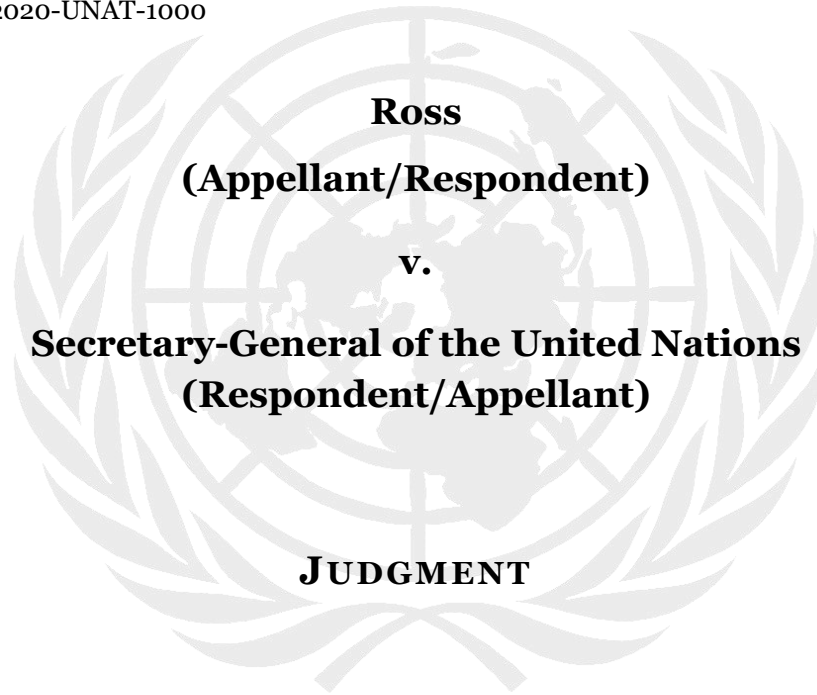




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2020-UNAT-1000



**Ross
(Appellant/Respondent)**

v.

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

JUDGMENT

Before: Judge Martha Halfeld, Presiding
Judge Sabine Knierim
Judge Kanwaldeep Sandhu

Case Nos.: 2019-1313 & 2019-1314

Date: 27 March 2020

Registrar: Weicheng Lin

Counsel for Mr. Ross: Self-represented

Counsel for Secretary-General: Francisca Lagos-Pola

JUDGE MARTHA HALFELD, PRESIDING.

1. Mr. Felix Ross, a former staff member of the Office of the United Nations High Commissioner for Refugees (UNHCR) filed three applications before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) contesting his non-selection for a P-4 position in Tunis, his separation from service from UNHCR, and the placement of a note in his personnel file. The UNDT consolidated the applications and issued one Judgment wherein the UNDT dismissed his claims pertaining to separation, found that his non-selection was unlawful due to procedural irregularity, and ordered the removal of the note from his personnel file. Both Mr. Ross and the Secretary-General have appealed to the United Nations Appeals Tribunal (Appeals Tribunal). On appeal we grant the Secretary-General's appeal and vacate the UNDT's Judgment as far as it relates to its finding on Mr. Ross' non-selection. We dismiss Mr. Ross' appeal.

Facts and Procedure

2. The UNDT established the following facts:¹

... The Applicant entered service with UNHCR on 3 November 2008 as a P-3 Legal Officer in the Legal Affairs Service (LAS) in Geneva, Switzerland. ...

... On 1 January 2015, the High Commissioner promoted the Applicant to the P-4 level while he was on special leave without pay.

... On 1 July 2015, the Applicant commenced a temporary assignment as a Senior Protection Officer in Rabat, Morocco. His temporary assignment was extended until 31 March 2016.

... The P-4 Senior Protection Officer position in Rabat was advertised as a regular post as part of the September 2015 compendium. The Applicant applied for the post.

... On 23 December 2015, the Applicant learned that another candidate had been appointed to the regular P-4 Senior Protection Officer post in Rabat.

.... At the Applicant's request, UNHCR's Division of Human Resources Management (DHRM) provided him with the hiring manager's views on his candidacy for the regular P-4 Senior Protection Officer post in Rabat on 8 January 2016. The hiring manager, [...], was also the Applicant's supervisor.

¹ Impugned Judgment, paras. 11-50.

... On 14 January 2016, the Applicant filed a complaint with the UNHCR Inspector General's Office (IGO) against [his supervisor], alleging that [he]: (i) had breached the selection procedures by discussing the process with him prematurely; (ii) had lied to him about his chances of success in the recruitment process; (iii) had provided comments on his candidacy and performance to DHRM that were a "total fabrication"; (iv) was acquainted with the appointed candidate and "wanted [him] for the position at all cost"; and (v) had created a "negative atmosphere within the office" with his authoritative management style.

... The IGO informed the Applicant on 18 January 2016 that after a review of his complaint, the Investigation Service had decided not to proceed with a formal investigation. The Applicant was advised to seek management evaluation instead. The Applicant emailed the IGO on 28 January 2019 requesting reasons for the Investigation Service's decision. The IGO informed the Applicant on 29 January 2019 that his email had been forwarded to the Investigation Service for assessment.

... The Applicant emailed Ms. Karen Farkas, then Director DHRM, on 28 January 2016 informing her that he was taking annual leave until 21 February 2016 and requesting that UNHCR end his assignment in Morocco immediately because he could no longer work with [his supervisor] due to the complaint he had filed against him. He called on UNHCR to offer him another suitable assignment.

... On the same day, the Deputy Director of the Middle East and North Africa Bureau informed the Applicant that the selected candidate had declined the Senior Protection Officer post in Rabat and that DHRM was prepared to recommend him for the position.

... The Applicant declined the Deputy Director's offer on 31 January 2016.

... In an email dated 15 February 2016, Ms. Farkas informed the Applicant that [his supervisor] was keen to have him return to Rabat to complete his temporary appointment. She requested that the Applicant: confirm his return to work in Rabat on 22 February 2016; consider an extension of his temporary assignment; and that he reconsider being recommended to the Senior Protection Officer post in Rabat.

... In a response dated 16 February 2016, the Applicant declined to return to Rabat to complete his temporary appointment and to extend the assignment for fear of retaliation from [his supervisor]. He elected to remain on annual leave and to use special leave without pay to cover the period from 22 February to the end of his temporary appointment on 31 March 2016. This arrangement was approved by DHRM on 17 February 2016.

.... On 2 March 2016, UNHCR's Emergency Response and Temporary Staffing Needs Unit in Geneva emailed the Applicant about his interest to serve as a P-4 Senior Protection Officer in Djibouti for six months. Between 2 and 28 March 2016, the Applicant communicated with the UNHCR Representative in Djibouti (the Representative) about the temporary assignment being offered to him.

On 8 March 2016, the Applicant informed the Representative that although he was interested in the position in Djibouti, he was unable to commit due to his family situation. He stated further that he would only go to Djibouti if his wife was also assigned there by her employer, the International Organization for Migration (IOM).

... On 24 March 2016, the Applicant was informed by the Human Resources Staff Services (HRSS)/DHRM by a letter dated 18 March 2016 that since they had not been notified of the extension of his appointment or of his selection for a new post within UNHCR, they would proceed with his separation from service effective 1 April 2016.

... The Applicant accepted the offer of a six-month temporary assignment as a P-4 Senior Protection officer to Djibouti on 29 March 2016.

... On 30 March 2016, the UNHCR Representative in Djibouti informed him that since he was not a staff member in between assignments (SIBA), the operation in Djibouti would not be able to pay the costs related to his temporary assignment. DHRM confirmed to the Applicant by email dated 31 March 2016 that the temporary assignment could not be approved due to funding issues.

... The Applicant was separated from service on 1 April 2016 and on 8 April 2016, he requested management evaluation of the decision not to renew his fixed-term appointment [(FTA)] beyond 31 March 2016.

... The UNHCR Deputy High Commissioner upheld the administrative decision not to renew the Applicant's fixed-term appointment in a memorandum dated 10 June 2016.

... On 11 October 2016, the Applicant emailed DHRM requesting documentation on the selection process for a Senior Legal Officer position he had applied for in Brussels.

... On the same day, Ms. Carina Karlsson, the Senior Principal Secretary of DHRM, emailed Mr. Lorenzo Pasquali, the Deputy Director/DHRM, and a Ms. SW about the Applicant's email and included the following: "Karen [Ms. Farkas, the former Director of DHRM] has moreover enquired if the name of the former staff member could be ['] flagged['] to say ['] consult['] as [the Applicant] will have internal status to apply for positions still. Grateful if you could let me know – and also whether we should pass this course of action through LAS?"

... Mr. Pasquali responded to Ms. Karlsson's email as follows: "[...] Concerning the flag, I am going to ask Z to include the consult per/ex notation in the last row of the MSRP."

... A note was included in the Applicant's record in the MSRP that read "Consult PER/EX or the Chief of PAPS before any possible rehire. Action recorded as per the request from Lorenzo Pasquali, the Deputy Director of DHRM via email on 11 October 2016".

... UNHCR advertised job opening 14082 for the position of Senior Protection Officer at the P-4 level in Tunis, Tunisia, on 21 July 2017. The Applicant applied for the position but was not selected. The result of the selection decision for this position was circulated to UNHCR staff members on 14 November 2017.

... Upon the Applicant's repeated requests, the Respondent provided him access to an electronic copy of his Official Status File (OSF) on 17 November 2017. The Applicant wrote to Respondent's counsel the same day challenging the completeness of the file provided and requesting that missing documentation (a [Personnel Action Form] PAF regarding his termination and email communication regarding his separation) be provided to him.

... Counsel for Respondent responded on 19 November 2017 that UNHCR had given him access to an electronic copy of his OSF and that the electronic copy was a true copy of his physical file.

... On 20 February 2018, the Respondent filed a submission in Case No. UNDT/NBI/2016/054 in compliance with Order No. 018 (NBI/2018), which included the information that had been inserted into the Applicant's OSF at Mr. Pasquali's direction.

... On 21 February 2018, the Applicant wrote to the current Director of DHRM, Ms. Terry Morel, to request the deletion of "records illegally entered into MSRP".

... On 27 February 2018, Ms. Morel replied to the Applicant indicating, *inter alia*, that the Respondent's Principal Legal Adviser would reply to his query.

... On 28 February 2018, the Respondent's Principal Legal Adviser responded to the Applicant by explaining the purpose of the "consult PER/EX" notation and noting the Agency's view that there was no valid reason to accede to the Applicant's request for deletion.

... On 2 March 2018, the Applicant filed a request for management evaluation contesting the Respondent's alleged decision to "insert adverse material into [his] online personnel file to hinder [him] from getting reemployed by UNHCR".

... On 9 March 2018, the Applicant filed an application for suspension of action pending management evaluation with the [Dispute] Tribunal.

... On 16 March 2018, the [Dispute] Tribunal granted the application for suspension of action by way of its Order No. 032 (NBI/2018) and ordered the Respondent to remove the adverse material from the Applicant's online personnel file, pending management evaluation.

... On 19 March 2018, the Deputy High Commissioner, UNHCR, issued a management evaluation decision which found the Applicant had not been blacklisted or retaliated against by UNHCR and amended the MSRP entry to read as follows: "In case of queries or requests for administrative action by the staff member, for purposes

of coordination please contact Deputy Director, DHRM”. The Deputy High Commissioner informed the Applicant that he could communicate his views to the Principal Legal Adviser, UNHCR, if he considered the amended annotation to constitute adverse material.

... On 28 and 29 March 2018, the Applicant filed a substantive application and a motion for interim measures pending proceedings, respectively, with the [Dispute] Tribunal challenging the decision to insert adverse material into his online personnel file. The [Dispute] Tribunal was satisfied that the Respondent was making concerted efforts to comply with Order No. 032 (NBI/2018) and therefore rejected the Applicant’s motion for interim measures on 6 April 2018.

... On the same day, the Applicant wrote to Respondent’s counsel reiterating his disagreement with the annotation, his view that he was still *de facto* blacklisted and a request that the annotation be deleted in its entirety.

... The Applicant requested management evaluation of the decision not to select him for the Senior Protection Officer post in Tunis on 7 April 2018. The Deputy High Commissioner upheld the non-selection decision in a response dated 22 May 2018

... The Respondent’s counsel responded to the Applicant on 25 April 2018 informing him that the 19 March 2018 decision of the Deputy High Commissioner would remain in effect and that “[...] it is proposed to insert into your personnel file the comments contained in your email of 6 April 2018. That is, a hard copy of your email to me of 6 April 2018 would be placed in your physical Official Status File and the contents of that email would be inserted as text into MSRP under your entry.”

... On the same day, the Applicant objected to the inclusion of any annotation in his electronic or physical OSF on the basis that it was discriminatory and illegal. He requested again that the annotation be deleted entirely.

... According to the Respondent, he understood the Applicant’s 25 April 2018 email to mean that the Applicant did not want his comments to be inserted in his OSF. However, the Respondent has neither modified the annotation in the Applicant’s MSRP nor has he added the Applicant’s comments to his OSF.

3. On 10 July 2019, the Dispute Tribunal in Nairobi issued Judgment No. UNDT/2019/126 in the cases of *Ross v. Secretary-General of the United Nations*. The UNDT disposed of three applications submitted by Mr. Ross, namely, i) Case No. UNDT/NBI/2016/054 against the decision not to renew his fixed-term appointment and to separate him from service; ii) Case No. UNDT/NBI/2018/040 against the decision to insert adverse material into his OSF; and iii) Case No. UNDT/NBI/2018/083 against the decision to appoint another candidate to the position of Senior Protection Officer in Tunis.

4. The UNDT dismissed Case No. UNDT/NBI/2016/054 as it found that Mr. Ross had failed to substantiate his claims of a flawed process and improper motives that led to his separation from service. With respect to Case No. UNDT/NBI/2018/040, the UNDT found that the Administration had failed to follow the proper procedures for the placement of adverse material in Mr. Ross' OSF and ordered the immediate removal of the notation contained in his OSF, though the UNDT determined that the decision to exclude Mr. Ross from the selection process at an early stage had been tainted by procedural error and had been unlawful. The UNDT awarded Mr. Ross USD 2,000 for moral harm for this error.

5. On 6 September 2019, Mr. Ross filed an appeal against the impugned Judgment. His appeal however exceeded the page limit so on 11 October 2019 he refiled his appeal in compliance with the Appeals Tribunal's Order No. 355 (2019), which had denied his motion seeking a page limit increase for his appeal brief. On 13 December 2019, the Secretary-General filed his answer. The Appeals Tribunal registered this case as Case No. 2019-1313.

6. On 9 September 2019, the Secretary-General filed an appeal and on 2 November 2019 Mr. Ross filed an answer. The Appeals Tribunal registered this case as Case No. 2019-1314.

7. On 24 January 2020, the Appeals Tribunal issued Order No. 363 (2020) to consolidate the two cases for all purposes, noting that both parties had appealed the same UNDT Judgment.

8. Mr. Ross filed the following three motions before the Appeals Tribunal: i) motion for additional pleadings, dated 17 January 2020; ii) motion for temporary suspension of the proceedings, dated 27 February 2020; and iii) motion for submission of applicable legal norms, dated 3 March 2020. The Secretary-General filed responses to each motion.

9. In addition, the Chairperson of the UNHCR Staff Council filed a friend-of-the-court application, dated 28 February 2020. Both parties have expressed their positions in respect of the friend-of-the-court application.

Submissions

Case No. 2019-UNAT-1313

Mr. Ross' Appeal

10. Mr. Ross argues that the UNDT committed several factual errors. The UNDT stated he had been promoted on 1 January 2015. However, his promotion had been implemented retroactively as of this date and only after he had complained about UNHCR's incorrect implementation of the promotion policy. Being separated for operational reasons only four months after the promotion supports his claim that he had been separated with an improper motive. The UNDT also erred in finding that he had refused to take assignments when, in reality, he and UNHCR had jointly agreed that he would go on leave while the Organisation resolved the conflicts he had with his supervisor. The UNDT also erred in stating that his argument was that he had been black-listed for seeking legal redress against only one selection process when he had actually sought legal redress against two selection processes as well as the implementation date of his promotion and his separation. Seeking redress had motivated the Director and the Deputy Director of DHRM to black-list him. The UNDT also erred in stating that there had been ten candidates short-listed when there had actually only been nine. This factual error resulted in the erroneous calculation of his chance of success and in turn his damages. Furthermore, the UNDT erred in finding that other candidates had been illegally excluded from the recruitment process when, in reality, he was the only candidate that had been excluded from the process. Being the only candidate illegally excluded supports his claim that he was black-listed.

11. The UNDT committed several errors of law. The UNDT erred in its conclusion that he had been separated because he had objected to continuing to work with his supervisor. In actuality, his separation had not been based on this conflict but had been based on alleged "operational reasons" because he had not obtained a new assignment by 1 April 2016. The UNDT erred by wrongly interpreting UNHCR's policy on fixed-term appointments as having a two-pronged approach. The UNHCR Policy on Administration of Fixed-Term Appointments UNHCR/HCP/2015/9 (the UNHCR Policy) provided for a two-year or three-year extension. Thus, the alleged operational reasons had not existed. UNHCR had been expanding due to the crisis in Syria. The UNDT, therefore, erred in law when it concluded that his supervisor's recommendation had been required for an extension whereas per the UNHCR Policy this had not been a requirement. Furthermore, Mr. Ross had met the conditions for the three-year extension,

and his special leave without pay had not constituted a disruption to the requirement of having three years of uninterrupted service. He also notes that a new assignment at the moment of an extension is not a requirement for the extension of fixed-term appointments under paragraph 19 of the UNHCR Policy.

12. In addition, Mr. Ross argues that the UNDT erred in finding that he did not have a legitimate expectation of renewal created by the Organization. UNHCR had implied the Agency would be extending his appointment when it shared his profile with representatives worldwide and offered him a temporary assignment in Djibouti. The UNDT also erred in not finding that UNHCR had failed in its obligation to exercise due diligence to actively assist him in finding a new assignment. Paragraph 3.2 of the UNHCR Policy required the administration to proactively make efforts to secure him a next assignment. UNHCR violated its own policy and its duty of care when it decided on his separation while at the same time discussing a new assignment with the representative in Djibouti. UNHCR had the duty of care to remedy the situation which it had created and thus should have assigned him to one of the numerous vacant P-3 or P-4 posts worldwide. The UNDT erred in not finding the note placed in his personnel file was a form of blacklisting and retaliation as its reference to consult with the Chief before “any possible rehire”. This note constituted abuse and harassment. Despite the UNDT ordering removal of the note, UNHCR placed a second note in his file, which was evidence of further harassment and abuse of authority. The UNDT failed to recognize this blacklisting was a form of retaliation, and also failed to identify the links between this blacklisting and his exclusion from the position in Tunis and his separation.

13. The UNDT failed to examine the conflict of interest as the former Legal Advisor and the Senior Legal Officer had advised DHRM on his separation yet those were the same individuals he had previously accused of rigging the selection processes. In addition, the UNDT erred by not referring the several named individuals for accountability, as they had conspired, abused their authority, and harassed him in retaliation for his seeking justice.

14. The UNDT erred in procedure by denying Mr. Ross the right to present evidence and obtain witness testimony. The UNDT denied all of his motions seeking to adduce additional evidence related to harassment, abuse of authority, and retaliation, on the grounds that they related to peripheral matters. Lastly, Mr. Ross notes that he has made efforts to limit his damages by applying to numerous positions in and outside of the United Nations and immediately opening his own law firm.

15. Mr. Ross requests the Appeals Tribunal to vacate the impugned Judgment and reinstate him. As an alternative to reinstatement, he seeks three years' net base salary plus pension fund contributions as compensation. He also requests that the Appeals Tribunal declare the selection of the candidate to the position of Senior Legal Officer (P-4) in Tunis as null and void and rescind the decision, or in the alternative, award him three months' net base salary. He also seeks six months' net base salary for his missed career opportunities. Furthermore, he requests that the Appeals Tribunal order the deletion of the note that has been placed in his personnel file and the payment to him of one year's net base salary for moral harm. Mr. Ross requests that this Tribunal refer, for accountability, the Director of DHRM, the Deputy Director of DHRM and the Deputy High Commissioner. Lastly, he seeks USD 20,000 in costs for his legal fees and interest on each monthly salary payment. In the alternative to the above, Mr. Ross seeks a remand to the UNDT so that additional evidence may be obtained and witnesses may be heard.

The Secretary-General's Answer

16. The Secretary-General submits that Mr. Ross' arguments regarding his non-selection and the annotation in his personnel file are not receivable, erroneous, and repetitive. The Secretary-General maintains that the UNDT erred in finding that Mr. Ross had *locus standi* since at the time he submitted his application for the non-selection, he had already separated from the Organization and was no longer considered an internal candidate. Mr. Ross also failed to submit a timely request for management evaluation of the non-selection decision. The UNDT erred in considering Mr. Ross as an internal candidate under UNHCR's relevant policy and in turn erred in finding he should have been short-listed for the position in Tunis. Furthermore, Mr. Ross's arguments relating to the non-selection and the annotation should not be considered by the Appeals Tribunal as he prevailed in those cases and the jurisprudence is clear that a prevailing party may not appeal. The UNDT found the non-selection decision unlawful and ordered its rescission and, in the alternative, an in-lieu compensation. Mr. Ross appeals and argues that the UNDT erred in affixing his in-lieu compensation as it erred in calculating the chance of his success for the Tunis position. He argues it should have considered him as one of nine, and not one of ten, short-listed candidates. Mr. Ross is incorrect as the record shows there had been 32 candidates. One of those candidates had not been assessed because he had already been appointed to another position. Out of those assessed candidates nine had been short-listed and 22 including Mr. Ross had not been short-listed. Had Mr. Ross been short-listed with the other

nine candidates he would have made the tenth candidate to have been short-listed as correctly determined by the UNDT.

17. The UNDT correctly dismissed Mr. Ross' application as the non-renewal decision was lawful. Mr. Ross' assertions on this decision do not establish an error warranting a reversal. Mr. Ross had twice refused to accept an assignment that would have extended his fixed-term appointment, and instead he went on Special Leave Without Pay (SLWOP) to cover the remainder of his appointment. Thus, the UNDT correctly found that Mr. Ross, by refusing two offers of extension, assumed the risk of not securing another assignment before the expiry of his fixed-term appointment. Mr. Ross also did not have a legitimate expectation of renewal. Both Staff Rule 4.13 and the UNHCR Policy clearly express that fixed-term appointments do not carry any expectancy, legal or otherwise, of renewal. Mr. Ross failed to show that UNHCR had made any express promise to extend his fixed-term appointment and so the UNDT correctly found that he did not have a legitimate expectation of renewal. In addition, the UNDT correctly held that his non-renewal had conformed with the UNHCR procedures, and it properly rejected Mr. Ross's argument that the management had failed to exercise its duty of care to assist him in finding a new assignment. Mr. Ross himself did not make much effort to find another reassignment as from the time he refused to be assigned to Rabat through to the end of his appointment as UNHCR had advertised 70 positions at the P-4 level, of which he only applied to three. There is also no evidence of improper motive related to his separation.

18. Most of Mr. Ross' appeal arguments are repetitious and fail to establish any error. He submits that the UNDT erred in dismissing his motions to hear witnesses and obtain information and so requests the Appeals Tribunal to remand this matter to the UNDT. He, however, fails to substantiate why additional evidence is necessary. In addition, Mr. Ross' argument regarding his annual income from his own law practice constitutes additional pleadings that are not part of the record. He has not identified anything exceptional to justify the admission of these additional pleadings and accordingly this section of the appeal should be rejected.

19. The Secretary-General requests that the Appeals Tribunal affirm the impugned Judgement pertaining to the non-renewal of Mr. Ross' appointment and dismiss his appeal in its entirety.

Case No. 2019-UNAT-1314

The Secretary-General's Appeal

20. The Secretary-General maintains that the UNDT erred in fact and law in finding Mr. Ross' applications receivable. Mr. Ross did not have *locus standi* to contest his not being treated as an internal candidate for the position in Tunis. Per Article 2(1) of the UNDT Statute, the UNDT has jurisdiction over applications filed by individuals listed in Article 3(1) of its Statute. Mr. Ross was no longer a staff member at the time of the decision not to select him as he had separated over a year earlier. While Article 3(1) allows former staff members to avail themselves of access to the internal justice system they may do so only if the application meets the criteria set out in Article 2(1), which requires a contested administrative decision alleged to be non-compliant with one's terms of appointment. Even though Mr. Ross was a former staff member, he was allowed to apply for internally advertised UNHCR positions. He was, however, not considered an internal candidate. Thus, the UNDT erred in finding he had *locus standi* regarding his claims that his rights as an internal candidate had been violated.

21. In addition, Mr. Ross failed to file a timely request for management evaluation as required by Staff Rule 11.2. The UNDT erroneously found that Mr. Ross learned of his non-selection unofficially in the middle of February 2018 and filed a request for management evaluation on 7 April 2018. Mr. Ross' own submission stated that he had become aware of his non-selection more than 90 days prior to 27 March 2018, namely, at some point on or before 27 December 2017. Thus, his deadline had been 25 February 2018 and he had therefore failed to timely file a request for management evaluation.

22. The UNDT erred in law and fact in concluding that the decision not to select Mr. Ross for the Tunis position was unlawful. As noted, Mr. Ross was not an internal candidate for the position. It also erred in finding that he should have been short-listed. The record indicated that the hiring manager short-listed only internal candidates. As he was not an internal candidate, his exclusion was in accordance with the set criteria. Furthermore, the Secretary-General has broad discretion in matters of selection and it is not the role of the UNDT to supplant such discretion with its own decision.

23. The Secretary-General requests the Appeals Tribunal to vacate the UNDT Judgment with respect to Mr. Ross' non-selection application and to dismiss his non-selection application in its entirety.

Mr. Ross' Answer

24. The Secretary-General's appeal contains factual errors. Firstly, he was not promoted until November 2015 with retroactive effect from 1 January 2015. Secondly, the appeal erroneously indicates that the hiring manager had only short-listed internal candidates. This is not correct.

25. Mr. Ross did not lack *locus standi* as paragraph 20 of the UNHCR's Revised Policy provided former staff members with the right to apply for internally advertised positions for up to two years after separation and did not provide for any preference to be given to current staff members over former staff members. He had only become aware of the decision in February 2018. In addition, the UNDT did not err in finding that he was an internal candidate. In turn, he notes that his exclusion from the short-list was not lawful and he was the only candidate that had been excluded.

26. Mr. Ross contests the Secretary-General's allegations about when he had been informed of his non-selection in relation to the management evaluation request deadlines and thus, argues that his application was receivable before the UNDT.

27. Mr. Ross requests that the Appeals Tribunal dismiss the Secretary-General's appeal in its entirety.

Mr. Ross' motion for additional pleadings

28. On 17 January 2020, Mr. Ross filed a motion for additional pleadings in order to address certain exceptional circumstances. He asserts that the Secretary-General had distorted facts and had defamed him, and that the Secretary-General had failed to substantively respond to 80 per cent of his pleadings before the Appeals Tribunal.

29. On 13 February 2020, the Secretary-General filed his response, objecting to the motion on grounds that Mr. Ross failed to support his contention that the issues that he raised constituted exceptional circumstances and his additional pleadings were a repeat of his

submissions before the Appeals Tribunal. Mr. Ross' claims regarding the failure to investigate his allegations of misconduct were the subject of another case before the Dispute Tribunal and fall outside of the scope of the present case. Furthermore, the seven documents that Mr. Ross seeks to adduce do not prove or establish the facts directly relevant to the present case. Mr. Ross has thus failed to explain why it would be in the interest of justice and an efficient and expeditious resolution of the proceedings to admit such documentary evidence at this stage of the present case.

Mr. Ross' motion for temporary suspension of the proceedings

30. On 27 February 2020, Mr. Ross filed a motion for temporary suspension of the proceedings in respect of Case Nos. 2019-UNAT-1313 and 2019-UNAT-1314, until the Dispute Tribunal rendered its decision in another application pending before it as Case No. UNDT/NY/2019/O61. According to Mr. Ross, in that case before the Dispute Tribunal, he had challenged the decision not to investigate his complaint of retaliation, harassment and abuse of authority in connection with the decisions to separate him from service and to black-list him. In his view, the Dispute Tribunal's determination would be extremely important for his appeal before the Appeals Tribunal as the burden of proof would shift if the Secretary-General is determined by the UNDT to have violated his duty to investigate.

31. On 5 March 2020, the Secretary-General filed his response objecting to the motion. In his view, a suspension of the proceedings before the Appeals Tribunal is not warranted, because it would run counter to the expeditious resolution of the present case, which is in its final stage. Moreover, the facts and evidence of Mr. Ross' case before the Dispute Tribunal are not open for consideration by the Appeals Tribunal in the present case. Also, Mr. Ross' case before the Dispute Tribunal is not directly related to the present case before the Appeals Tribunal and has no bearing on the present case.

Mr. Ross' motion for submission of applicable legal norms

32. On 2 March 2020, Mr. Ross filed a motion requesting leave to submit legal norms to submit the UNHCR's Policy on discrimination, harassment, sexual harassment and abuse of authority, effective 1 September 2014 (UNHCR/HCP/2014/4). Mr. Ross maintains that this policy document is relevant to the issue as to whether or not the Secretary-General had a duty to investigate his complaint and what consequences for violation of that duty should be considered

by the Appeals Tribunal. He apologizes for only submitting this policy at such a late stage of the proceedings because he became aware of it during the week of February-March 2020, and also because this document had only been published on UNHCR's intranet, to which he had no access since his separation from service.

33. In his response, dated 5 March 2020, the Secretary-General objected to the motion, maintaining that Mr. Ross has not established how the submission of this policy document satisfies the threshold of "exceptional circumstances" required by the Appeals Tribunal for the provision of additional evidence.

Friend-of-the-court application

34. On 28 February 2020, Mr. Guy Avognon, Chairperson of the UNHCR Staff Council, filed a friend-of-the-court application in respect of Case No. 2019-UNAT-1313, where Mr. Ross is the appellant, in order to appraise the Appeals Tribunal of some background information on UNHCR's policy on fixed-term appointments.

35. Mr. Ross has no objection to this application.

36. In his observations on 9 March 2020, the Secretary-General objects to the friend-of-the-court application. In his view, the application should not be granted as it does not meet the standard articulated in the Statute of the Appeals Tribunal. It fails to set out any argument as to why Mr. Avognon, who has no legal background, or the UNHCR Staff Council, has the legal or other expertise to assist the Appeals Tribunal in its deliberations. Neither does it indicate that Mr. Avognon has unique knowledge of facts which have not already been provided to the Appeals Tribunal.

Considerations

Motion for temporary suspension of proceedings and "Comments on the Respondent's comments"

37. After Mr. Ross filed his appeal, he submitted a motion seeking to suspend the appeals proceedings in his case until the UNDT had rendered its decision in Case No. UNDT/NY/2019/061. Mr. Ross argues that in his pending case before the UNDT, he has challenged the decision not to investigate his complaint of retaliation, harassment and abuse of

authority regarding the decision to black-list him and separate him from service. In his view, the UNDT's future finding on this matter could impact the burden of proof concerning his allegations, which would be in line with the jurisprudence of other tribunals.

38. We find no merit in Mr. Ross's motion, which he called "Comments on the Respondent's Comments". Although the context of his applications might be the same, it is clear that the factual circumstances of the present case are quite distinct from the ones he seems to have alleged in the case still pending before the UNDT. While in the latter case, he argues that retaliation, harassment and abuse of authority are the underlying or disguised reasons to separate him, in the former case, he contends: (i) that the reasons which were related to operational needs given as a justification for the non-renewal were invalid; (ii) that he had a legitimate expectation of renewal; and (iii) that he was entitled to a three-year extension of his FTA, according to the UNHCR Policy.

39. It is true that in the present case Mr. Ross has also mentioned extraneous factors and improper motives by his managers who were involved in the decision to separate him from service. The Appeals Tribunal notes that UNHCR decided on 18 January 2016 not to proceed with a formal investigation into Mr. Ross' complaint against his supervisor, and that at the same time it advised him to request a management evaluation.² However, in the present case, this allegation of retaliation or discrimination does not constitute the main grounds for Mr. Ross' claim, but rather appears to be a mere circumstantial factor of peripheral (secondary) importance as compared to the principal contentions. The fact that Mr. Ross has filed another application based on the sole allegation of retaliation, harassment and abuse of authority as the underlying motives for his being black-listed and separated from service only reinforces this conclusion. Moreover, any decision by the UNDT in the pending case will not have the effect of cancelling or modifying the considerations already taken into account by the UNDT in the present case. Nor will it affect the Appeals Tribunal's views on the matter, as the factual circumstances of the present case have already been established, in light of the evidence presented herein.

² Impugned Judgment, para. 18.

40. Therefore, there is no need for a suspension of proceedings at the appeals level based on the possible future considerations or findings of the UNDT in the pending case. However intertwined the situations might be, the claims in each application are clearly distinguishable. Mr. Ross' motion for temporary suspension of proceedings is therefore denied.

41. Given the application still pending before the UNDT, which is related to his complaint of retaliation, harassment and abuse of authority regarding the decision to black-list Mr. Ross and separate him from service, the Appeals Tribunal will not deal with any of these allegations in the present judgment. Any assessment or interpretation by the Appeals Tribunal on this matter is premature, as it would void the scope of the application still pending judgment before the UNDT and undermine the two-tier system of administration of justice.

42. In this regard, Mr. Ross' request in his appeal for witnesses to be heard or for a remand of his case to the UNDT for the purpose of producing evidence of retaliation or discrimination is without merit. Had he considered them necessary or useful, he could have submitted statements or affidavits so as to demonstrate their relevance to this case after the UNDT had refused to hold a hearing, just as he did when he annexed his wife's affidavit.

Application to File a Friend-of-the-Court Brief by the UNHCR Staff Council

43. The UNHCR Staff Council has submitted an application to file a Friend-of-the-Court brief, claiming that this case will have a significant impact on a large number of staff members of UNHCR, as it relates to the interpretation of UNHCR's Policy on the administration of fixed-term appointments, and over 85 per cent of the UNHCR staff members are currently holders of temporary appointments or fixed-term appointments.

44. Article 17(1) of the Appeals Tribunal's Rules of Procedure provides that:

A person or organisation for whom recourse to the Appeals Tribunal is available and staff associations may submit a signed application to file a friend-of-the-court brief, which may be transmitted electronically. The Registrar shall forward a copy of the application to the parties, who shall have three days to file any objections on a prescribed form.

45. In its brief, the Staff Council discusses the UNHCR Policy on fixed-term appointments, particularly the three-year extension, the continuity of service, the need to ensure in-house expertise and the possibility of staff members being in-between assignments without the need for their separation from service. The Staff Council further affirms that the needs of UNHCR, which

is not mentioned in the policy, should not be taken into consideration for the granting of a three-year fixed-term appointment. Lastly, the Staff Council notes that, in light of the expansion of the work at the beginning of 2016, UNHCR could have found a suitable assignment for Mr. Ross, whose profile was in high demand at the time, and that failing to do so could be interpreted as an act of retaliation, in the absence of any other objective reason not to renew his appointment.

46. In his objection to the Friend-of-Court brief, the Secretary-General contends that (i) the request presented by the UNHCR Staff Council does not meet the standard required by the Appeals Tribunal's jurisprudence in *Terragnolo*;³ (ii) the present case does not raise specific or particular questions which are not within the expertise of Counsels or of the Judges; and (iii) the brief fails to indicate how it would assist the Appeals Tribunal in its deliberations. The Secretary-General requests time to comment on the merits of the submission, should the Friend-of-Court brief be admitted in the present case.

47. The Appeals Tribunal notes the interest of the UNHCR Staff Council in bringing its views to this case, particularly with regard to the broad policy on fixed-term appointments. Up to this point and however brief the arguments might have been, the application could well have assisted the Appeals Tribunal in its deliberations. Nonetheless, as will be discussed later in this Judgment, the decision of this Appeals Tribunal to affirm the UNDT Judgment in the matter of the non-renewal of Mr. Ross's fixed-term appointment does not concern the discussion about the broad interpretation of the UNHCR Policy in this particular area. This is because the considerations of the UNDT relate only to Mr. Ross' particular situation, specifically related to the fact that he had refused the offers of extension of his fixed-term appointment, and do not refer to a broader interpretation that could have an impact on the staff members as a whole or particularly, on the possibility of a three-year extension of any fixed-term appointment.

48. There is, therefore, in the present case, no need to assess the extension or interpret the rules of the broad policy on fixed-term appointment renewals as a general matter. On the other hand, the individual aspects of the case mentioned by the UNHCR Staff Council cannot be received or taken into consideration by this Appeals Tribunal, as this would override the inherent purpose of the Friend-of-the-Court procedure to establish general and collective guidelines for the future rather than those for an individual. In such a context and in line with our

³ *Terragnolo v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-445, paras. 15-17.

jurisprudence, while there could be room for a Friend-of-the-Court brief considering the parties' arguments, the circumstances of the case do not warrant such an intervention.

Motion for additional pleadings

49. After having filed his appeal dated 6 September 2019, Mr. Ross submitted a motion for additional pleadings with numerous annexes. In this motion, he seeks the Appeals Tribunal's interpretation with regard to the situation that he describes as being the consequence of his complaint against his supervisor four years ago, which has not yet been investigated. He claims that the other senior officials have been involved over these years. Further, Mr. Ross contends that the facts and arguments presented by the Secretary-General in his answer to the appeal are not correct and do not entirely address all the pleadings, and that Mr. Ross' promotion took place in November 2015 (and was only retroactively implemented as of January 2015). In his view, the Appeals Tribunal should shift the burden of proof in the present case.

50. Mr. Ross also requests leave to submit additional documentary evidence, including his application for revision of Judgment No. 2019-UNAT-944, a complaint to the High Commissioner of UNHCR and other documents. He asserts that this additional evidence shows an absence of investigation into his allegations against his supervisor.

51. First of all, as discussed above, the allegation of possible retaliation seems to be the matter of another application still pending before the UNDT and it is not appropriate for the Appeals Tribunal to assess any allegations regarding this issue in the present case. Secondly, neither the Appeals Tribunal Statute nor the Appeals Tribunal Rules of Procedure provide for an appellant to file an additional pleading after the respondent has filed his or her answer. Article 31(1) of the Rules and Section II.A.3 of Practice Direction No. 1 of the Appeals Tribunal allow the Appeals Tribunal to grant a party's motion to file additional pleadings only if there are exceptional circumstances justifying the motion.⁴ Mr. Ross has not demonstrated any exceptional circumstances which would justify the Appeals Tribunal's exercising of its discretion to allow him to file such additional pleadings.

⁴ See *Afawubo v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-863, para. 18, citing *Fayek v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-739, para. 7.

52. Finally, pursuant to Article 2(5) of our Statute, there are no exceptional circumstances to justify receiving the additional evidence submitted by Mr. Ross with this motion, which for the most part was known “to either party and should have been presented at the level of the Dispute Tribunal”. Mr. Ross appears to be seeking to re-argue and re-try the merits of his appeal, rebuking the Secretary-General’s answer, which is not admissible. Mr. Ross’ motion for leave to file additional pleadings is thus denied.

Submission of “applicable legal norms”

53. Mr. Ross has filed a motion for leave to submit UNHCR’s Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority of 2014 (UNHCR/HCP/2014/4) (2014 Policy), claiming that it established a duty of investigation by the Inspector General’s Office, which was violated by UNHCR when it did not investigate his complaint.

54. In light of the above, the Appeals Tribunal agrees with the Secretary-General’s reply in that the 2014 Policy is not relevant to the present case, as this Judgment will not deal with any issue related to the allegation of discrimination, harassment or retaliation. There are, thus, no exceptional circumstances to justify the filing of such an additional legal document, since the facts and arguments of the present case do not relate to any such allegation. Besides, as ignorance of the law is no excuse, the 2014 Policy should have been known to Mr. Ross before the issuance of the UNDT Judgment and his allegations based on this policy should have been submitted to the UNDT, had they been considered pertinent to the case at hand. Mr. Ross’ motion for leave to file “applicable legal norms” is thus denied.

Oral hearing

55. As a further preliminary matter, Mr. Ross requests an oral hearing. Oral hearings are governed by Article 8(3) of the Appeals Tribunal’s Statute and Article 18(1) of our Rules. However, at this stage, there is no point in holding a hearing to clarify the factual issues raised by Mr. Ross. Any hearing on this matter would have to be held by the UNDT, which provides the normal procedure for first instance fact-finding. Moreover, 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 the present case. Finally, 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 Appeals Tribunal’s Rules. Thus, the request for an oral hearing is refused.

Merits

56. There are several issues to be dealt with in the present Judgment. On the one hand, the Secretary-General contests the UNDT Judgment insofar as it relates to Mr. Ross' non-selection for the post in Tunis, while Mr. Ross challenges the UNDT decision with regard to the non-renewal of his FTA, the amount of compensation awarded, the grounds for compensation, as well as the referral for accountability and the award of costs. Mr. Ross did not appeal against the issue pertaining to the insertion of adverse material into Mr. Ross' personnel file. Thus, the Appeals Tribunal will examine each of the contended issues in turn.

The non-renewal of the FTA (UNDT application UNDT/NBI/2016/054)

57. Mr. Ross requests reversal of the Impugned Judgment which dismissed his application challenging the non-renewal of his FTA. Mr. Ross had served UNHCR beginning from 3 November 2008 in different locations, starting in Geneva (Switzerland), then in Kassala (Sudan), Nairobi (Kenya) and finally in Rabat (Morocco) on an FTA and temporary reassignments. During this time, he also took some SLWOP. His separation from service took effect on 1 April 2016.

58. Mr. Ross claims that the UNDT erred in fact when it found that he had refused to return to Morocco. He states that the agreement about his going on leave in order for the Organization to solve the problem between him and his supervisor had been reached jointly. He further claims that the real reason for his separation was not his objection to continuing to work with his supervisor, but the "operational reasons" stemming from the fact that he had not obtained a new assignment or appointment after 1 April 2016.

59. In this respect, the UNDT found that, having refused to accept an extension of his temporary assignment on 31 March 2016 (the same date as the expiration of his FTA) and an offer to be recommended for a regular position in Rabat, Mr. Ross knowingly assumed the risk of not being able to secure another assignment or position before his FTA expired.⁵

60. We fully agree with the UNDT in its reasoning here. While it is true that UNHCR agreed with Mr. Ross' request for additional annual leave and SLWOP so as to cover the period for the completion of his temporary assignment in Rabat, the evidence in the record reveals that it had

⁵ Impugned Judgment, paras. 72 and 73.

been Mr. Ross's initiative to propose this. More than this, in an e-mail of 28 January 2016, Mr. Ross unequivocally communicated that, following his complaint against his supervisor and in order to temporarily resolve the situation and give the Organisation time to examine his complaint, he would take annual leave, stating that UNHCR needed to end his assignment in Morocco and offer him another suitable assignment.

61. Regardless of the reasons he offered at the time and the final outcome of his request, it is therefore undeniable that it was Mr. Ross who took the decision not to go back to his post. He also adhered to his decision, when shortly thereafter, he was offered a return to work, together with an extension of his temporary assignment and a recommendation for him to take up the position of Senior Protection Officer in Rabat, for which he had previously applied. This refusal occurred despite the express promise of no retaliation on the part of his supervisor, as contained in the 15 February 2016 e-mail, reiterated on the following day. UNHCR ultimately acceded to Mr. Ross' proposal of annual leave and SLWOP.

62. Mr. Ross might well be right in his assumption that those actions in February 2016 could have led to the conclusion that it was within UNHCR's interests to leave the work-related conflict between him and his superior in Morocco behind. Shortly thereafter, UNHCR also tried to find Mr. Ross another post in Djibouti, although this ultimately turned out to be financially impossible. The fact that UNHCR took these actions, however, does not amount to any acknowledgement of his supervisor's fault in the conflict, nor does it imply that Mr. Ross was right in his presumption that retaliation would occur. Although we do not have any indication as to the reasons underlying the attempt to find an alternative post for Mr. Ross, this might possibly have happened for other managerial reasons. Mr. Ross' reluctance to return to work was unjustified, particularly considering, at that time, he knew that the Director of DHRM (who was not his direct supervisor) was also aware of the situation.

63. In any event, according to Staff Rule 4.13(c), a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service. Specifically, paragraph 8(b) of the UNHCR Policy provides that an "FTA is a time-limited appointment issued in respect of staff members who have been appointed to a position by the High Commissioner, or officer with the High Commissioner's delegated authority, following a UNHCR competitive selection process. It does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service."

64. Likewise, it is the established jurisprudence of the Appeals Tribunal that, ordinarily, an FTA carries no expectation of renewal, unless there is evidence of a firm commitment otherwise.⁶ Our jurisprudence has required this commitment to be in writing.⁷ In the present case, there is not a single allusion, not to mention any evidence, of such a firm commitment on the part of UNHCR. The offer of the post in Djibouti by no means constitutes such a commitment, because there was no such mention in the process of negotiation. Mr. Ross, thus, fails in his argument that it was incumbent upon UNHCR to find him a position before separating him from service. Moreover, even if this logic were to be considered, he at first declined the offer made to him twice with no justifiable reason as discussed above, and then made little effort to apply for other advertised P-4 positions at the time, and finally took such a long time in deciding about the Djibouti offer that he could no longer qualify for the position due to funding reasons. All this is enough to call into question Mr. Ross' claims that UNHCR acted in bad faith or failed to comply with its duty of care.

65. In light of the aforementioned, the other issues raised by Mr. Ross are inconsequential for his intended purposes in this appeal. It is indeed not pertinent to argue about the possible absence of any operational reasons for the separation, since the real reason behind the separation was his continued persistence in refusing the offers of extension of his FTA. That is to say that the eventual offers superseded any previous reasons for the non-extension. Moreover, as already noted in *Krioutchkov*⁸ and *Aliko*,⁹ the Appeals Tribunal is not a forum for a party to reargue the case without identifying the defects and demonstrating on which grounds an impugned UNDT judgment is erroneous. More is required. The appellant must demonstrate that the UNDT has committed an error of fact or law warranting intervention by this Tribunal.¹⁰ As has been repeatedly stated by the Appeals Tribunal, “[i]n the absence of a compelling argument that the UNDT erred on a question of law, or on a question of fact resulting in a manifestly unreasonable decision, we will not lightly interfere with the findings of the Dispute Tribunal”.¹¹

⁶ *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153, para. 47.

⁷ *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-411, para. 26.

⁸ *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-711, paras. 20-22.

⁹ *Aliko v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-540, paras. 28-30.

¹⁰ *Abdel Rahman v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-610, para. 20; *Aliko v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-540, para. 28; and *Crichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035, para. 30.

¹¹ *Goodwin v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-346, para. 23.

66. Finally, Mr. Ross' request for the Organisation to delete the note that had been placed in his personnel file is moot, as this has already been ordered in the UNDT Judgment, which order the Secretary-General has not appealed. Any other note included in his file does not fall within the scope of the original administrative decision and should be challenged by the normal administrative procedure.

67. Mr. Ross's appeal with regard to the non-extension of his FTA must therefore fail.

The non-selection for the Tunis position (UNDT application UNDT/NBI/2018/083)

68. In his appeal, the Secretary-General claims that the UNDT erred in receiving the application challenging the non-selection decision, since Mr. Ross was no longer a staff member at the time the position was advertised, and therefore had no standing to contest the administrative decision. Also, Mr. Ross failed in a timely manner to request a management evaluation of the decision not to select him.

69. According to the record, Mr. Ross applied for the P-4 position in Tunis on 21 July 2017, whereas he had been separated from service since 1 April 2016. The decision not to select him was taken on 14 November 2017, even though this was not communicated to Mr. Ross at that time. Maintaining that he only became aware of this in mid-February 2018, Mr. Ross filed a request for management evaluation on 7 April 2018.

70. The first issue for consideration and determination is thus whether the UNDT was correct in its finding that Mr. Ross had standing to challenge the decision not to select him for an internally advertised post. According to the UNDT, by virtue of the fact that Mr. Ross was a former staff member allowed to apply for the said position, "he remained an internal candidate for purposes of the vacancy advertisement to which he applied".¹² The UNDT also held that Mr. Ross was "entitled to a limited protection regarding his right to be informed of his unsuccessful candidacy and to a fair consideration of his application to the position as an internal candidate".¹³

71. Pursuant to its Statute, the UNDT's jurisdiction is limited to cases brought by a) staff members, b) former staff members, and c) any person making claims in the name of an incapacitated or deceased staff member of the United Nations. Indeed, Article 2 of the

¹² Impugned Judgment, para. 98.

¹³ *Ibid.*, para. 99.

Dispute Tribunal Statute broadly sets out those matters upon which the Dispute Tribunal is competent to hear and pass judgment. In addition to applications against administrative decisions imposing disciplinary measures, and applications seeking enforcement of implementation of agreements reached through mediation, Article 2(1) provides, in relevant part, that the Dispute Tribunal may review the following:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of the alleged non-compliance[.]

72. Article 3(1) of the Dispute Tribunal Statute provides, in pertinent part:

An application under article 2, paragraph 1, of the present statute may be filed by:

(a) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(c) Any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes.

73. The Secretary-General argues that there is no link between the challenged administrative decision not to select Mr. Ross and his former terms of appointment or contract of employment, which is necessary for an application to be receivable. However, the UNHCR Revised Policy and Procedures on Assignments in force at the relevant time state in pertinent parts:

Applications and Eligibility

18. An internal candidate is a UNHCR staff member in the international professional category currently holding an Indefinite or Fixed-Term Appointment (FTA) who has been appointed following an UNHCR competitive selection process that has been reviewed by the [Joint Review Board] JRB or previous joint staff/management bodies and appointed by the High Commissioner.

(...)

Special Eligibility Criteria

20. Former UNHCR international professional staff members who were appointed following a UNHCR competitive selection process and who held an Indefinite Appointment or a FTA for an uninterrupted period of at least one year and former NPOs who have served a minimum of four years in this category prior to separation may apply for internally advertised vacancies in the international professional category at their previous grade or equivalent or one grade above for a period of five years following separation for women and for a period of two years following separation for men, unless otherwise prescribed in an agreed termination or voluntary separation.

74. Therefore, while the Appeals Tribunal agrees that the vast majority of cases admitted before the internal justice system comply with the criteria set forth by the Secretary-General, there are certain situations in a “grey area” that merit attention and cannot be excluded from this system. In *Al Hallaj*,¹⁴ the Appeals Tribunal established that a quasi-contract formed when an offer of employment is unconditionally accepted by the person who fully satisfies the conditions specified within, is sufficient to allow for the person, albeit not yet a staff member of the Organisation, to challenge a decision stemming from such a quasi-contract. The quasi-contract also creates obligations for the Organisation which include behaving in keeping with the principle of good faith (to elucidate the other party on the relevant obligations, to provide assistance, to protect legitimate expectations, etc.), and acting fairly, justly and transparently in its dealings with the person. These aspects and expressions of the principle of good faith supplement, and at the same time, consolidate the terms of the emerging contract of employment. They constitute in their specific application an indispensable part of the parties’ compliance with the “terms of appointment”.¹⁵

75. In the present case, Mr. Ross, a former staff member, has challenged the decision not to select him for a new position for which he was to be considered especially eligible and therefore allowed to apply for the internally advertised vacancy. A degree of equality between former staff members and current staff members was thus established by the aforementioned Policy for the purposes of eligibility criteria. The interpretation suggested by the Secretary-General (to restrict the receivability of a legal application to the justice system to staff members who wish to challenge their respective terms of appointment) would have the consequence of depriving Mr. Ross of any formal recourse to the internal justice system, even though his situation was

¹⁴ *Al Hallaj v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-810, paras. 37-47.

¹⁵ *Id.*, paras. 38 and 39.

equated to that of any other internal candidate. That is to say that he was likened to a staff member for the purposes of eligibility for the post advertised, which is sufficient to warrant his standing to challenge before the UNDT any decision stemming from the post advertised. There is hence no error in the UNDT Judgment, which found that the application was receivable *ratione personae*.

76. The second matter for consideration and determination with regard to the receivability of the application before the UNDT is whether the UNDT was correct in its finding that the filing of the management evaluation request was timely. In this respect, we find that the Secretary-General is correct in his assertion that Mr. Ross had previously acknowledged being aware of the decision not to select him and therefore should have requested management evaluation earlier. In his initial application before the UNDT registered under UNDT/NBI/2018/40, Mr. Ross stated the following in a document dated 27 March 2018 concerning the decision not to select him:

43. In April 2017 the Applicant had applied for the position of Senior Protection Officer, P4, in Tunis. The Applicant had excellent chances to be selected. He had previously worked as a Senior Protection Officer in Morocco. He had thus worked in the same position in an operation which is very similar to the Tunisia operation. In addition the Applicant's wife works with IOM in Tunisia. The Applicant would have thus had to be given preference under UNHCR's procedures regarding appointments.

44. The blacklisting of the Applicant however eliminated the Applicant's chances to be selected for the position. The manager of the position and human resources staff in Tunis immediately must have seen the initial annotation on the Applicant's file when deciding whom to shortlist for the position. The Applicant was therefore probably not even shortlisted for the position. And even if he was shortlisted, DHRM staff in Geneva would have eliminated the Applicant from the selection process because of the annotation in his online personnel file.

45. The selection process was finalized and another candidate was appointed. *The decision stands and cannot be appealed by the Applicant anymore because more than 90 days have passed since.* The Applicant's harm in this regard is thus irreparable and can only be compensated.

46. If the Applicant had been selected for the position in Tunisia, he would have been rehired by UNHCR as of 1 January 2018 and he would have received an initial fixed-term appointment of two years. This is relevant as the Applicant might be granted compensation in other judgments. It will have to eventually be determined how the different compensations ordered by the Tribunal relate to each other –

whether they compete or overlap. Any compensation granted in this case has to be considered as compensation for not having received a salary as of 1 January 2018.¹⁶

77. This is to say that, having acknowledged that the 60-day window to request management evaluation had already elapsed on 27 March 2018, his filing for such on 7 April 2018 was clearly too late. The application is therefore not receivable *ratione materiae*.

Awards of compensation

78. In his appeal, Mr. Ross claims the following compensation:

- i. compensation in lieu must be set, in light of the separation from service being null and void, to the amount of three years' net base salary plus pension fund contributions;
- ii. compensation in lieu of the rescission of the decision not to select him for the Tunis position should be three months' net base salary (and not the one-tenth of the net base salary which he would have received at the P-4 level for one year had he been appointed to the post, as awarded by the UNDT);
- iii. compensation for missed career opportunities must be awarded in the amount of six months' net base salary; and
- iv. compensation for moral harm should be set to the amount of one-year net base salary deriving from the unlawful separation, black-listing and non-selection for the position in Tunisia (the UNDT had awarded USD 2,000 as compensation for moral damages stemming from the non-selection decision).

79. In light of what has been previously established in this Judgment, there was no illegality in his separation from service. Therefore, there are no grounds for an award of compensation in lieu, nor for an award of compensation for moral damage or for missed career opportunities. The Secretary-General's appeal is granted and the UNDT Judgment is vacated insofar as it relates to the rescission of the decision not to select Mr. Ross for the Tunis post and to the amount of compensation awarded in lieu. Mr. Ross' appeal with regard to the possible error in the calculation of the compensation in lieu concerning the non-selection is therefore dismissed.

¹⁶ Emphasis added.

Referral for accountability and award of costs

80. Mr. Ross requests this Tribunal to refer for accountability the Director of DHRM, Deputy Director of DHRM and the Deputy High Commissioner. He also seeks USD 20,000 in costs for his legal fees. He claims that several named individuals conspired, abused their authority, harassed and retaliated against him because he was seeking justice.

81. The Appeals Tribunal agrees with the UNDT's finding that no manifest abuse of process has been established which could justify an award of costs against the Secretary-General in the present case. Likewise, Mr. Ross has failed to establish any error in the UNDT Judgment, which made no findings justifying a referral for accountability in the present case.¹⁷

¹⁷ Impugned Judgment, para. 126 e.

Judgment

82. The Secretary-General's appeal is granted in part, and Judgment No. UNDT/2019/126 is hereby vacated in part. Mr. Ross' appeal is dismissed.

Original and Authoritative Version: English

Dated this 27th day of March 2020.

(Signed)

Judge Halfeld, Presiding
Bournemouth, United Kingdom

(Signed)

Judge Knierim
Hamburg, Germany

(Signed)

Judge Sandhu
Vancouver, Canada

Entered in the Register on this 19th day of June 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar