UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2021-UNAT-1169

Oldrich Andrysek

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge Dimitrios Raikos Judge Sabine Knierim
Case No.:	2021-1504
Date:	29 October 2021
Registrar:	Weicheng Lin

Counsel for Appellant:	Robbie Leighton, OSLA
Counsel for Respondent:	Francisca Lagos Pola, Angélique Trouche

JUDGE MARTHA HALFELD, PRESIDING.

1. Before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), Mr. Oldrich Andrysek, a staff member in between assignments (SIBA) with the Office of the United Nations High Commissioner for Refugees (UNHCR) contested the decision to place him on Special Leave Without Pay (SLWOP) effective 11 June 2019. The UNDT, in Judgment No. UNDT/2020/190, dismissed the application, by majority decision with Judge Buffa dissenting. Mr. Oldrich has appealed the UNDT Judgment.

2. For the reasons set out below, the United Nations Appeals Tribunal (Appeals Tribunal) dismisses the appeal and affirms the UNDT Judgment.

Facts and Procedure

3. Mr. Andrysek joined UNHCR in August 1990 on a fixed-term appointment. Throughout his tenure with UNHCR, Mr. Andrysek has served in various positions (varying from the P-2 level to the D-1 level) in different locations.

4. In January 2000, his fixed-term appointment was converted into an indefinite appointment.

5. On 1 January 2011, Mr. Andrysek was assigned to Kyiv as Regional Representative at the D-1 level. His initial five-year standard assignment length (SAL) was shortened to 28 February 2015. This position was his last *regular* assignment. His last assignment with UNHCR was a temporary assignment in Budapest, Hungary, where he worked as a Senior Staff Development Officer (P-5) for the Global Service Centre from 18 July 2016 to 1 January 2017.

6. From 2 January 2017 to 25 November 2017, Mr. Andrysek was placed on special leave with full pay (SLWFP), as a SIBA.

7. On 15 August 2017, UNHCR issued UNHCR/HCP/2017/2, Recruitment and Assignments Policy (RAP) and UNHCR/AI/2017/7, Recruitment and Assignments Administrative Instruction (RAAI), which prospectively altered the rules applied to SIBA, effective 1 January 2018, by regulating that after nine months of being on SLWFP following their last regular assignment or 1 January 2018, whichever is later, they would be placed on SLWOP. On 26 November 2017, Mr. Andrysek became ill and was placed on certified sick leave.

8. On 21 June 2018, Mr. Andrysek received a letter from the Director of the Division of Human Resources (DHR) reminding him of the changes to the rules for SIBA and particularly about the maximum cumulative period of nine months on SLWFP. In September 2018, Mr. Andrysek was declared fit to work, but was granted a medical constraint on 3 October 2018, such that he could only be assigned to H, A and B duty stations. From 27 September 2018 to 10 June 2019, Mr. Andrysek was on SIBA status and SLWFP. On 24 April 2019 and then again on 27 May 2019, he was informed by the Administration that he would reach the nine cumulative months of SLWFP on 10 June 2019 and would then be placed on SLWOP. The letter of 27 May 2019 also informed Mr. Andrysek of the High Commissioner's decision to cover pension and medical insurance contributions for SIBA for an additional nine months following placement on SLWOP.

9. Mr. Andrysek was placed on SLWOP on 11 June 2019. On 19 July 2019, he requested management evaluation of the decision to place him on SLWOP effective 11 June 2019. On 30 August 2019, the Deputy High Commissioner informed Mr. Andrysek that the decision to place him on SLWOP was being upheld. On 27 November 2019, Mr. Andrysek filed with the UNDT (i) a motion for suspension of the decision to place him on SLWOP until a judgment on his application was issued; and (ii) an application challenging the decision to place him on SLWOP effective 11 June 2019. On 5 December 2019, the UNDT granted the motion for suspension until the completion of the trial proceedings.

10. By Order No. 008 (GVA/2020) of 23 January 2020, the UNDT informed the parties that a three-Judge Panel had been appointed to review the case.

11. On 6 November 2020, the UNDT issued its Judgment. The UNDT concluded, by majority decision with Judge Buffa dissenting, that the decision to place Mr. Andrysek on SLWOP was lawful and, therefore, rejected the application.

12. In reviewing the lawfulness of the contested decision, the UNDT considered whether the new UNHCR legal framework set out in the RAAI was consistent with Staff Rule 5.3(f), and whether the Administration had placed Mr. Andrysek on SLWOP in accordance with the legal framework. The UNDT noted that Staff Rule 5.3(f) sets out the general principle that a staff member can be exceptionally placed on SLWOP when the interest of the Organization so requires and that section 139(c) of the RAAI materializes the conditions under which SIBA can be placed on SLWOP in the specific context of UNHCR. The UNDT found that the

circumstances for the placement of SIBA on SLWOP are *per se* exceptional and, consequently, that the text of section 139 of the RAAI is consistent with Staff Rule 5.3(f). The UNDT further noted that Mr. Andrysek was one of two staff members who had been placed on SLWOP after the entry into force of the RAAI, and he was the only staff member who remained on SLWOP, which is indicative of how the placement of SIBA on SLWOP was exceptional. In the specific circumstances of the case, the UNDT found that Mr. Andrysek had been correctly placed on SLWOP effective 11 June 2019 in accordance with section 139(c) of the RAAI.

13. The UNDT then turned to consider the obligations of the Organization and SIBA placed on SLWOP when their contract contains the undertaking clause. While the UNDT was mindful that in *Timothy*,[1] the Appeals Tribunal focused on the requirements imposed on the Administration and the staff member in the specific context of abolition of posts due to a restructuring exercise, the UNDT held that this jurisprudence provided important guiding principles relevant to determine the obligations of both parties when SIBA are placed on SLWOP when their contract contained the undertaking clause. The UNDT concluded that as per *Timothy* a principle of shared responsibility applied.

14. The UNDT held that the Administration should demonstrate good faith efforts to find a suitable post for the affected staff member holding a continuing or indefinite appointment by considering the affected staff member for available suitable posts; assigning the staff member on a preferred or non-competitive basis; and making efforts to find an alternative post at his or her grade level, or even at a lower grade if in such case the staff member expressed an interest. The UNDT found that while the Administration was required to consider the relevant staff member on a preferred basis for available suitable posts, the Administration had no duty to consider a staff member who was not fully competent to perform the core functions and responsibilities of a position.

15. Turning to the staff member's duties, the UNDT found that the staff member was required to fully cooperate in the process leading to secure alternative employment. He or she should do so in good faith and show an interest in new positions by timely and completely applying for vacancies. If the Administration informed the affected staff members that they were expected to apply for suitable available positions, they were obliged to fully cooperate and

[1] *Timothy v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-847.

make a good faith effort in order for their applications to succeed, including submitting timely applications and respecting the formal requirements.

16. The UNDT then turned to consider whether the parties had fulfilled their respective obligations in this case. The UNDT held that the evidence showed that UNHCR had offered support and advice to Mr. Andrysek concerning his applications by encouraging him to apply to all suitable vacancies including at a lower grade. Moreover, when Mr. Andrysek missed the application deadline for the September 2019 compendium, the UNHCR Administration accepted his late job applications. UNHCR also proposed Mr. Andrysek for temporary assignments. The UNDT considered that "the overall set of factual circumstances", i.e. Mr. Andrysek's "medical constraint, his limited UN official languages skills and rotation history, as well as the relatively small number of his applications prior to his placement on SLWOP, combined with his reluctance to be appointed to P-5 level positions and the number of limited vacant positions at the D-1 level, had undoubtfully a negative impact in his chances of being successfully chosen for another position".[2] The UNDT concluded that UNHCR had fulfilled its obligations towards Mr. Andrysek and that Mr. Andrysek who had not made good faith efforts to find an alternative position, bore a significant share of the responsibility for the situation he found himself in.

17. As to Mr. Andrysek's contention that no temporary assignment had been offered to him and that preference should have been given to him over external candidates, the UNDT noted that there were limited temporary assignment opportunities at the D-1 and P-5 level that did not require very specific profiles and that the Department of Human Resources Management (DHRM) had proposed Mr. Andrysek for 22 temporary assignments. In this regard, the UNDT found that ten requests for temporary assignment had subsequently been cancelled or withdrawn for operational reasons, four temporary assignments had been filled by other internal candidates, one temporary assignment had been downgraded to the P-4 level and a candidate had been taken on a reimbursable loan, two temporary assignments had been filled by external candidates, one temporary assistance request had been filled through a consultancy for operational reasons and two temporary requests were still open at the time of the reply to the UNDT The UNDT noted that Mr. Andrysek had not been selected for the remaining two other temporary assignments and no evidence had been provided in that regard.

[2] Impugned Judgment, para. 107.

18. With respect to the two selection processes where external candidates had been recruited, and where staff on SIBA status, like Mr. Andrysek, had priority over external applicants, the UNDT found that Mr. Andrysek had not been selected for the temporary positions because he had not been found suitable. The UNDT was satisfied that the Organization fulfilled its obligation by (i) proposing SIBA candidates, including Mr. Andrysek, after receiving the temporary assignment requests; (ii) making sure that the suitability of the SIBA candidates proposed was assessed; and (iii) ensuring that external candidates were only considered after the respective managers had duly reviewed all the SIBA candidates and assessed them as unsuitable.

19. Turning to the powers of the High Commissioner and the Director of DHR to place staff members in alternative positions, the UNDT held that while the Administration may assign SIBA to positions in line with sections 133 and 134 of the RAAI, the use of this placement authority was discretionary, and the Administration was under no obligation to use its placement power. Even applying the standard set out in *Timothy*, the UNDT held that a staff member only benefitted from consideration on a preferential or non-competitive basis for positions if he or she was determined to be fully suitable for the position and he or she had made good faith efforts to apply and secure a position. The UNDT concluded that it was not the legislator's intention to turn the "assignment" of SIBA to regular positions or temporary assignments into an automatic prerogative of said staff members as it would go against the rationale and the main principles that guide the recruitment processes in the Organization.

20. While the UNDT noted "the moral right of a staff member to be given work",[3] it found that in the present case, Mr. Andrysek was not working because he had not been successful in getting an alternative position and the fact that he had not secured a position did not entail an immediate breach of this subjective right.

21. As to Mr. Andrysek's contention that his former supervisor in Ukraine had "blackballed" him and basically blocked his career progression in UNHCR, the UNDT found that the preponderance of the evidence did not demonstrate that said supervisor had undermined Mr. Andrysek's reputation and chances of success and it was not possible to establish a clear connection between his lack of success in his applications and the alleged undue interference by his former supervisor in his career progression.

[3] *Ibid.*, para. 131.

22. The UNDT concluded that the decision to place Mr. Andrysek on SLWOP was lawful and, by majority with Judge Buffa dissenting, rejected the application.

23. Mr. Andrysek filed his appeal on 6 January 2021 and the Secretary-General filed his answer on 8 March 2021.

Submissions

Mr. Andrysek's Appeal

24. Indefinite placement on SLWOP acts as constructive termination. While on SLWOP Mr. Andrysek remains subject to all obligations of a staff member including that he may not carry out an outside activity without permission of the Organization. He is, however, provided with neither work nor pay. Moreover, a staff member's diplomatic status at their duty station results from pay. The discretionary decision to pay pension and medical insurance contributions for a limited period of time meant Mr. Andrysek was on special leave with partial pay allowing the Organization to renew his diplomatic status at the duty station. This status was, therefore, conferred for a limited period of time and based on a discretionary decision rather than by application of the rule. The rule creates a situation where a staff member, without the right to reside at their duty station absent diplomatic status, will be forced to relocate upon placement on SLWOP. However, they will only be able to access repatriation grant should they choose to resign which Mr. Andrysek did not wish to do.

25. Mr. Andrysek has an officially recognised heart condition. To access after-service healthcare he is required to maintain continuity of coverage until retirement. This means he can remain on SLWOP only as long as he can pay his own and the Organization's contributions to medical insurance without any salary to cover such. Only resignation with early retirement cures this situation. Mr. Andrysek is effectively forced to resign. The UNDT therefore correctly found that the protections for a staff member facing termination in *Timothy* applied to his situation. The RAAI operates to prevent any staff member in UNHCR being afforded priority consideration upon termination. A staff member whose post is abolished will not be terminated. Instead, their SAL will be reduced, and they will become a SIBA rather than facing termination with priority consideration. This means fixed-term appointment holders do not get termination with priority consideration and indemnity if separated, instead they get nine months SLWFP before being placed on SLWOP for the remainder of their appointment. The RAAI is therefore in discord with

Staff Rule 9.6(e). It subverts rights that accrue under Staff Rule 9.6 which is higher in the hierarchy of rules.

26. The UNDT erred in finding the Administration had fulfilled its obligations set out in *Timothy*. While the UNDT accurately identified that under *Timothy* obligations accrued to the staff member and the Organization, it failed to assess the extent to which the obligations had been complied with. In this regard, the Secretary-General's stated position in court was that Mr. Andrysek had been considered exclusively on a competitive basis and was not deserving of priority consideration. The Secretary-General stated that giving priority consideration would be unlawful as Article 101 of the Charter required the Administration to maintain the "competitive principle" and to do otherwise would expose it to challenges from significantly stronger candidates who were excluded from consideration in order to place a SIBA.

27. The UNDT erred in fact and law in finding that Mr. Andrysek had not met his obligations under *Timothy*. The UNDT applied a presumption of regularity to the Administration's actions because Mr. Andrysek did not contest individual recruitment processes. The UNDT found that Mr. Andrysek demonstrated a lack of real interest and did not apply in good faith for some of the posts. Mr. Andrysek was deemed to have acted in bad faith by accurately describing his career aspirations. His appropriate application of experience to requirements of the post was overlooked by the UNDT when making a finding he had acted in bad faith.

