



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

Judgment No. 2023-UNAT-1359

**Mohammad Tofazzel Hossain
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge John Raymond Murphy Judge Martha Halfeld
Case No.:	2022-1730
Date of Decision:	30 June 2023
Date of Publication:	19 July 2023
Registrar:	Juliet Johnson

Counsel for Respondent/Applicant: Self-represented

Counsel for Appellant/Respondent: Noam Wiener

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The Secretary-General has appealed to the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) Judgment No. UNDT/2022/069 (impugned Judgment), in which the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) granted Mr. Mohammad Tofazzel Hossain's application contesting the decision not to renew his fixed-term appointment due to abolition of his post (contested decision). The UNDT found that the contested decision was unlawful and ordered Mr. Hossain's reinstatement and retroactive payment to the United Nations Joint Staff Pension Fund for the reinstated period, or, alternatively, 30 months' net base pay in lieu of reinstatement.
2. For the following reasons, we grant the appeal.

Facts and Procedure

3. In 2016, Mr. Hossain commenced service as a Finance Specialist at the P-3 level with the Programme Management Unit (PMU) of the Zimbabwe Resilience Building Fund (ZRBF), a program supported by the United Nations Development Programme (UNDP) Country Office in Zimbabwe. The ZRBF is funded by the United Kingdom's Department for International Development (DFID), the European Union, the Government of Sweden, and UNDP.
4. Sometime in 2017, the Head of the PMU (Mr. Hossain's supervisor), the Country Director and his deputy formulated a long-term vision Human Resources (HR) Strategy for the ZRBF PMU (HR Strategy document).
5. Based on this HR Strategy, on 26 February 2018, the Head of the PMU invited Mr. Hossain to a meeting to advise him that according to the long-term vision of the ZRBF PMU, his position would no longer be required.
6. On 8 March 2018, the Resident Representative, UNDP Zimbabwe, notified Mr. Hossain in writing that the Finance Specialist position he encumbered would be abolished and that a national position would be created as part of the long-term vision and strategy of the ZRBF to build the capacity of national staff. He was advised in that notice to provide support and training to national staff. He was further informed that his fixed-term appointment would be extended until 31 December 2018, at which time his assignment with the UNDP Zimbabwe Country Office would reach completion.

7. On 5 October 2018, Mr. Hossain filed a request for management evaluation of the contested decision.

8. On 31 October 2018, the DFID issued its annual report of the ZRBF's activities. The DFID Report noted a number of deficiencies in the ZRBF's work and recommended "[a] capacity assessment of the UNDP PMU in order to determine whether the team has the right allocation of roles and responsibilities".

9. Consequently, a Capacity Assessment Mission Team (the Panel) of three independent UNDP experts was assigned to conduct a capacity assessment of the ZRBF PMU (capacity assessment exercise).

10. In January 2019, the Panel conducted its assessment. The Panel reviewed reports documenting the ZRBF's work, consulted with the donors, the Government of Zimbabwe, and consortia partners, and conducted team-work sessions with the ZRBF PMU staff.

11. The Panel issued its report that same month (Panel Report). The Panel found, among others, that "partners perceive the financial management function and the resilience advisory functions as the weakest links with the PMU"; "its staff is competent and qualified to deliver the core functions of the PMU"; and "the overall structure of the PMU is not conducive for efficiency". Consequently, the Panel recommended revision of the Finance Unit of the PMU so that more "hands-on financial services [are] provided to the Consortia members to facilitate budgeting, delivery and reporting".

12. On 3 May 2019, ZRBF donors met to discuss the Panel's recommendations and agreed that certain positions would undergo changes to their terms of reference and might be changed from international to locally recruited national posts pursuant to the Panel Report. The post that had been encumbered by Mr. Hossain was among those slated for modification.

13. On 16 May 2019, the ZRBF Steering Committee (a body comprised of representatives of the Government of Zimbabwe and one of the donors on a rotational basis, which determines the ZRBF's goals and policies) discussed and approved of the new structure for the PMU proposed pursuant to the Panel's findings, resulting in the abolition of Mr. Hossain's post.

14. On 18 May 2019, the UNDP Zimbabwe Country Office requested the Organizational Design Unit at UNDP Headquarters in New York to review the proposed classification levels of the new structure which affected four posts, among them Mr. Hossain's post.

15. On 22 May 2019, the Organizational Design Unit concluded its review and classified the newly approved post of Finance and Operations Analyst, which would replace the abolished post with a Service Contract at the ICS-09 level equivalent.

16. On 30 May 2019, Mr. Hossain was informed that based on the capacity assessment exercise, the position of Finance Specialist he encumbered would be abolished, and that his fixed-term appointment would not be renewed beyond its expiry date on 30 June 2019.

17. Mr. Hossain's request for management evaluation of the contested decision was unsuccessful, and on 23 October 2019, he filed an application with the UNDT.

18. On 25 July 2022, the UNDT issued Judgment No. UNDT/2022/069.

19. The UNDT held that the preparation of the HR Strategy document, without consulting Mr. Hossain, constituted an abuse of authority. The UNDT also held that the contested decision was tainted by bias and that the fact that out of the three international posts at the ZRBF, his post had been chosen to be reclassified, without any justification, was proof, by a preponderance of the evidence, of discrimination. The UNDT further held that the fact that Mr. Hossain's supervisor did not get along with him meant that she was biased against him and as a result the contested decision was tainted by bias and, therefore, unlawful.

20. The UNDT held that the process was arbitrary and capricious because in formulating the scope of the Panel's assessment, the Resident Representative instructed the Panel to "review and finalise a long-term HR strategy for the PMU". This requirement was outside the DFID mandate and because the ZRBF was a donor funded project whose policy was guided by the ZRBF Steering Committee, the Country Office had acted *ultra vires* when it determined the scope of the Panel's assessment without first consulting with the ZRBF Steering Committee.

21. The UNDT held that the Panel, constituted of independent experts, did not independently reach its conclusions regarding the restructuring of the PMU, but, rather, its recommendations were predetermined. The UNDT reached this conclusion based on the following facts: the Strategy Report was drafted sometimes in 2017; in March 2018, the Resident Representative decided not

to renew Mr. Hossain's appointment beyond 31 December 2018; the March 2018 decision not to renew Mr. Hossain's appointment was based on the Strategy Report; and the 2019 decision to abolish the post was unlawful because the recommendations of the Panel were predetermined by the Strategy Report and therefore prejudiced.

22. The UNDT rescinded the May 2019 decision not to renew his fixed-term appointment and ordered Mr. Hossain's reinstatement. Alternatively, the UNDT ordered in-lieu compensation in the amount of 30 months' net base pay. Additionally, the UNDT ordered retroactive payment of contributions to the United Nations Joint Staff Pension Fund for the reinstated period.

23. The Secretary-General filed an appeal on 23 September 2022. The following day, the Secretary-General also filed a motion for leave to submit additional evidence and pleadings before the Appeals Tribunal, i.e. a 3 May 2018 e-mail message from the Zimbabwe Country Director to the Head of the PMU asking for the preparation of the Strategy Report which would prove that the March 2018 decision to abolish the post could not have been based on the Strategy Report, because the Strategy Report was drafted two months later in May 2018.

24. Mr. Hossain did not oppose the motion, and by Order No. 478 (2022) dated 12 October 2022, the UNAT granted the Secretary-General's motion.

25. On 14 November 2022, Mr. Hossain filed his answer to the appeal.

Submissions

The Secretary-General's Appeal

26. The Secretary-General submits that the UNDT erred in considering the application receivable. The UNDT is confusing the decision not to renew Mr. Hossain's appointment and the decision to abolish his post leading to the mistaken conclusion that Mr. Hossain had sought management evaluation of the decision reviewed by the UNDT - the decision not to renew his appointment. Moreover, the UNDT erred by considering that the decision to abolish the post, was a reviewable administrative decision.

27. In the event that the UNAT considers that the UNDT should have entertained the application, the Secretary-General submits that the UNDT erred by holding that the contested decision was unlawful. The Administration has broad discretion concerning the organization of

offices and abolition of posts. The Secretary-General's exercise of his discretion to reorganize the PMU was taken following an extensive assessment of the PMU and a subsequent multi-step review process by an independent Panel, outside donors, the ZRBF Steering Committee, and different units of UNDP.

28. The Secretary-General contends that the UNDT erred by holding that the Head of the PMU had abused her authority. The drafting of the Strategy Report without consulting Mr. Hossain was not an abuse of authority by the Head of the PMU. The Administration has no legal obligation to consult with staff members prior to reorganization or restructuring of the units in which they serve. In addition, the mere fact that disagreements existed between Mr. Hossain and his supervisor does not prove bias. It was also not Mr. Hossain's supervisor who recommended examining the roles and responsibilities of staff at the PMU, who recommended changes to the post and who agreed to the changes and approved the new structure which resulted in the abolition of the post. For the UNDT's theory that the post was abolished because of the supervisor's bias to be true, she would have had to convince all the bodies involved in the above actions to undertake an assessment and then recommend a reorganization of the PMU, all for the sake of not renewing Mr. Hossain's appointment. No evidence in the case file exists to support this conclusion.

29. The Secretary-General avers that the UNDT erred in holding that the abolition of the post was arbitrary, capricious, and discriminatory. Contrary to Mr. Hossain's contention, the Panel's scope of assessment had been lawfully determined. The UNDT misconstrued the DFID's recommendation and erred in understanding the role of the Steering Committee and of the UNDP Country Office in the management of the ZRBF. Contrary to the UNDT's finding, the scope of the Panel assessment, including the review of the long-term human resources strategy for the PMU derive directly from the DFID recommendation. Moreover, UNDP has sole authority to determine who to hire and how to staff its project teams. The Country Office was well within its authority to include among the Panel's terms of reference a review of the human resources management of the PMU as it has the authority to decide, by itself, on the appointment of staff, and, at any rate, the DFID made the same recommendation.

30. The Secretary-General submits that the review of the Strategy Report did not predetermine the result of the Panel's assessment. The UNDT's holding which rests on its finding that because the Panel had considered the Strategy Report, its independence was compromised, is based on conclusions which are both factually wrong and legally erroneous. First, the UNDT erred in finding that the Strategy Report was drafted in 2017 when instead it was drafted in May 2018. Second, the

decision not to renew Mr. Hossain's appointment in March 2018, which was later rescinded, was not made by Mr. M, but by Mr. BP, who was the Resident Representative at the time. Third, the March 2018 decision not to renew Mr. Hossain's appointment was not based on the Strategy Report which was composed in May 2018, two months after the March 2018 decision. Fourth, nothing suggests that the Strategy Report predetermined the results of the capacity assessment. Indeed, a large number of the recommendations made by the Panel differed from the proposals in the Strategy Report and several positions were affected by the recommendations.

31. Moreover, the UNDT erred in finding that the abolition of the post was a pretext for not renewing Mr. Hossain's appointment. The Resident Representative who decided, in March 2018, not to renew the appointment after 31 December 2018, himself rescinded the decision in November 2018 and extended the appointment. He was not the same Resident Representative who later in 2019 decided to abolish Mr. Hossain's post, pursuant to the Panel's recommendation. Mr. M, while serving as the Country Director, asked for the creation of the Strategy Report in May 2018. In January 2019, after he had become the Resident Representative, he shared the Strategy Report with the Panel because he correctly believed that the Panel should review it as part of its assessment of the human resources plan for the PMU. There is no evidence that the Strategy Report constrained the discretion of the three independent Panel members.

32. Furthermore, the UNDT ignored that different bodies supported the contested decision. Even if the Panel's capacity assessment was in some way tainted by the fact that the Strategy Report was among the various documents it had reviewed – which it was not – the Panel's recommendation to change the post was subsequently reviewed by additional bodies who independently agreed with the abolition of the post or who reviewed the classification of the new finance post in the new structure. Despite there being no evidence to the contrary, the UNDT found that restructuring the PMU, abolishing the international post and creating a national post in its place was arbitrary and lacked rationale. The UNDT ignored the fact that while different donors had submitted various organograms in earlier reports, the October 2018 report produced by the DFID was the most current report. It is on the basis of the DFID Report, which explicitly recommended a review of the PMU's organization, that an assessment of the PMU's functions was undertaken.

33. The Secretary-General contends that the UNDT erred in holding that the contested decision was discriminatory. The mere fact that one out of three posts was slated for abolition, provides no basis to make a finding that the contested decision was discriminatory. To substantiate

a holding that discrimination took place, the UNDT would need to state the basis on which the discrimination took place and state what evidence supports the claim that such a basis for discrimination existed. The impugned Judgment does not name an alleged basis for discrimination nor provide any proof to support such an allegation.

34. The Secretary-General further submits that even if the UNAT decided to uphold the contested decision, it should reduce the amount of compensation awarded. The UNDT provided no explanation as to the exceptionality of the case justifying 30 months' net base salary worth of compensation. Additionally, it is unclear whether the UNDT expected the Organization to retroactively pay the Pension Fund on behalf of Mr. Hossain only in case of his reinstatement to his now abolished post, or if the UNDT intended that the Organization make such payments even in case of in-lieu compensation. If the UNDT intended its order to be specific performance, then the order is not lawful because participation in the Pension Fund is only available to individuals employed by the Pension Fund's member organizations. If the UNDT intended to require the Administration to retroactively contribute to the Pension Fund on behalf of Mr. Hossain in addition to providing compensation in lieu of reinstatement, then the compensation awarded to him is even further in violation of Article 10(5)(b) of the UNDT Statute, as it amounts to 30 months' worth of net base salary plus retroactive payments to the Pension Fund.

35. The Secretary-General requests that the UNAT reverse the UNDT Judgment and uphold the contested decision.

Mr. Hossain's Answer

36. Mr. Hossain submits that the UNDT did not err in finding his application receivable. The UNDT Judgment clearly stated that the UNDT has the competence to receive cases that have previously been subject to management evaluation. The unlawful abolition of his post has direct legal consequences to the terms and conditions of his appointment, since as a consequence of the unlawful decision, he lost his job. This decision was subject to management evaluation and as such, his application before the UNDT was receivable.

37. Mr. Hossain contends that the UNDT Judgment is "balanced, well-articulated, comprehensive and based on evidence provided" and that the Secretary-General has not demonstrated that the UNDT made any errors on the merits of the case. Mr. Hossain references

the Secretary-General's arguments by paragraph and page numbers and rebuts his contentions by reiterating his arguments made before the UNDT as well as recounting the UNDT's findings.

38. In particular, Mr. Hossain contends that while the Organization does have the power to restructure its departments or units, the Administration has the obligation to act fairly, justly and transparently in its dealings with its staff members even in a restructuring exercise. The process to abolish Mr. Hossain's post started in February 2017 when his fixed-term appointment was only renewed for six months because of his only "partially meeting expectations" during the 2016 performance period. Contrary to the Secretary-General's submission, Mr. Hossain was never given feedback regarding his response to the Panel Report and the former's submission on this point is a "lie" to mislead the Appeals Tribunal.

39. Mr. Hossain submits that the Panel was aware of the fact that the Head of the PMU was adamant to "get rid" of him "at any costs" and in order to do so, she as well as the Country Office's management took multiple steps; her plans were eventually implemented using the "so-called panel report". Although there were no complaints against Mr. Hossain, as confirmed at the oral hearing, the Panel presented Mr. Hossain negatively to the donors, government counterparts and the Country Office management in order to humiliate him with an ulterior motive.

40. Mr. Hossain further contends that the Country Director shared the HR Strategy document with the Panel while it was not shared with Mr. Hossain, while it was not in the list of documents reviewed by the Panel, and it was not even uploaded by the Secretary-General onto CCMS. It was only following the UNDT's instruction that the document was shared during the hearing. The strategy document was developed by the Head of the PMU according to her predetermined plan to abolish the Finance Specialist position, which was ultimately implemented through the Panel Report. The Panel was well aware of the conflict between Mr. Hossain and his supervisor; but it met separately with her regardless and discussed and agreed to the ZRBF structure as per her plan. This demonstrates not only the Panel's lack of independence, but also collusion. The Panel incorporated unauthenticated information received from the Head of the PMU and outsiders in its report which is another example of impairment of the Panel's independence.

41. Turning to the UNDT's order on remedies, Mr. Hossain submits that the UNDT's Judgment with regard to the higher compensation amount "may have been made" in consideration of the fact that "his career and family life have been seriously affected due to the harassment, discrimination, and abuse of authority" he suffered. Had Mr. Hossain's position not been

unlawfully abolished, he could have continued in his position until December 2021, as other international staff, and as such the UNDT made a “legitimate award, based on the reality”. Moreover, as a candidate in an abolished post, he should have received priority consideration over other candidates in recruitment which he had not received. The UNDT’s order to reinstate him and to retroactively pay contributions to the Pension Fund is “an absolutely right and correct judgment”. With the order of reinstatement to service, the restoration of contributions to the Pension Fund automatically happens as it means that there is a continuation of service.

42. Mr. Hossain thus requests that the UNAT dismiss the appeal and affirm the UNDT Judgment.

Considerations

Whether the UNDT erred in law and fact in considering the application receivable

43. We address first the challenge to the UNDT’s conclusion that Mr. Hossain’s application was receivable *ratione materiae*.

44. The UNDT concluded that the issue before it was “the non-renewal of [Mr. Hossain’s] contract due to abolition of his post; whether the restructuring process, leading to the abolition of the post, was pre-determined, discriminatory, improperly motivated and abuse of authority”.¹

45. The Secretary-General appeals on the ground that the UNDT erred in law and in fact when it found that Mr. Hossain’s application was receivable. The Secretary-General contends that Mr. Hossain only challenged the decision to abolish the post, not the decision to separate him from service by not renewing his fixed-term appointment. In his request for management evaluation, he explicitly requested management evaluation of the Country Office decision to abolish the post of Finance Specialist. Since Mr. Hossain identified the non-justiciable decision to abolish the post as the contested decision – a decision that does not have any direct impact on his terms of employment – the UNDT had no jurisdiction to hear the case *ratione materiae* and should have dismissed it for lack of receivability at the outset.

46. For the reasons which follow, we find that this head of the appeal is entirely without merit.

¹ Impugned Judgment, para. 32.

47. The UNDT's conclusions on the question of receivability are set out in the following paragraph of its Judgment. It held that:²

... In determining the issue, the Tribunal has been guided by the Applicant's request for management evaluation. The Applicant received his first notice of non-renewal of contract in March 2018. It was put on hold to allow for a capacity assessment exercise. A fresh notice was issued on 30 May 2019 that the position of Finance Specialist he encumbered would be abolished, and that his FTA would not be renewed beyond its expiry date on 30 June 2019. The Applicant requested management evaluation of this decision and is the subject of these proceedings. However, in support of his case, the Applicant raised several instances including the capacity assessment exercise and re-classification of his post to show that the impugned decision was pre-determined, improperly motivated and unlawful.

48. Having reviewed the content of Mr. Hossain's request for management evaluation and of his application brief, the specific circumstances of the present case, as well as the management evaluation response confirming the lack of Mr. Hossain's entitlement both to a renewal of his fixed-term appointment and to a notice of non-renewal, we agree with, and uphold, the UNDT's finding that Mr. Hossain's application was receivable *ratione materiae* as it was directed against the administrative decision dated 30 May 2019 not to renew his contract of employment.

49. As the Appeals Tribunal has held:³

It is the role of the Dispute Tribunal to adequately interpret and comprehend the application submitted by the moving party, whatever name the party attaches to the document, as the judgment must necessarily refer to the scope of the parties' contentions. Thus, the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review.

50. We find no fault with the UNDT's reasoning when it defined and identified the administrative decision to be determined. We therefore uphold the UNDT's finding that the issue of the non-renewal of Mr. Hossain's fixed-term contract was the subject matter of the litigation before it and its determination that the application was receivable *ratione materiae*.

² *Ibid.*, para. 31.

³ *Fasanella v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-765, para. 20 (internal footnote omitted).

Whether the UNDT erred by holding that the contested administrative decision was unlawful

51. We now turn to the issue of the lawfulness of the non-renewal of Mr. Hossain's fixed-term appointment. It is well established that:⁴

[A]n international organization necessarily has the power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff. The Appeals Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However, even in a restructuring exercise, like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with staff members.

52. Further, it is a well-established principle that fixed-term appointments or appointments of limited duration carry no expectation of renewal or conversion to another type of appointment.⁵

53. Even the renewal of the appointment of a staff member on successive appointments does not, in and of itself, give grounds for an expectancy of renewal, unless the Administration has made an express promise that gives the staff member an expectancy that his or her appointment will be extended. The jurisprudence requires not only a firm commitment to renewal by the circumstances,⁶ but also that this promise at least be in writing.⁷

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

⁴ *Nouinou v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-902, para. 34 (internal footnotes omitted).

⁵ *He v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-825, para. 40, citing *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 25, in turn citing *Ncube v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-721, para. 15.

⁶ *Toure v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-660, para. 25.

⁷ *He, op. cit.*, para. 41, citing *Muwambi, op. cit.*, para. 25, citing in turn *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-411, para. 26.

55. Nevertheless, an administrative decision not to renew a fixed-term appointment can be challenged on the grounds that the Administration has not acted fairly, justly or transparently with the staff member or was motivated by bias, prejudice or improper motive.⁸ The staff member has the burden of proving such factors played a role in the administrative decision.⁹

56. The Appeals Tribunal has consistently held that:¹⁰

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

The Appeals Tribunal has further held that:¹¹

As part of its judicial review, it is necessary to determine whether the decision was vitiated by bias or bad faith, that is, if it was taken for an improper purpose. A decision taken for an improper purpose is an abuse of authority. It follows that when a complainant challenges a discretionary decision, he or she by necessary implication also challenges the validity of the reasons underpinning that decision. In this respect, as applied to this case, the Tribunal may examine the circumstances surrounding the abolition of [the staff member's] post to determine whether the impugned decision was tainted by abuse of authority.

57. As stated in *Obdeijn*:¹²

An administrative decision not to renew [a fixed-term appointment] must not be deemed unlawful on the sole ground that the decision itself does not articulate any

⁸ *He op. cit.*, para. 43, citing *Muwambi, op. cit.*, para. 27, in turn citing *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para. 33; *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153, paras. 45 and 46.

⁹ *He, op. cit.*, para. 43, citing *Muwambi, op. cit.*, para. 27, in turn citing *Kacan v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-426, para. 20; *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 33; *Asaad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-021.

¹⁰ *He, op. cit.*, para. 44 (internal footnotes omitted).

¹¹ *Toure, op. cit.*, para. 30 (internal footnote omitted).

¹² *Obdeijn, op. cit.*, para. 32.

reason for the non-renewal. But that does not mean that the Administration is not required to disclose the reasons not to renew the appointment.

58. Rather, the Administration has an obligation to state the reasons for an administrative decision not to renew an appointment to assure the Tribunals' ability to judicially review the validity of the Administration's decision.¹³

59. In the present case, Mr. Hossain was advised on 30 May 2019 by the UNDP Resident Representative to Zimbabwe that based on the capacity assessment exercise, the position of Finance Specialist he encumbered would be abolished, and that his fixed-term appointment would not be renewed beyond its expiry date on 30 June 2019.

60. The UNDT concluded that the process of restructuring the PMU leading to the abolition of Mr. Hossain's post and hence non-renewal of his contract was arbitrary, capricious, motivated by prejudice, procedurally irregular and an error in law.

61. The Secretary-General submits that the UNDT erred in fact and law in concluding that the decision not to renew Mr. Hossain's fixed-term appointment was unlawful, since the reason for the Administration's decision not to renew his appointment was the legitimate reorganization of the PMU resulting in the abolition of Mr. Hossain's post following an extensive assessment of the PMU and a subsequent multi-step review process by an independent Panel, outside donors, the ZRBF Steering Committee, and different units of UNDP. Therefore, the Secretary-General submits that the UNDT erred in finding that the Administration had abused its authority, acted with bias, and discriminated against Mr. Hossain.

62. We agree. The reasons proffered by the Administration for not renewing Mr. Hossain's fixed-term appointment beyond 30 June 2019, namely the abolition of his post in the context of a reorganization exercise of the PMU, are valid reasons. However, despite the validity of these reasons, the UNDT embarked on an analysis of the circumstances surrounding the abolition of Mr. Hossain's post, obviously to determine whether the impugned decision was tainted by abuse of authority or bias, discrimination etc., and determined on the evidence on file and the witnesses' testimonies at the hearing that such improper motives existed and tainted the impugned administrative decision.

¹³ *He, op. cit.*, para. 46; *Muwambi, op. cit.*, para. 30, citing *Ncube v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-721, para. 17 and cite therein.

63. This ruling of the UNDT was primarily based on the following findings:

- In formulating the scope of the Panel’s assessment, the Resident Representative instructed the Panel to “review and finalise a long-term HR strategy for the PMU”. The UNDT held that this requirement was “outside the DFID mandate” and that because the ZRBF was a donor funded project whose policy was guided by the ZRBF Steering Committee, the Country Office acted *ultra vires* when they determined the scope of the Panel’s assessment without first consulting with the ZRBF Steering Committee.¹⁴

- The decision to abolish Mr. Hossain’s position was premeditated and the capacity assessment exercise was a mere tool to achieve a predetermined decision of restructuring the Finance Unit and separating him from service.¹⁵ Per the UNDT’s reasoning, the following factors were established, *inter alia*, to substantiate Mr. Hossain’s allegation that the decision to abolish his position was predetermined:¹⁶

a. The Team became aware during the consultations that there was a conflict between the Head of PMU [emphasis added], who was the Applicant’s direct supervisor and that the Applicant held the position of Finance Specialist which had been abolished in the HR Strategy to create room for national staff.

b. The Team was aware or ought to have known during the assignment that the HR Strategy document sent in advance of the mission was prepared by the Head of PMU [emphasis added] without input from or participation or consultation with the Finance Specialist or any member of the finance unit or donors.

...

e. The Team considered this HR strategy and adopted some of its recommendations [emphasis added], most notably, reducing the finance portfolio, although relevant documentary evidence including the ZRBF Annual Review Report prepared by DFID dated 31 October 2018 and the EU Result Oriented Monitoring (ROM) (Mission) Report made no such recommendation and the Team did not explain the position they took in direct reference to the HR Strategy document.

- The separation was motivated by improper motive. In the absence of any legitimate justification for the restructuring, the real reason was that Mr. Hossain’s supervisor¹⁷

¹⁴ Impugned Judgment, para. 59.

¹⁵ *Ibid.*, para. 57.

¹⁶ *Ibid.*, para. 52 (internal footnotes omitted).

¹⁷ *Ibid.*, para. 70.

did not want him around. She wanted to get rid of him. It was an abuse of authority to prepare an HR Strategy with changes in the Finance Unit without consultation or disclosure to the ZRBF [Steering Committee] and without soliciting feedback from [Mr. Hossain] being the major casualty of the exercise. The position of Finance Specialist was reclassified without specifying any procedure from the relevant legal framework applicable to UNDP.

- Mr. Hossain was discriminated against in a pool of international staff members. There were three international positions in the PMU, and according to the Panel's leader,¹⁸

international staff get replaced by national staff as a normal sustainability process and a means to empowering nationals, the Respondent was, however, not able to provide any criteria which he used to select [Mr. Hossain's] position of the three international positions for abolition. Any of the three international staff members should have been given equal and fair consideration either to stay or to leave by applying an objective criterion in cases of abolition of posts, which is competence, integrity and length of service.

64. In this regard, the UNDT opined further that:¹⁹

Considering that the HR Strategy document was prepared by the Head of PMU, restructuring the Finance Unit, without consulting the Unit, nor shared with the donors or stakeholders and that it contradicted findings of donor reports on review of ZRBF, it was an unsafe document to use in the capacity assessment exercise. The Country Director, himself, opined in his oral testimony that, sharing "*the HR Strategy would have just confused people*". It was not safe because there was a perception that its author, who was in conflict with her supervisee, might be biased. The perception here is real and the apprehension of bias not unfounded hence the Tribunal concurs with the Applicant that in as far as the capacity assessment report relied on the HR Strategy document to arrive at its decision to abolish the Finance Specialist position, that decision was arrived at by using irrelevant consideration, it was biased against him. *The Tribunal finds that had the HR Strategy document not formed part of the guiding material for the capacity assessment exercise relating to finance functions, the outcome would have been different. Relying on the HR Strategy produced absurd and perverse results compared with the objectives of DFID's recommendation and the donors' expectations.*

65. The Appeals Tribunal finds that the UNDT's conclusion is legally and factually incorrect for the reasons set forth below. Since each error of law constitutes a sufficient ground to

¹⁸ *Ibid.*, para. 71.

¹⁹ *Ibid.*, para. 64 (second emphasis added; internal footnote omitted).

reverse the UNDT Judgment, we need not address each and every challenge raised by the Secretary-General on appeal.²⁰

66. First, it is common cause that on 31 October 2018, the DFID issued its annual report of the ZRBF's activities. The DFID Report noted a number of deficiencies in the ZRBF's work and one of its recommendations was an assessment of the UNDP PMU to determine whether "the team ha[d] the right allocation of roles and responsibilities and help to get the most out of the team's talent towards the effective management of ZRBF". As the Secretary-General rightly asserts, this target recommendation comprises the core functions of human resources management, i.e., ensuring an efficient and effective use of human resources, including determination of the types of expertise required to execute the ZRBF's mandate. Hence, contrary to the UNDT's finding, the scope of the Panel's assessment including to "review and finalise a long-term HR strategy for the PMU" was clearly aligned with the relevant DFID recommendation. At any rate, the UNDP Administrator, who is competent to make staffing determinations, was well within his authority to include among the Panel's terms of reference a review of the human resources management of the PMU. In other words, it was within the remit of management to organize its processes to lend to a more efficient and effective operation of its departments.²¹

67. Further, we do not agree with the UNDT's finding, allegedly based on our Judgment in *Matadi et al.*,²² that:²³

Where restructuring is likely to negatively affect staff members, the Administration has an obligation to consult the affected staff members and give them an opportunity to comment or give feedback on the proposed structure before implementation".

[C]onsultation should be carried out in good faith and "should occur before a final decision has been made so that the staff member has a proper opportunity to be heard without the matter having been pre-determined such.

68. Notably, in this regard, the UNDT, relying on the *ratio decidendi* of our Judgment in *Matadi et al.*, held that "[i]t was an abuse of authority to prepare an HR Strategy with changes in the Finance Unit without consultation or disclosure to the ZRBF [Steering Committee] and

²⁰ *Hepworth v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-503, para. 38.

²¹ *Comp. Masri v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-626, para. 30.

²² *Matadi et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-592, paras. 23 ff.

²³ Impugned Judgment, paras. 40 and 41.

without soliciting feedback from [Mr. Hossain] being the major casualty of the exercise”;²⁴ and that:²⁵

There is no evidence that [Mr. Hossain] was given the opportunity as an affected individual to comment on the proposed restructuring of his position from the beginning of the process or at any point in time, in violation of UNAT jurisprudence which requires that such consultations take place. ... The implementation of the recommendation did not take relevant factors into consideration, namely, the requirement to carry out genuine, transparent and good faith consultations.

69. The UNDT’s interpretative approach of our Judgment in *Matadi et al.* is misplaced. Its challenged finding does not fall within the parameters of our established jurisprudence in *Matadi et al.* as referred to below. In that case, the staff members argued that in undertaking a retrenchment exercise at the United Nations Mission in Liberia, the Administration did not adequately consult the relevant staff unions. While the UNDT ruled that the Administration had not adequately consulted with the National Staff Association, the Appeals Tribunal found that the staff unions had been given adequate opportunity to participate in the retrenchment exercise.

70. However, it does not follow from our Judgment in *Matadi et al.* that the Administration is under a legal obligation to consult with individual staff members who may be affected by the abolition of a post prior to reorganization or restructuring of the units in which they serve. Hence, in the present case, contrary to the UNDT’s determination, the Head of the PMU was not required to consult with Mr. Hossain in the process of preparing the Strategy Report, and thus refraining from consulting him did not constitute an abuse of authority or other kind of illegality on the part of the Administration. This is so regardless of the fact that, as results from the evidence on file, Mr. Hossain was given the opportunity to present his feedback at different stages of said process, including during discussions with the Panel on the PMU functions and through his written comments on the findings and recommendations of the Panel’s draft report.

71. Next, the evidence does not support the UNDT’s finding that the decision to abolish Mr. Hossain’s position in the context of restructuring the PMU was premeditated and biased. The factors on which the UNDT selectively based its finding that the decision to abolish Mr. Hossain’s position was predetermined do not positively establish any bias and do not

²⁴ *Ibid.*, para. 70.

²⁵ *Ibid.*, para. 65.

explain how, if at all, the potential bias to which it referred was connected to the specific restructuring and the abolition of Mr. Hossain's position.

72. With due deference to the UNDT, in our view, it was not reasonable for the Dispute Tribunal to conclude, based on the sole fact of the alleged existence of friction between the Head of the PMU and Mr. Hossain, that the abolition of his position was the result of bias against him. Even if such disagreement existed between them that was not enough as an evidentiary basis to establish bias in the specific case and the causal link to the impugned decision. Many factors intervened which could possibly interrupt such a nexus - even if such existed - which they did.

73. Indeed, it is not in dispute that it was not Mr. Hossain's supervisor who recommended examining the roles and responsibilities of staff at the PMU. It was on the basis of the DFID Report of 31 October 2018, which explicitly recommended a review of the PMU's organization, that an assessment of the PMU's functions was undertaken by the Panel.

74. Similarly, it was not Mr. Hossain's supervisor who recommended changes to the post but the Panel, composed of three independent experts from outside the Country Office, who found in their report in January 2019, among others, that "partners perceive the financial management function and the resilience advisory functions as the weakest links with the PMU" and that "the overall structure of the PMU is not conducive for efficiency". Subsequently, the Panel recommended revision of the Finance Unit of the PMU so that more "hands-on financial services [are] provided to the Consortia members to facilitate budgeting, delivery and reporting".

75. Finally, it was not Mr. Hossain's supervisor who agreed to the changes and approved the new structure which resulted in the abolition of the post, but the donors and the ZRBF Steering Committee on 16 May 2019, who discussed and approved of the new structure for the PMU proposed pursuant to the Panel's findings. As the Secretary-General correctly argues, even *assuming arguendo* that the Panel's recommendations were predetermined - and there is no indication they were - there was no evidence adduced by Mr. Hossain, who bears the specific evidentiary burden, to substantiate that the additional reviewers were somehow complicit in an alleged plot to unlawfully separate Mr. Hossain from service, or in a capricious, arbitrary, irregular, and administrative decision motivated by prejudice with the sole intent of separating him from service.

76. Furthermore, the fact that the Capacity Assessment Mission Team reviewed the Strategy Report as part of its assessment of the PMU does not mean that the Panel's recommendations were predetermined, nor does it render the decision to abolish the post or not to renew Mr. Hossain's appointment unlawful. The Team reviewed lots of documents, interviewed multiple individuals and conducted work sessions with the entirety of the PMU staff. Contrary to the UNDT's holding, nothing suggests that the Strategy Report, out of all the documents reviewed by the Team, was the one that predetermined the results of the capacity assessment conducted by the Panel.

77. Indeed, a review of the Panel's assessment and of the Strategy Report immediately reveals that a significant number of the recommendations made by the Panel differed from the proposals in the Strategy Report and that several positions, including other international positions, were affected by the recommendations. This is also noted in the UNDT Judgment stating that "[t]he Team considered this HR strategy and adopted some of its recommendations, most notably, reducing the finance portfolio".²⁶ As the Secretary-General rightly puts it, had the Strategy Report dictated the result of the Panel's investigation, as found by the UNDT, a much closer resemblance would have been expected between the two documents, which is not the case here.

78. The fact that the restructuring of the PMU and the reclassification of posts to national posts was based on UNDP policy is corroborated by the witness testimony of Mr. T before the UNDT who was one of the Panel members who conducted the capacity assessment exercise of the PMU in 2019. Referring to the rationale that led to the abolition of the post encumbered by Mr. Hossain, Mr. T testified that:²⁷

[T]hey followed the Terms of Reference, reviewed documentation supplied to them, held consultations with institutions including PMU staff members and came up with an objective report which contained several recommendations one of which was to restructure the finance functions of PMU. The new functional structure did not have the Applicant's position, a national position was created instead. In his opinion, once the institutional set up of the programme is established and running, as you move forward, you phase out international posts to build national capacity. When asked what criteria he used to suggest phasing out the Applicant's international position and not the other two international positions, the witness said he did not review the Applicant's position but functions of the Finance Unit within PMU which had changed. He informed the Tribunal that he had no

²⁶ *Ibid.*, para. 52(e).

²⁷ *Ibid.*, para. 51 (internal footnote omitted).

expertise in finance and that none of his team members possessed such expertise either but that the team was guided by relevant background documentary material and oral consultations. He emphasized that the team did not wish to be drawn into internal conflicts between the Applicant and his supervisor. Their consultations were restricted to functions of PMU and not individual assessments.

79. From the foregoing, we hold that the abolition of Mr. Hossain's post was the result of a legitimate organization of the PMU which led to the restructuring of posts and, in Mr. Hossain's case, to the abolition of his post and the non-renewal of his fixed-term appointment.

80. Last but not least, we do not find any illegality in the impugned administrative decision not to renew Mr. Hossain's fixed-term appointment because of the sole fact that it was his post which was abolished out of the three international staff members' posts. This alone is not sufficient to support a finding, on a balance of probabilities, that the Administration made the contested decision based on discrimination, improper motives or unfairness, or that Mr. Hossain received a less favourable treatment, as the UNDT improperly found. As already held, the decision to abolish Mr. Hossain's post was legally taken for reclassification purposes, triggered by recommendations requiring streamlining, and there was no bias in that decision. Mr. Hossain has not presented sufficient evidence showing that the Administration had improper motivation or prejudice against him resulting in the non-renewal of his appointment.

81. Under these circumstances, reviewed as a whole, the Appeals Tribunal holds that the UNDT erred in law and fact and reached a manifestly unreasonable decision by concluding that Mr. Hossain had proved on a balance of probabilities that the administrative decision not to renew his fixed-term appointment had been motivated by improper motives and he had been discriminated against.

Compensation

82. Since the UNDT based its award of damages on the erroneous and unsupported conclusion that the Administration's decision not to renew Mr. Hossain's fixed-term appointment was unlawful, that award must be vacated. Because no illegality was found, there is no justification for the award of compensation or moral damages. As this Tribunal has stated before, "compensation cannot be awarded when no illegality has been established; it cannot be

granted when there is no breach of the staff member's rights or administrative wrong[-]doing in need of repair".²⁸

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

Judgment

84. The Secretary-General's appeal is granted, and Judgment No. UNDT/2022/069 is hereby reversed.

Original and Authoritative Version: English

Decision dated this 30th day of June 2023 in New York, United States.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Halfeld

Judgment published and entered into the Register on this 19th day of July 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar

²⁸ *Muwambi, op. cit.*, para. 66, citing *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33; *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-508, para. 27; *Oummih v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-420; *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095.