016, the Applicant filed a request for management evaluation of the decision, which was notified to her on that date not to renew her contract. The [Dispute] Tribunal considers that, in the request for management evaluation, she clearly referred to the contested decision as being the decision not to renew her contract which was determined and therefore was the consequence of the abolition of her post starting on 28 October 2016. This reason of non-renewal of the Applicant’s contract was confirmed in the management evaluation response, which stated that “[...] the decision not to renew [the Applicant’s] appointment was the natural consequence of the lack of identification of additional funding since November 2015” and concluded that the Applicant’s contract “was not renewed due to lack of funds”. The [Dispute] Tribunal considers that it results that the legal nature of the contested decision is a termination since the abolition of post was initiated before the expiration of the contract. The [Dispute] Tribunal further considers that the fact that the date of the implementation of the decision to abolish the Applicant’s post was postponed and finally coincided with the expiration date of the Applicant’s contract is not changing the legal nature of the termination decision.

41. The UNDT went on to conclude:¹²

... [T]he 7 September 2016 request for management evaluation contesting the decision not to renew the Applicant’s fixed-term contract also covered the reasoning of this decision, namely the abolition of her post, as results from above. In light of the above, the Tribunal concludes that the present application regarding the abolition of post is receivable *ratione materiae*.

42. However, Ms. Nouinou did not directly raise a challenge to the abolition of her post in her request for management evaluation, as the UNDT acknowledged. Any fair and objective reading of Ms. Nouinou’s request for management evaluation of 7 September 2016 shows that she referred to the abolition of her post as the cause for the administrative act of not renewing her

¹¹ Impugned Judgment, para. 122.

¹² *Ibid.*, para. 123.

contract beyond its expiration on 28 October 2016, which was the topic of her request for management evaluation, and the same interpretation of the request for management evaluation was evident in the management evaluation response. Management evaluation is to afford the Administration the opportunity to correct any errors in an administrative decision so that judicial review of the administrative decision is not necessary. Clearly identifying the administrative decision the staff member disagrees with is essential for this goal to be met. Because Ms. Nouinou's request for management evaluation focused solely on the decision not to renew her appointment, and did not identify the abolition of her post, the MEU could not and did not address it directly. In concluding that Ms. Nouinou sought management evaluation of the abolition of her post, the UNDT erred in law and fact resulting in a manifestly unreasonable decision. The UNDT also exceeded its jurisdiction or competence in receiving the abolition of the post claim and reaching its merits.

43. Turning to the issue of the lawfulness of the non-renewal of Ms. Nouinou's fixed-term appointment beyond its expiration date on 28 October 2016, and before embarking on a consideration of the specific arguments made on appeal in this case, it is apposite to reprise the jurisprudence of the Appeals Tribunal as to how the UNDT should exercise its powers of judicial review in relation to matters of appointments and promotions.

44. It is a well-established principle that fixed-term appointments or appointments of limited duration carry no expectation of renewal or conversion to another type of appointment.¹³

45. Even the renewal of the appointment of a staff member on successive appointments does not, in and of itself, give grounds for an expectancy of renewal, unless the Administration has made an express promise that gives the staff member an expectancy that his or her appointment will be extended. The jurisprudence requires this promise at least be in writing.¹⁴

¹³ *He v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-825, para. 40, citing *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 25, in turn citing *Ncube v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-721, para. 15; *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 32; *Badawi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2012-UNAT-261, para. 33; *Schook v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-216, para. 3; *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153, paras. 39-42; *Syed v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-061, para. 13.

¹⁴ *He v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-825, para. 41 citing *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 25, in turn citing *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-411, para. 26.

46. As provided in Staff Regulation 4.5(c) and Staff Rule 4.13(c), respectively, “[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service”, and “[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service, except as provided under staff rule 4.14(b)”.

47. Nevertheless, an administrative decision not to renew a fixed-term appointment can be challenged on the grounds that the Administration has not acted fairly, justly or transparently with the staff member or was motivated by bias, prejudice or improper motive.¹⁵ The staff member has the burden of proving such factors played a role in the administrative decision.¹⁶

48. The Appeals Tribunal has consistently held that:¹⁷

When judging the validity of the Secretary-General’s exercise of discretion in administrative matters, as in the case of a non-renewal decision, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The UNDT can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Dispute Tribunal to substitute its own decision for that of the Secretary-General.

49. As part of its judicial review, it is necessary to determine whether the decision was vitiated by bias or bad faith, that is, if it was taken for an improper purpose. A decision taken for an improper purpose is an abuse of authority. It follows that when a complainant challenges a discretionary decision, he or she by necessary implication also challenges the validity of the reasons underpinning that decision.¹⁸ In this respect, as applied to the present case, the

¹⁵ *He v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-825, para. 43 citing *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 27, in turn citing *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para. 33 and *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153, paras. 45-46.

¹⁶ *He v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-825, para. 43 citing *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 27, in turn citing *Kacan v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-426, para. 20; *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 33.

¹⁷ *He v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-825, para. 44 (internal footnote omitted) citing *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 28, in turn citing *Said v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-500, para. 40 and cites therein.

¹⁸ *Toure v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-660, para. 30.

Tribunals may examine the circumstances surrounding the abolition of the staff member's post to determine whether the impugned decision was tainted by abuse of authority.

50. As stated in *Obdeijn*, “[a]n administrative decision not to renew [a fixed-term appointment] must not be deemed unlawful on the sole ground that the decision itself does not articulate any reason for the non-renewal. But that does not mean that the Administration is not required to disclose the reasons not to renew the appointment.”¹⁹ “Rather, the Administration has an obligation to state the reasons for an administrative decision not to renew an appointment to assure the Tribunals’ ability to judicially review the validity of the Administration’s decision.”²⁰

51. In the present case, Ms. Nouinou was advised on 19 November 2015 by the Executive Officer of OIOS, as requested by the DD, ID/OIOS/Vienna, that the ID/OIOS would honour her appointment until 28 October 2016 but that any further extensions would be subject to available funding. Finally, on 7 September 2016, the OiC of the EO/OIOS and the Director of ID/OIOS met with Ms. Nouinou and informed her that her fixed-term contract with ID/OIOS would not be extended and, on the same day, she received an official notification from the EO/OIOS, referring to the procedures concerning her separation from ID/OIOS upon expiration of her fixed-term appointment, effective at close of business on 28 October 2016.

52. The non-extension of Ms. Nouinou’s fixed-term contract was a result of the abolition of her post at the G-4 level due to a lack of funds. As per the UNDT Judgment and the documents on file, the source of funding of her reassignment to ID/OIOS on 15 May 2013, and then of her fixed-term appointment on 29 October 2013 for one year, as well as on 29 October 2014 for two years, until 28 October 2016, was extra-budgetary (from OIOS’ OIA account). It is not disputed that on 23 July 2014, OIOS received funds for four years to be placed in the OIOS Trust Fund, to cover the existing posts and it was confirmed with the Executive Office that “the existing staff members [would] get two-year appointments and the new staff [would] get one-year appointments”.²¹

¹⁹ *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para. 32.

²⁰ *He v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-825, para. 46 (internal footnote omitted) citing *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 30, in turn citing *Ncube v. Secretary General of the United Nations*, Judgment No. 2017-UNAT-721, para. 17 and cites therein.

²¹ Impugned Judgment, para. 7.

53. Nevertheless, the financial difficulties OIOS was faced with did not disappear, and this fact is undisputedly borne out by the document issued *in tempore non suspecto* by OPPBA (in December 2014), which advised the EO/OIOS that there were insufficient resources in the Trust Fund to fund all planned activities. Following which, OPPBA issued allotment advice that would allow ID/OIOS to fund Ms. Nouinou's salary and that of another General Service staff member, which was funded by the same Trust Fund through 31 August 2015. Thereafter, in March 2015, ID/OIOS identified some unused funds which could be used to fund the two appointments through December 2015.

54. The lack of resources in the OIA account was due to a reduction of OIOS' activities in the area of it providing services to the Funds and Programmes, which provided money to the OIA account through reception of cost reimbursement for these services. Whereupon, Ms. Nouinou was informed by the Administrative Management Officer, ID/OIOS, in the first place in late 2014 that the OIA account "was unlikely to be able to continue to fund her position", and then on 19 November 2015 by the Executive Officer of OIOS, as requested by the DD, ID/OIOS/Vienna, that ID/OIOS "would hono[u]r her appointment until 28 October 2016 but that any further extensions would be subject to available funding".²² Ultimately, as of 30 June 2016, the OIA account was depleted and could no longer fund Ms. Nouinou's position, which was abolished and Ms. Nouinou's fixed-term contract was not renewed beyond its expiration on 28 October 2016.

55. The Secretary-General submits that the UNDT erred in fact and law in concluding that the decision not to renew Ms. Nouinou's fixed-term appointment was unlawful, since the reason for OIOS' decision not to renew her appointment was that the OIA account that had financed her position had been depleted, to wit, the account no longer had sufficient resources in it to continue to finance her position and, thus, in accordance with the Appeals Tribunal's jurisprudence, OIOS had a valid reason for not renewing Ms. Nouinou's fixed-term appointment.

56. We agree. The reasons proffered by the Administration for not renewing Ms. Nouinou's fixed-term appointment beyond 28 October 2016, namely the lack of funding, are valid reasons. However, despite the validity of these reasons, the UNDT embarked on an analysis of the circumstances surrounding the abolition of Ms. Nouinou's post, obviously to determine whether the impugned decision was tainted by abuse of authority, and determined that "the decision to separate the Applicant as a result of the abolition of her post at the G-4 level due to a lack of

²² *Ibid.*, para. 10.

funds, and the consequent decision not to renew her two-year fixed-term contract for another two years (28 October 2016 to 28 October 2018) is unlawful”.²³

57. This ruling of the UNDT was primarily based on its findings that there was no specific measure of reorganization proposed by OIOS and/or decided by the General Assembly, such as the abolition of General Service posts due to lack of funds prior to the abolition of Ms. Nouinou’s post, and that the lack of funds in the OIA account was not relevant to the contested decisions and could not constitute a reason for the abolition of Ms. Nouinou’s post in September 2016.

58. In this regard, the UNDT opined:²⁴

... The Respondent stated in his submissions, including in the closing submissions, that the Applicant’s post was funded from the OIA account, which is an extra-budgetary source of funding, also known as the Reimbursement Account for the OIOS. The OIA account was established on 1 January 2001 to receive cost reimbursement for OIOS services provided to United Nations Funds and Programmes. ID/OIOS reduced the amount of cost reimbursement type work it performed in 2010-2011 and the account began to deplete. The last deposit into the OIA account was made in December 2013, and, by November 2014, there were insufficient resources in the OIA account to continue to fund the three Administrative Assistant posts. As of 30 June 2016, the balance was USD279.32 and, as of 31 December 2016, the balance was minus USD690. However, as results from the correspondence of February 2015, there were clear activities within the OIA account, different amounts of money being deposited and payments being made.

... In the reply, the Respondent indicated that between 1 July 2016 to October 2016, “Senior Management in OIOS approved the temporary use of [GTA] funds to create a position for the sole purpose of honouring the remaining length of the Applicant’s appointment, which was valid through to the end of October 2016”.

... The Tribunal is of the view that the information related to the OIA account as being the source of funding for the Applicant’s post until 2016 *is contradicted* by the fact that since November 2014, OIOS used funds from the OIOS Trust Fund for all the existing posts in 2014, including the Applicant’s, and that these funds were to cover the existing posts until 2018. Also, these funds were considered to be sufficient not only for the existing posts until 2018 but also for new posts. The Tribunal also notes that OIOS created a new G-level post in 2016 before OIOS decided to abolish the Applicant’s post for lack of funds. Further, it is unclear if after November 2014, these funds were transferred into the OIOS regular budget or remained in the OIOS Trust Fund.

²³ *Ibid.*, para. 157.

²⁴ *Ibid.*, paras. 160-163 (emphasis added).

... The Respondent provided no information on the funding situation of the OIA account after 30 December 2016 despite an express request the Tribunal made in Order No. 33 (NY/2017); neither in the 20 March 2017 Respondent’s response to Order No. 33, nor in any of the subsequent submissions provided during the proceedings, including the closing submissions. The Tribunal considers that *there is no clear evidence* that, [i]n September 2017, when the Applicant was effectively separated from the Organization, the situation of the OIA account was the same as in December 2016.

59. The UNDT went on to state:²⁵

... The Tribunal notes that, *as results from an email* sent on 23 July 2014, the EO/OIOS informed Mr. BS that OIOS received funds for four years in 2014, to be placed in the OIOS Trust Fund for Enhancing Professional Capacity (“the Trust Fund”) to cover the existing posts and that it was confirmed with the Executive Office that “the existing staff members [would] get two-year appointments and the new staff [would] get one-year appointments”. As a result, the Applicant’s contract was renewed for two years, until October 2016, and it was expected to be renewed for another two years, since the funding of the existing staff members/posts, including the Applicant’s, was secured for four years, until 2018[.]

... It results that since the Applicant post was no longer funded since November 2014 from the OIA account, the lack of funds in OIA was not relevant and could not constitute a reason for the abolition of the Applicant’s post in September 2016.

60. The Appeals Tribunal finds that the UNDT’s conclusion is legally and factually incorrect for the reasons set forth below. Since each error of law constitutes a sufficient ground to reverse the UNDT Judgment, we need not address each and every challenge raised by the Secretary-General on appeal.²⁶

61. First, as stated above, Ms. Nouinou was not encumbering an established regular-budget post, but an extra-budgetarily funded position. Therefore, contrary to the UNDT’s finding, OIOS was not required to seek the approval of the General Assembly prior to discontinuing it.²⁷

62. Second, the evidence does not support the UNDT’s finding that Ms. Nouinou’s post was no longer funded since November 2014 from the OIA account, whereupon OIOS used funds from the OIOS Trust Fund for all existing posts in 2014, including Ms. Nouinou’s and that these funds were to cover the existing posts until 2018. The available record clearly indicates that

²⁵ *Ibid.*, paras. 164, 165 (emphasis added).

²⁶ *Hepworth v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-503, para. 38.

²⁷ *Comp. Toure v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-660, para. 36.

Ms. Nouinou's position was funded from the OIA account until its depletion, at which point GTA funds were exceptionally used to continue her appointment from 1 July 2016 through its date of expiration on 28 October 2016. Apparently, the UNDT's finding was based on an erroneous interpretation of an e-mail message, dated 23 July 2014, from the Administrative Officer, ID/OIOS, to the Deputy Director, ID/OIOS. Clearly, on its face that e-mail message discussed a four-year contribution from Norway to the United Nations in support of OIOS' activities. That contribution, however, was not related to the OIA account, as the UNDT incorrectly found and relied upon in framing its analysis and reaching its conclusions.

63. Third, as a matter of law, the Dispute Tribunal erred throughout the Judgment by failing to recognize, respect and abide by the Appeals Tribunal's jurisprudence, as it must. Specifically, the UNDT's findings that "[t]he Tribunal is of the view that the information related to the OIA account as being the source of funding for the Applicant's post until 2016 *is contradicted* by the fact that since November 2014, OIOS used funds from the OIOS Trust Fund for all the existing posts in 2014",²⁸ and that "[t]here is no clear evidence that, [i]n September 2017, when the Applicant was effectively separated from the Organization, the situation of the OIA account was the same as in December 2016"²⁹ arguably reflect an erroneous shifting of the burden of proof to the Administration to show that the decision not to renew Ms. Nouinou's appointment was not motivated by improper reasons.

64. To begin with, apart from the fact that at the material time of the contested decision (in October 2016), the lack of funds would have led any reasonable decision-maker to make the non-renewal decision,³⁰ and concomitantly it is immaterial in this respect, as correctly argued by the Secretary-General, whether *ex post facto* in September 2017 the situation of the OIA account was the same as in December 2016, the UNDT's conclusions, purportedly that the Administration had hidden reasons not to renew Ms. Nouinou's fixed-term appointment, are based solely on speculation. While it is true that Ms. Nouinou has put forward that she was targeted because she had worked for the former Director of Investigations, and that the reason why she had been forced out of OIOS was simply part of the ongoing toxic working environment in ID/OIOS as the Director of Investigations who had left the Organization with a settlement through his own UNDT Case, this allegation is not corroborated by the evidence on file. Ms. Nouinou presented absolutely no evidence showing that the Administration had improper motivation or prejudice

²⁸ Impugned Judgment, para. 162 (emphasis added).

²⁹ *Ibid.*, para. 163.

³⁰ *Comp. He v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-825, para. 49.

against her resulting in the non-renewal of her appointment. The mere allegation is not a proof. Nor has the UNDT made any specific finding in that regard.

65. However, as stated above, the Appeals Tribunal's jurisprudence places that burden on the staff member to show, not on the Administration. Erroneously shifting the burden to the Administration tainted the UNDT's findings of unlawfulness. Since these findings are based on an error of law, they cannot support the UNDT's ultimate conclusion that the non-renewal decision was unlawful. We hold the same view with respect to the rest of the UNDT's findings, in that OIOS had the funds on 21 February 2017 to employ a new temporary staff member in a different section of OIOS at the G-level which had similar functions as the Applicant's.³¹ Thus, this Tribunal finds that the UNDT erred on a question of law and fact resulting in a manifestly unreasonable decision when it concluded there was no valid reason for the non-renewal of Ms. Nouinou's appointment.

66. The same goes for the distinct UNDT holdings regarding the obligation of the Administration to retain Ms. Nouinou and place her on any available suitable posts at the G-5 or G-4 level or at a lower level available in New York,³² as well as its finding:

[r]egarding the (...) refusal to reassign the Applicant under [a] zero dollar incumbency for two months to (...) CTED, where she had been selected for a short-term position until 31 December 2016, (...) that this decision, which was taken without [compliance with] the mandatory provisions of staff rule 9.6(e)(iii) and 9.6(f) and sec. 11.1(b) of ST/AI/2010/3 being observed and applied, in light of the above considerations, is also unlawful because it breached the Applicant's right to be reassigned on a non-competitive basis to any available suitable vacant post, under a fixed-term or temporary appointment, or to any other post for which she was competitively selected and that she would preferably accept.

67. These false conclusions are indicative of the UNDT's confusion as to the correct legal nature of the contested decision in the case at hand, which the first instance Judge wrongly perceived as termination due to the abolition of post, resulting in an incorrect application of the relevant legal framework [Staff Rule 9.6(a), 9.6(e)(iii), 9.6(f) and Section 11.1(b) of ST/AI/2010/3] for the termination of a fixed-term appointment to a case of an administrative decision of non-renewal of a contract.

³¹ Impugned Judgment, para. 166.

³² *Ibid.*, paras. 167-176.

No legitimate expectancy of renewal

68. Furthermore, the UNDT held that Ms. Nouinou had a legitimate expectancy for her two-year fixed-term contract to be renewed after 28 October 2016. In this respect, the UNDT found that:³³

... [A]s results from an email sent on 23 July 2014, the EO/OIOS informed Mr. BS that OIOS received funds for four years in 2014, to be placed in [the Trust Fund] to cover the existing posts and that it was confirmed with the Executive Office that “the existing staff members [would] get two-year appointments and the new staff [would] get one-year appointments”. As a result, the Applicant’s contract was renewed for two years, until October 2016, and it was expected to be renewed for another two years, since the funding of the existing staff members/posts, including the Applicant’s, was secured for four years, until 2018. According to the established jurisprudence, a fixed-term contract does not carry an expectancy of renewal, except in situations where the Administration made an express promise that gave rise to a legitimate expectation of renewal (...). The Tribunal considers that based on this written confirmation that her post, which existed in October 2016, would be funded until October 2018, the Applicant had a legitimate expectancy for her two-year fixed-term contract to be renewed after 28 October 2016.

69. This conclusion is again incorrect. First, as already set out above,³⁴ this holding is based on an erroneous interpretation of the e-mail of 23 July 2014 quoted above. Moreover, this e-mail does not indicate an express promise to Ms. Nouinou giving her an expectancy of renewal of her fixed-term contract. On the contrary, Ms. Nouinou was advised on 19 November 2015 by the Executive Officer of OIOS, as requested by the DD, ID/OIOS/Vienna, that the ID/OIOS would honour her appointment until 28 October 2016 but that any further extensions would be subject to available funding, which, at the material time of the expiration of her fixed-term contract on 28 October 2016, was not in place.

Compensation

70. Since the UNDT based its award of damages on the erroneous and unsupported conclusion that the Administration’s decision not to renew Ms. Nouinou’s appointment was unlawful, that award must be vacated. Because no illegality was found, there is no justification for the award of any compensation for material or moral damages. As this Tribunal stated before, “compensation

³³ *Ibid.*, para. 164.

³⁴ See above paras. 59 and 62.

cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair".³⁵

71. Accordingly, the Secretary-General's appeal should be granted and the impugned Judgment should be vacated.

Judgment

72. The appeal is granted and Judgment No. UNDT/2018/070 is hereby vacated.

Original and Authoritative Version: English

Dated this 29th day of March 2019 in New York, United States.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Thomas-Felix

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

(Signed)

Weicheng Lin, Registrar

³⁵ *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 66 citing *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33; *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-508, para. 27; *Oummih v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-420; *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095.