28. The UNDT erred in fact and law and failed to exercise its jurisdiction by not reviewing the manner in which Mr. Andrysek's candidacy had been considered for assignments. While the UNDT accepted that the protections in *Timothy* should have applied to Mr. Andrysek, the UNDT chose not to review recruitment processes for regular or temporary posts, finding instead that the failure to contest recruitment processes he was subject to led to a presumption of regularity for those processes. However, in *Timothy* the applicant did not contest the various recruitment processes he was subject to immediately prior to his termination. The fact the processes were not contested did not give rise to a presumption of regularity in *Timothy* nor render them irrelevant to that challenge.

29. The UNDT erred in law by considering that "suitability" for a post was a pre-requisite for priority non-competitive consideration. It is the opposite; "suitability" or otherwise can only be assessed through priority non-competitive consideration. The competitive recruitment processes Mr. Andrysek was subject to may have been correctly carried out, but he should not

have been subject to competitive recruitment. UNHCR only alleged his unsuitability for 11 posts. For all others, he was considered competitively. As such, the Secretary-General had not demonstrated compliance with the requirements of *Timothy*. By deciding uncontested recruitment processes were beyond the scope of review, the UNDT chose not to review the extent to which UNHCR had complied with its obligations. Instead, all that was considered were Mr. Andrysek's actions.

30. The UNDT erred in law by concluding Mr. Andrysek had been given appropriate consideration for temporary assignments in particular for those where external candidates were recruited. In UNHCR temporary assignment opportunities are not advertised and a staff member may not apply. Mr. Andrysek only became aware of the posts which he had been proposed for by DHR in the context of litigation. It was, therefore, not available to him to contest decisions he was never informed of. Mr. Andrysek was proposed for 32 of 413 possible temporary assignments. Details of the 32 indicate they covered a broad range of functions. Nothing is known about the remaining 318 (*sic*.). The Secretary-General never claimed that Mr. Andrysek or other SIBA had been provided priority consideration and the UNDT chose to ignore the failure to provide priority non-competitive consideration for temporary assignments. This despite the absence of any mechanism to apply for temporary assignments, meaning no allegation of bad faith on the part of Mr. Andrysek was or could be made.

31. Where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given. Here the UNDT applied the opposite, a presumption or even assumption of regularity. In relation to two temporary assignments, Mr. Andrysek additionally argued that UNHCR had failed to follow their own rule requiring that prior to recruiting an external candidate it be documented that no suitable SIBA was available. This is the only circumstance in which UNHCR rules provide for priority consideration of SIBA. The UNDT addressed the processes in relation to the two temporary assignments for which external candidates were recruited finding suitability was assessed according to the rule. They then extrapolated from this that a similar process was adopted for other temporary assignments for which Mr. Andrysek was recommended, even though the Secretary-General never claimed to have provided any priority non-competitive consideration of SIBA for such temporary assignments.

32. Regarding the two temporary appointments for which external candidates were recruited, the evidence disclosed in litigation demonstrated that for one of them, SIBA were considered as a block rather than individually, were assessed against requirements for an "ideal" candidate rather than simply on suitability and were assessed against requirements absent from the Terms of Reference which is in and of itself unlawful. Regarding the other assignment, a specific external candidate was identified by the hiring manager before being provided with a list of available SIBA. The *post facto* assessment of Mr. Andrysek's suitability found him unsuitable for not demonstrating he met desirable but not required criteria. The UNDT examined whether UNHCR had met its obligation only in relation to the recruitment of external candidates for two temporary assignments. The UNDT failed entirely to examine whether UNHCR had applied the obligations in *Timothy* to any of the remaining 411 temporary assignments.

33. The UNDT erred in fact and law by failing to consider the decision of UNHCR not to place SIBA. The RAAI provides mechanisms to alleviate the situation of SIBA. The High Commissioner may unilaterally place them in regular positions and the Director DHRM may unilaterally place them in temporary assignments or on the list of candidates to be considered for posts even where the staff member has not applied. On 12 March 2018, the High Commissioner indicated that this placement authority would not be used. The Secretary-General indicated to the UNDT that since the RAAI came into force the High Commissioner had never placed a SIBA. Mr. Andrysek did not argue, as suggested by the UNDT, that he had a right to placement deriving from this rule. Instead, he argued that the High Commissioner could not unilaterally decide that the promulgated rule would not be used to alleviate the issue of SIBA in general. A discretion to place Mr. Andrysek existed, which the High Commissioner failed to exercise as the result of a blanket decision, thereby ignoring a promulgated rule.

34. Based on the foregoing contentions, Mr. Andrysek also contends that the UNDT erred in fact and law finding that his right to work had not been infringed.

35. The UNDT erred in finding that Mr. Andrysek had not been constructively terminated. UNHCR's rules provide for different treatment between staff with indefinite appointments with or without the undertaking. Indefinite appointment holders who do not have an undertaking, who are less protected, are afforded a choice between termination with indemnity and separation benefits or placement on SLWOP while they continue to seek work. Indefinite appointment holders with the undertaking are unilaterally placed on SLWOP until they resign, without

indemnity, or secure work. The UNDT failed to identify that such termination runs contrary to the undertaking provided to such staff members and that this would leave staff with an undertaking obliged to remain without pay, unable to make insurance payments required to secure ASHI, for a period of time to be determined by UNHCR before being separated.

36. Finally, the UNDT erred in law by striking out the two medical reports filed with closing submissions on grounds that they should have been filed prior and that the Secretary-General was denied a right of reply. Medical harm resulting from a decision to place Mr. Andrysek on SLWOP has accumulated over time. Mr. Andrysek filed medical evidence with his initial application and sought only to supplement such evidence giving a full idea of the harm caused. The Secretary-General was on notice that Mr. Andrysek sought moral damages and addressed such before the UNDT. Mr. Andrysek requests that UNAT consider this evidence.

37. Mr. Andrysek seeks rescission of the contested decision noting that it does not relate to appointment, promotion or termination, so alternative compensation is not required; a lifting of the SLWOP and placement on full pay status, hoping that placement on a suitable available vacant post will follow. He further seeks compensation for loss of salary suffered during the period of his placement on SLWOP, from 5 June 2019 until 5 December 2019 as well as from 6 November 2020 to the date of judgment on this appeal; as well as compensation for any pension and/or medical insurance contributions paid by him during the period of his SLWOP, with interest on this amount to compensate him for the requirement to take out a loan for this purpose. He also seeks moral damages for the impact of his prolonged period without work and subsequent placement on SLWOP.

The Secretary-General's Answer

38. The UNDT correctly dismissed the application. The UNDT's conclusion that the decision to place Mr. Andrysek on SLWOP was lawful was in accordance with the relevant law and facts in the present case. The UNDT correctly found that Mr. Andrysek's placement on SLWOP as of 11 June 2019 was consistent with Staff Rule 5.3 and therefore lawful.

39. Mr. Andrysek has failed to demonstrate that the UNDT made any errors warranting a reversal of the Judgment. Mr. Andrysek's submissions are prevalently reiterations of his submissions before the UNDT where he argued that placing a staff member, who is on an indefinite appointment with the undertaking clause, on SLWOP effectively constitutes termination from

service and that, accordingly, the protections and obligations set out in *Timothy* apply to him. Throughout the appeal, Mr. Andrysek tries to broaden the scope of the UNDT's findings by advancing that the UNDT acknowledged that the Administration has, in respect of Mr. Andrysek, as a SIBA on SLWOP holding an indefinite appointment with the "undertaking", the same obligations that it has for staff on permanent appointments that are being terminated. As set forth below, the obligations set out in *Timothy* do not arise for SIBA, and none of Mr. Andrysek's submissions establish an error warranting the reversal of the Judgment.

40. The UNDT did not err in finding that the Administration had fulfilled its obligations towards Mr. Andrysek. The argument that the UNDT accurately identified that under *Timothy* obligations accrued to the staff member and the Organization and that the UNDT failed to assess the extent to which the obligations had been complied with by the Organization, is misconstrued. The UNDT distinguished the present case from *Timothy* because it did not concern a termination of appointment. It did not find that the obligations set out in *Timothy* were applicable; rather, in considering the obligations of both parties, the UNDT found that *Timothy* could provide guiding principles when SIBA are placed on SLWOP and when their contract contains the undertaking clause. The UNDT held that in the present case a principle of shared responsibility applied and that similarly to *Timothy* the Organization had to act fairly and transparently towards SIBA who were searching for new assignments.

41. Unlike what Mr. Andrysek advances, the UNDT did not only assess whether Mr. Andrysek had been proactive in applying to vacant posts but also whether the Organization had acted fairly and transparently in helping him find a suitable job. The UNDT held that the evidence showed that UNHCR had offered support and advice to Mr. Andrysek concerning his applications: The Deputy Director, DHR, for example offered support and advice to Mr. Andrysek and personally encouraged him to apply to all suitable vacancies; when Mr. Andrysek missed the application deadline for the September 2019 compendium, the UNHCR Administration accepted his late job applications; and UNHCR proposed Mr. Andrysek for temporary assignments. The UNDT also correctly considered that "the overall set of factual circumstances" had a negative impact on Mr. Andrysek's chances of being selected for another position.

42. The UNDT did not err in finding that Mr. Andrysek had not fulfilled his obligations. The legal framework of UNHCR requires staff members to engage proactively with DHR to discuss career path options and placement opportunities to apply for suitable positions including at their grade level. The UNDT correctly found that Mr. Andrysek did not make good faith efforts to find

an alternative position and that he, therefore, bore a significant share of the responsibility for his situation. He was preferably looking into D-1 positions and not at grade positions; his motivation letters for positions at the P-5 level showed that he was not truly interested; and he applied to positions without possessing the requisite requirements. He did not apply below grade (P-4) even though he would have retained his personal grade of P-5 and would have received his salary and entitlements at that level.

43. The UNDT did not err in law or in fact in its review of Mr. Andrysek's selection processes for alternative posts. Contrary to what Mr. Andrysek asserts, there is no obligation on the Organization to consider SIBA on SLWFP or SLWOP, with or without the "undertaking", for vacancies on a non-competitive basis. Indeed, no internal UNHCR rule foresees that Mr. Andrysek, as a SIBA, should be considered for vacancies on a non-competitive basis. It was correct for the UNDT not to assess whether Mr. Andrysek was afforded non-competitive recruitment for further assignments, because he was not entitled to a non-competitive recruitment. However, SIBA, as other internal staff members, are considered on a priority basis over external applicants.

44. Furthermore, the UNDT found that *Timothy* was distinguishable from the present case in that *Timothy* was a case of termination of a staff member's permanent appointment due to abolition of post, while the instant case concerns placement on SLWOP of a staff member on an indefinite appointment. In *Timothy*, UNAT applied Staff Rule 9.6(e) while the UNDT in the present case was involved with the application of Staff Rule 5.3. As to Mr. Andrysek's submissions that the UNDT erred in law in considering that suitability for a post was a prerequisite for priority non-competitive consideration, even in *Timothy* staff on indefinite appointments will have to be found to be suitable for the position to receive whatever priority consideration it is to which they may be entitled. Furthermore, contrary to Mr. Andrysek's contention the UNDT did review the manner in which the Administration had considered his applications for alternative posts by considering whether it had acted fairly and transparently in supporting him for a new assignment. The UNDT concluded that the Administration had fulfilled its obligations by proposing to the hiring managers SIBA, including Mr. Andrysek, ensuring that their suitability had been individually assessed for temporary assignments and ensuring that external candidates were only considered after the respective managers had duly reviewed and assessed all the SIBA candidates and had found them individually to be unsuitable.

45. With respect to Mr. Andrysek's argument that the UNDT did not review the recruitment processes of 411 possible temporary assignments but only assessed two of them, the UNDT reviewed in detail why Mr. Andrysek was not selected for the 22 temporary assignments DHR had proposed him for. Mr. Andrysek's argument that, unlike *Timothy*, the UNDT failed to consider all selection processes to which he had applied does not stand because the present case is entirely different from *Timothy*. In *Timothy*, the Tribunal looked at selection processes because the staff member's permanent appointment was being terminated, and therefore determined the Administration had an obligation to give priority consideration for other suitable positions before separating from service. As indicated above, the contested decision is not a termination from service, and there is no similar obligation for giving a staff member priority consideration before being placed on SLWOP after nine months on SIBA status.

46. The UNDT did not err in fact and law in failing to consider that UNHCR did not exercise its placement authority. Unlike what is advanced by Mr. Andrysek, the UNDT did review the powers of the High Commissioner and the Director of DHR to place staff members in alternative positions. The UNDT held that while the Administration may assign SIBA to positions in line with sections 133 and 134 of the RAAI, the use of this placement is discretionary. Accordingly, the UNDT ruled that the Administration was under no obligation to use its placement power. Moreover, the Administration's memorandum dated 12 March 2018 does not unlawfully and blanketly state that the Administration will never use its power to assign SIBA under the RAAI; the memorandum only says that the Administration's preference is to work with the hiring managers on staff postings as opposed to placing staff members into positions without the manager's consent. Additionally, these are policy considerations that a staff member cannot contest.

47. The UNDT did not err in fact and law in finding that Mr. Andrysek's right to work had not been breached. While the UNDT considered the moral right of a staff member to be given work, it added that the evidence showed that Mr. Andrysek was not working because he had not been successful in getting an alternative position, and the fact that he had not secured a position did not entail an immediate breach of this subjective right. In addition, the UNDT correctly found that the right to work had to be considered in the context of the case, the applicable legal framework and the nature of UNHCR's mandate. In the context of the United Nations, the requirement of suitability and excellence stems from the provisions of Article 101.3 of the United Nations Charter and provides the setting for the right to work.

Furthermore, Mr. Andrysek cannot invoke a right to work when he has made little to no effort in securing a new assignment.

48. The UNDT did not err in finding that Mr. Andrysek was not constructively terminated. Contrary to Mr. Andrysek's contention, the UNDT did not find that SIBA placed on SLWOP were being terminated from service. As SLWOP is not akin to termination, the rights that arise for staff members who are being terminated do not arise for staff placed on SLWOP, regardless of whether on indefinite appointments or not, with or without the undertaking clause. While being placed on SLWOP, Mr. Andrysek still retains an employment relationship with the Organization. In fact, while being on SLWOP, he will continue to be an internal candidate for UNHCR posts and has the possibility of continuing to participate in the United Nations Joint Staff Pension Fund (UNJSPF or Pension Fund) and in the Organization's health insurance system. He also remains eligible for ASHI. Although his entitlements and salary were suspended when he was placed on SLWOP, they were not terminated. Once he secures a post, he will continue with his salary and entitlements where he left off without having to start from scratch.

49. UNAT should reject Mr. Andrysek's claims for remedies, since he has failed to demonstrate that the contested decision is unlawful. Alternatively, should UNAT consider the contested decision unlawful, Mr. Andrysek cannot be placed back on SLWFP as he requests. He already benefitted from 1,464 days on SLWFP as a SIBA without an assignment and cannot indefinitely be on SLWFP. Mr. Andrysek should apply widely (including at the P-4 level) and in good faith to increase his chances of finding a new assignment. The Administration will in any case continue to act fairly and transparently and make reasonable efforts to support him in finding a position for which he is suitable. Regardless of whether he secures a post he will reach his normal retirement age of 62 in January 2022.

50. As to Mr. Andrysek's contention that the UNDT erred by rejecting two medical reports filed with his closing submissions, the issue is inconsequential since the UNDT found no unlawful decision. The UNDT further correctly pointed out that this late filing prevented the Administration from fully questioning these reports and that Mr. Andrysek had had ample opportunity to file the medical evidence beforehand. While Mr. Andrysek raises that harm accumulates over time, he also argues that he filed some medical evidence with his initial application; this tends to show that the alleged harm already existed and that there was no legitimate reason to produce evidence when the debates had already closed. Alternatively,

should UNAT consider that the issue of compensation arises, none of the reports establishes harm attributable to the contested decision.

51. The Secretary-General requests that UNAT uphold the Judgment and dismiss the appeal.

Considerations

52. As a preliminary matter, Mr. Andrysek claims that the UNDT erred in striking out the medical reports filed with his closing submissions.[4] He maintains that the harm he suffered accumulated over time and that all he wanted was to supplement the evidence he had already produced in his initial application.

53. The Appeals Tribunal takes note of the fact that the medical reports date from 16 and 17 July 2020 and they both state that Mr. Andrysek had been a long-term patient. One of the reports refers to him having been a patient since 2017. The application before the UNDT was filed on 27 November 2019; therefore both medical reports should have been introduced before the closing submissions on 7 August 2020, which ordinarily provide an opportunity for the parties to submit their final arguments and/or reiterate their main lines of reasoning, rather than an opportunity to file new pieces of evidence. Had the reports been accepted, another round of comments and discussions might have been initiated, just when the case was already mature enough for a judgment to be issued.

54. Any filing of additional evidence together with the closing submissions should be duly justified and Mr. Andrysek has not persuaded the Appeals Tribunal of the correctness of his inertia in not having filed these or similar reports at an earlier stage of the process. Rather, according to his own words, the harm had accumulated over time, which means that it was continuous and could have been proven beforehand. This is in keeping with the adversarial principle which governs the proceedings and aims to avoid an element of surprise to the other party at an unexpected moment of the lawsuit, such as the time for the closing submissions. There is no error in the UNDT's determination to strike out those medical reports.

[4] *Ibid.*, para. 44.

55. The main issue of merit for the Appeals Tribunal to consider and determine in the present case is whether the UNDT erred on a question of law or of fact when it held that UNHCR did not act unlawfully when it placed Mr. Andrysek on SLWOP during his SIBA status in accordance with internal regulations, after him having enjoyed SLWFP for the limit of nine months without further assignments. There is a dissenting opinion to the UNDT Judgment which found that Mr. Andrysek's placement on SLWOP was unlawful.

56. Staff Rule 5.3(f) provides that: "In exceptional cases, the Secretary-General may, at his or her initiative, place a staff member on special leave with full or partial pay or without pay if he or she considers such leave to be in the interest of the Organization."

57. On the matter of whether a staff member like Mr. Andrysek, holding an indefinite appointment while on SIBA status, should be granted SLWFP or SLWOP, Section 16 of the RAAI provides the following:[5]

> 16. Unassigned Staff Members
>
> 126. UNHCR's highly dynamic rotation and mobility system may result in situations where international Professional staff members are not reassigned before the end of their SALs [Standard Assignment Length). *Avoiding and mitigating such situations is a shared responsibility* of the Organization and the concerned staff member.
>
> 127. Staff members entering into their rotation cycle or impacted by position change, are required to apply to suitable positions, including at their grade, and engage in relevant learning activities. They should proactively discuss with DHRM career path and assignment opportunities. Such actions will help reduce the risk of staff members becoming in-between assignments.
>
> 128. Subject to recognized special or medical constraints, staff members in-between assignments *must* undertake short-term assignments, which include missions and temporary assignments, as well as regular assignments where and when their skills and experience are required as determined by the Operation and endorsed by the Director of DHRM.
>
> 129. …
>
> 130. DHRM will support staff members in-between assignments or at risk of becoming in-between assignments through career counselling. This includes discussing assignment and career transition opportunities based on the staff member's career aspirations and the Organization's workforce needs.

[5] Emphases added; internal footnotes omitted.

131. DHRM *may include* staff members who have not been selected for a new assignment six months before the end of their SALs on lists of candidates for advertised positions at their current grade, provided they meet the position requirements and subject to recognized special or medical constraints. The staff member will be informed accordingly.

132. DHRM will continue to ensure that *short-term external recruitment is undertaken only after* DHRM, in coordination with the requesting manager and the functional unit if applicable, documents that *no suitable staff member in-between assignments is available.*

133. The Director of DHRM *may* temporarily assign staff members in-between regular assignments to vacant positions where their skills and experience are required. When DHRM considers a staff member in-between regular assignments for a short-term assignment, due regard will be given to the staff member's profile, qualifications and experience, as well as availability, taking into account, for example, medical or special constraints and approved leave plans. Assignments to lower level positions require the staff member's agreement.

134. The High Commissioner *may* assign a staff member in-between regular assignments to any suitable position, subject to recognized special or medical constraints, *irrespective of whether the staff member applied for that position.* Assignments to lower level positions require the staff member's agreement.

135. A staff member assigned to a regular position or temporary function under this section who refuses to undertake the assignment for reasons other than a recognized medical or special constraint preventing that assignment will be on unauthorized absence and the payment of salary and allowances will cease for the period of unauthorized absence. In cases of repeated or persistent refusal further administrative or disciplinary action may be taken.

136. *A staff member in-between regular assignments holding an Indefinite* or Fixed-Term *Appointment who is not assigned to temporary functions* will maintain the grade of the position to which they were previously assigned and *will be placed on Special Leave With Full Pay (SLWFP) for a maximum cumulative period of nine months* or the remainder of his or her contract length, whichever is shorter. …

137. …

138. A staff member in-between assignments who does not wish to be considered for regular or temporary assignments under this section should request annual leave or Special Leave Without Pay (SLWOP). If SLWOP is granted at the staff member's request, the staff member will only return to pay status upon regular assignment by the High Commissioner or temporary assignment by the Director, DHRM. If the staff member returns to pay status following a temporary assignment but remains in between regular assignments, SLWFP will be granted for the remainder of the nine months period under paragraph 136 or the remainder of the contract length, whichever is shorter.

> 139. If a staff member remains *unassigned for nine cumulative months* between two regular assignments, the following measures will be taken, depending on the staff member's contractual status:
>
> ...
>
> c. Holders of indefinite appointments granted before November 2002 containing the so-called "undertaking" will be placed on SLWOP as from the first day of the tenth cumulative month without an assignment *until assignment or separation from the Organization*.
>
> 140. A staff member who has been placed on SLWOP following nine cumulative months without an assignment in accordance with paragraph 139 above will only return to pay status upon assignment to a regular position or temporary function of at least two months. In case of a temporary assignment or mission, the staff member will only return to pay status for the duration of that assignment or mission and will subsequently be again placed on SLWOP until the next regular or temporary assignment or mission.

58. Still on the issue of unassigned staff members, the RAP states in relevant part that:

> 34. In a highly mobile rotational system such as that of UNHCR, international Professional staff members may at times find themselves in-between assignments. Avoiding and mitigating such situations is a shared responsibility of the concerned staff member and the Organization. Unless on temporary assignment or mission, staff members in-between assignments will be placed on Special Leave With Full Pay (SLWFP) for a maximum cumulative period of nine months or for the remaining length of their contract, whichever is shorter. Staff members in-between two regular assignments will maintain the grade of their last position. A temporary assignment or mission suspends the nine-month period until the completion of that assignment or mission, following which the count continues. A regular assignment will reset the nine-month period, which will begin anew should the staff member again become in-between assignments after the regular assignment.
>
> 35. Staff members in-between assignments or at risk of becoming in-between assignments receive dedicated career counselling and support. They are obliged to undertake missions, or temporary or regular assignments, where their skills and experience are required. Refusal to undertake assigned functions may lead to administrative and disciplinary action. Staff members remaining without an assignment following the expiry of the nine-month period will be separated from UNHCR or placed on Special Leave Without Pay (SLWOP), depending on their contractual status.

59. According to this framework, given the high rotation of international staff members at UNHCR, avoiding or mitigating situations of SIBA is a shared responsibility of the staff member concerned and UNHCR. In this regard, UNHCR should give career counselling

to the staff member concerned, including discussing assignment and transition opportunities and give the staff member preference over external recruitment to suitable short-term positions. UNHCR may include staff members on lists for suitable advertised positions or assign the staff member, *irrespective of his or her previous application*, to vacant suitable regular or temporary positions at the same or at a lower level (in the latter case, the agreement of the staff member is required).

60. Staff members, in turn, should engage in learning activities, discuss assignment opportunities, and accept short-term or regular suitable assignments except for reasons of a recognised medical or special constraint preventing the assignment failing which they will be considered on unauthorised absence, with payment of salary and allowances ceased (if the refusal is repeated or persistent, further administrative or disciplinary action may also be faced).

61. Regarding the period of SLWFP while on SIBA status, the applicable legal framework provides that the maximum time is nine months or the remainder of the length of the contract, whichever is shorter. If the staff member remains unassigned for nine cumulative months between two regular assignments, two different outcomes could ensue: i) if the staff member holds an indefinite appointment, he or she will be placed on SLWOP and will only return to pay status upon assignment to a regular position or temporary function of at least two months; and ii) if the staff member does not have a permanent appointment, he or she will be separated from UNHCR.

62. Mr. Andrysek holds an *indefinite appointment*. Thus, even after having remained unassigned at the end of nine cumulative months, he could not be separated from UNHCR, but placed on SLWOP. He was indeed placed on SLWOP on 11 June 2019 and filed the application before the UNDT on 27 November 2019.[6] However, neither the RPA nor the RAAI stipulate a time limit for SLWOP. The UNDT thus found that Article 21(c) of the UNJSPF Regulations could apply, insofar as it limits the period of participation in the Pension Fund of a participant on leave without pay without concurrent contributions to three consecutive years, after which the participant is deemed to have been separated.

[6] Impugned Judgment, paras. 1 and 2.

63. According to the UNDT, the Pension Fund's provision would apply after the period of nine months following Mr. Andrysek's placement on SLWOP, during which UNHCR paid both Mr. Andrysek's and the Organization's contributions to Pension Fund and health insurance. Because Mr. Andrysek held an indefinite appointment, he could not be terminated during the period of three years mentioned in the Pension Fund's provision, according to the UNDT's conclusion mentioned in the previous paragraph. However, once this period elapsed, separation would apply, unless Mr. Andrysek was assigned to a suitable new position.[7] This is why the UNDT went on to determine whether both parties had complied with their respective duties to mitigate the SIBA situation which led to the contested placement on SLWOP. In other words, the UNDT assessed whether UNHCR had failed to observe its obligation to attempt to avoid having placed Mr. Andrysek on SLWOP. While Mr. Andrysek's appeal claims, and the dissenting opinion finds that the answer to this question is affirmative and that the contested decision should be rescinded[8], the UNDT Judgment found that there was no illegality in such a decision.[9]

64. At this point, the Appeals Tribunal takes note of the fact that Mr. Andrysek did not challenge his status as SIBA, nor his placement on SLWFP, but only his placement on SLWOP after the time limit of nine months of the SLWFP had elapsed, following which no suitable regular or temporary position was assigned to him. The UNDT found that UNHCR had complied with its duties to make reasonable and good faith efforts to find suitable placements for him[10], but Mr. Andrysek claims that this finding is an error and requests rescission of the decision to place him on SLWOP and placement on full pay status with a hope of finding a suitable available post.

65. In this regard, the UNDT appropriately applied the criteria set out in *Timothy*[11], according to which both UNHCR and the staff member holding an indefinite appointment would have a shared responsibility to find alternative positions which would avoid or minimize the time on SLWOP, which could possibly lead to a future separation. In so doing, the UNDT drew a parallel between Mr. Andrysek's SIBA situation and the abolition of a post, in order to find guiding principles to the case, since both situations would engender to the Administration

[7] *Ibid.*, paras. 81 and 82.
[8] Dissenting Opinion to Impugned Judgment (Dissenting Opinion), para. 32.
[9] Impugned Judgment, para. 138.
[10] *Ibid.*, para. 108.
[11] *Timothy*, *op. cit.*, para. 45.

and the staff member the same respective duties.[12] The scope of the dissenting opinion does not encompass this finding.[13]

66. The Appeals Tribunal has no reason to differ from the UNDT's Judgment. Firstly, the UNDT was correct to restrict its analysis to the overall assessment of the parties' duties and not to delve into the non-selection decisions of each of the various regular and temporary posts to which Mr. Andrysek had applied, which had not been specifically contested before the UNDT.[14] A review of recruitment processes for regular or temporary posts was thus excluded on grounds that Mr. Andrysek had failed to contest individual recruitment processes, limiting the UNDT scope of review.

67. Secondly, Mr. Andrysek's contract contains the special condition of "undertaking", according to which the then High Commissioner undertook "not to terminate this appointment except by applying the criteria provided in Staff Regulation 9.1(a) [now Staff Regulation 9.3(a)] relating to the termination of a permanent appointment".[15] This means that Mr. Andrysek's appointment could only be terminated in application of the criteria established by Staff Regulation 9.3(a), which provides as follows:

> **Regulation 9.3**
>
> (a) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment or for any of the following reasons:
>
> (i) If the necessities of service require abolition of the post or reduction of the staff;
>
> (ii) If the services of the staff member prove unsatisfactory;
>
> (iii) If the staff member is, for reasons of health, incapacitated for further service;
>
> (iv) If the conduct of the staff member indicates that the staff member does not meet the highest standards of integrity required by Article 101, paragraph 3, of the Charter;
>
> (v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his

[12] Impugned Judgment, paras. 84 and 85.
[13] Dissenting Opinion, para. 4.
[14] Impugned Judgment, paras. 48 and 49.
[15] *Ibid.*, para. 20 and footnote 51 to the RAAI.

> or her appointment, should, under the standards established in the Charter, have precluded his or her appointment;
>
> (vi) In the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned[.]

68. In light of the above, the UNDT correctly drew a parallel between Mr. Andrysek's placement on SIBA status and the abolition of a post.

69. Thirdly, the evidence on record, as correctly assessed by the UNDT, shows that Mr. Andrysek could have been more collaborative in his pursuit of a suitable post, even at a lower level if that was necessary to secure an alternative position.[16] While the UNDT found that Mr. Andrysek had not met his obligations, in this appeal Mr. Andrysek does not put forward any convincing argument to the contrary. All he does is attempt to reargue his case, which is relevant to demonstrate his dissatisfaction, but is not sufficient to reverse the UNDT's decision.[17] Therefore, Mr. Andrysek has failed to persuade the Appeals Tribunal of any error in the UNDT's finding that "the Applicant's medical constraint, his limited UN official languages skills and rotation history, as well as the relatively small number of his applications prior to his placement on SLWOP, combined with his reluctance to be appointed to P-5 level positions and the number of limited vacant positions at the D-1 level, had undoubtfully a negative impact in his chances of being successfully chosen for another position".[18]

70. Regarding temporary positions, Mr. Andrysek had particularly claimed preference for the posts in Cox's Bazar and Kabul.[19] Accordingly, the UNDT did not have to examine whether UNHCR had complied with its obligations with respect to the other 411 temporary job announcements, whose outcome, as discussed, had not been challenged by Mr. Andrysek.

71. Furthermore, Mr. Andrysek submits that the dissenting opinion to the UNDT Judgment takes issue with the fact that Mr. Andrysek was not offered any available temporary assignments while a SIBA. According to the dissenting opinion, before recruiting other candidates, UNHCR should have assessed Mr. Andrysek's suitability as SIBA for the available temporary positions or assignments with reference to the criteria of competence, integrity,

[16] Impugned Judgment, para. 108.
[17] *Abdulhamid Al Fararjeh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2021-UNAT-1136, para. 37.
[18] Impugned Judgment, para. 107.
[19] *Ibid*., para. 109.

length of service, nationality and gender. For the appeal and the dissenting opinion, UNHCR should have offered Mr. Andrysek those available positions/assignments, unless he was proved not to be suitable for those positions/assignments.[20] UNHCR's failure to comply with its obligation to consider Mr. Andrysek for the available temporary positions/assignments supported the dissenting opinion's finding of the unlawfulness of the decision to place him on SLWOP.[21]

72. Therefore, as per the appeal which is based on the dissenting opinion, Mr. Andrysek should be placed in the same situation he was prior to the contested decision, that is on SLWFP for a period of nine months as of the date when the UNDT Judgment became executable. During that period, UNHCR and Mr. Andrysek should have undertaken all efforts to find alternative employment for Mr. Andrysek as per the principles outlined in the opinion.[22] Accordingly, for the dissenting opinion, the contested decision of placing Mr. Andrysek on SLWOP was to be rescinded and damages should have been examined, considering however Mr. Andrysek's duty to mitigate loss.[23]

73. If the reasoning in the appeal based on the dissenting opinion to the UNDT Judgment was correct, it would render highly impossible any placement of SIBA on SLWOP, because UNHCR would apparently have to offer any temporary position to him or her.[24] This is why the Appeals Tribunal finds that Mr. Andrysek did not put forward any convincing reason of any error in the UNDT Judgment, which found that the evidence on record shows that he was not selected for the temporary assignments mentioned in his appeal, in Cox's Bazar or Kabul because he was not found suitable for those positions due to his lack of experience, knowledge or familiarity in fields considered to be crucial for the positions.[25] *Priority* in the consideration for a temporary post is not an absolute *criterion* of preference; it has to be assessed together with *suitability* for the same post. Priority is given to SIBA over external applicants which are at the same level.

[20] Dissenting Opinion, paras. 21-25.
[21] *Ibid.*, para. 26.
[22] *Ibid.*, para. 33.
[23] *Ibid.*, paras. 32-34.
[24] *Ibid.*, para. 30.
[25] Impugned Judgment, paras. 118 and 119.

74. In line with the dissenting opinion, Mr. Andrysek claims that no allegation of his non-suitability had been made for at least nine other assignments available in the period between 1 January 2017 and 21 February 2020. This, together with a presumption of suitability deriving from the submission of Mr. Andrysek's candidature for these positions by the Department of Human Resources Management, would indicate that he was excluded from suitable positions, which would render the decision to place him on SLWOP unlawful.[26] Although this reasoning could be a lateral argument, it is not sufficient to supersede the presumption of regularity deriving from the decision not to select Mr. Andrysek for those positions. Moreover, as correctly stated by the Secretary-General and pursuant to section 70 and following of the RAAI, screening is the very first step in the selection process before applications are routed to the manager and does not entail shortlisting or determination of suitability for the post. Specifically with regard to D-1 and P-5 positions, which were the only ones to which Mr. Andrysek applied, section 78 of the RAAI provides that DHRM oversees the selection interview in order to ensure that appropriate consideration is given to the candidates:

> In the case of P-5 and D-1 positions, given their significant representational, management and leadership roles as well as for reasons of corporate accountability, the panel interviews will be organized and managed by DHRM in coordination with the manager. For these positions, DHRM will serve as an observer to the interview, will maintain oversight of the interview process, including the compilation of the questions and will also serve as the Secretariat, which includes ensuring provision of appropriate documentation. Interview panels for P-5 and D-1 positions must reflect diversity of regions, functions and gender. Such panels will be comprised of a minimum of three members, including the manager of the position, a representative from the functional unit, if applicable, and at least one other panelist. All panel members should hold a grade at least one level higher than the position under consideration. External experts with relevant experience may also be invited as panel participants.

75. In light of the above and given that Mr. Andrysek had not challenged any of these decisions, the Appeals Tribunal finds no error in the UNDT's Judgment which concluded that due consideration was given to Mr. Andrysek for the temporary assignments and that he was not found to be suitable for the posts.[27] The present case is thus quite distinguishable from *El-Kholy*, where this Tribunal *inter alia* held that the staff member had demonstrated

[26] Dissenting Opinion, paras. 18 and 19.
[27] Impugned Judgment, para. 119.

sufficient cooperation after having applied and been selected for a temporary position in a different place and context.[28]

76. In this respect, the Appeals Tribunal finds no error in the UNDT Judgment's finding that the discretionary prerogative bestowed upon UNHCR to temporarily assign SIBA to vacant positions, irrespective of whether the staff member concerned had applied for that position[29], is not a compulsory action. Rather, such an assignment shall be subject to the SIBA's suitability to the vacant position, as clearly prescribed by sections 133 and 134 of the RAAI and as it naturally derives from section 8 of RAAI and Article 101.3 of the United Nations Charter, when they mention the necessity of securing the highest standards of efficiency, competence and integrity in UNHCR's workforce, in accordance with corporate and operational needs and priorities, taking into consideration the personal and professional needs of individuals as far as possible.

77. This is the perspective in which any priority consideration of suitability for a temporary post must be interpreted in the present case. That is to say that the suitability for the post as a means of guaranteeing the highest standards of efficiency, competence and integrity in the workplace took preference over Mr. Andrysek's individual privilege to be considered for the posts. Otherwise, there would be an inversion of values within the Organization: instead of privileging the general common good for the Organization, the rules would be protecting its individually considered staff members. Priority consideration for a temporary post would be granted to Mr. Andrysek had he been assessed to have the same level of suitability for the posts he applied for.

78. Therefore, it is open to UNHCR to assign SIBA to any suitable position, *subject to recognized special or medical constraints* and *where their skills and experience are required*, with *due regard given to the staff member's profile and qualifications*, irrespective of whether the staff member applied for that position, with the provision that "assignments to lower level positions require the staff member's agreement". This specific UNHCR authorization, which was dealt with by the Judgment – and not by the dissenting opinion – is fundamental, so as to preserve the desired efficiency of the workforce within UNHCR. There was thus no obligation on the part of UNHCR to exercise its authority

[28] *El-Kholy v. Secretary-General of the United States*, Judgment No. 2017-UNAT-730.
[29] See sections 133 and 134 of the RAAI quoted above, both of which use the notion "may" to indicate the Administration's discretion in the action.

to place Mr. Andrysek against any position that would not have been suitable for his professional profile.

79. As discussed, Mr. Andrysek has failed to demonstrate any error in the UNDT Judgment. In line with the above-mentioned provisions, his applications to temporary assignments could not have been considered non-competitively in relation to external candidates who were ultimately recruited, since Mr. Andrysek was found not suitable for the positions after having been given appropriate consideration.

80. The UNDT thus did not err when it found that the decision to place Mr. Andrysek on SLWOP was lawful, even though this decision was subsequently suspended by an interim order until the completion of the trial proceedings.[30]

81. There is one last issue which deserves to be highlighted here. It relates to an apparent inconsistency in Mr. Andrysek's claims: while he demonstrates an interest in the continuation of his appointment, having requested the lift of the SLWOP and his consequent placement on SLWFP followed by an assignment on a suitable vacant post, he also puts forward a claim of separation, with an attempt to build up the reasoning for a constructive termination.

82. In this sense, the UNDT did not err in finding that Mr. Andrysek was not constructively terminated. This is because the placement on SLWOP in situations such as the present one is not tantamount to termination. On the contrary, it is a temporary attempt to save the contract against termination, despite the staff member not being assigned to any post during a certain period. This is why the RAAI is not in discord with Staff Rule 9.6(e), which states the order of preference of retention of staff members subject to abolition of a post or reduction of staff. Rather, one instrument complements the other, by providing detailed information on how UNHCR shall manage a situation where the staff member on SLWOP retains his or her contract with the Organization while having the opportunity to find suitable vacant positions and benefiting from certain rights, such as internal candidacy for positions, membership of the UNJSPF and health insurance.

83. In this regard, the UNDT did not err in finding that Mr. Andrysek's right to work had not been violated and correctly stated that: "Even applying the standard set out in *Timothy*, for the reasons we have extensively explained above, which show that the Applicant has not

[30] Impugned Judgment, para. 142.

engaged meaningfully in the process to secure an alternative position, the Tribunal does not consider that his right to work has been breached."[31] The general principle of the right to work as stated in *Lauritzen*[32] has to be interpreted in light of the applicable legal framework, particularly the specific shared responsibility of both the staff member and UNHCR to find alternative suitable and vacant posts to situations such as the present one.

84. In so doing, the UNDT also envisaged that Mr. Andrysek himself had a clear preference for D-1 positions which were in turn not numerous at the time. Moreover, he had applied for positions without having the necessary language skills or experience,[33] the result being that he was not found suitable for any of the positions he had applied for.

85. Having said the above, the Appeals Tribunal understands and agrees with the UNDT's concern with regard to the inconvenient situation caused by the lack of time limit for the placement of SIBA on SLWOP, particularly when it comes to the considerable financial burden of paying contributions to the UNJSPF despite having earned no salary during the period. This legal *vacuum* creates a *limbo* and an uncomfortable situation for the staff member, even if he or she makes the necessary efforts in good faith to apply for suitable positions. This is a matter for the lawmakers to assess and regulate.

86. Notwithstanding this situation, the extreme solution proposed by Mr. Andrysek in the present case is not acceptable. To require UNHCR to provide work for its SIBA and then separate them on grounds of abandonment of post if they refuse to take it; or performance reasons, should they fail to perform, would undermine the requirements of suitability and selection, with the possible consequence of compromising the highest standards of efficiency, competency, and integrity required in selecting the best candidate for staff positions under Article 101 of the United Nations Charter[34], which are of paramount importance for the Organization.

87. The appeal accordingly fails.

[31] *Ibid.*, para. 133.
[32] *Lauritzen v. Secretary-General of the United Nations,* Judgment No. 2013-UNAT-282, para. 42.
[33] Impugned Judgment, paras. 100-104.
[34] *Megerditchian v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-088, para. 28.

Judgment

88. The appeal is dismissed and Judgment No. UNDT/GVA/2019/190 is affirmed.

Original and Authoritative Version: English

Dated this 29th day of October 2021.

(Signed)	*(Signed)*	*(Signed)*
Judge Halfeld, Presiding Juiz de Fora, Brazil	Judge Raikos Athens, Greece	Judge Knierim Hamburg, Germany

Entered in the Register on this 29th day of December 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar