



Before: Judge Rachel Sophie Sikwese

Registry: New York

Registrar: Isaac Endeley

SCHIFFERLING

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Cristian Gimenez Corte

Counsel for Respondent:

Kong Leong Toh, UNOPS

Introduction

1. On 25 November 2022, the Applicant, a former staff member in the United Nations Office for Project Services (“UNOPS”) based in New York, filed an application in which he contests three decisions namely, the “abolishment [of his post], [his] separation [from service], and [the] non-renewal [of his appointment]”.
2. On 27 December 2022, the Respondent filed a reply of 18 pages, submitting that the application has no merit. The reply was revised to comply with the 10-page limit and re-filed on 6 October 2023.
3. On 18 September 2023 the case was assigned to the undersigned Judge and on 26 October 2023, a case management discussion was held to discuss and agree on the conduct of the proceedings.
4. The parties agreed to have an oral hearing which took place from 5 to 9 February 2024. Five witnesses testified namely, the Applicant, NG (Senior Portfolio Manager, UNOPS), BM (Assistant Secretary-General, the Office of Information and Communications Technology, “ASG/OICT”), JW (former Executive Director, UNOPS), and AM (former Director of Operations Support, OICT).
5. For the reasons set out below, the application is dismissed.

Facts

6. The Applicant joined UNOPS on a fixed-term appointment on 16 April 2018, at the P-4 level, step 6, as Strategic Partnerships and Technology Innovation Officer. His appointment was renewed multiple times, with the last contract expiring on 31 August 2022 without an option of extension or renewal.
7. He challenges the administrative decision to abolish his post resulting in the non-renewal of his fixed-term appointment and separation from service. The basis of his challenge is that the decision is unlawful on six grounds as follows: (a) the Administration made express promises of renewal, giving rise to legitimate

expectations, (b) lack of funding from OICT is not a valid reason to terminate an UNOPS appointment, (c) having been assured that there was no financial crisis, the Administration is estopped from invoking a financial crisis, (d) discrimination, (e) if there was a financial crisis, this was a self-inflicted crisis due to negligence or corruption and (f) UNOPS, the actual and legal employer, should pay salaries and compensation.

8. The parties filed a joint consolidated list of agreed and disputed facts. It follows from the jurisprudence of the United Nations Appeals Tribunal (“UNAT”) that if the parties agree on certain facts, then the United Nations Dispute Tribunal (“UNDT”) is to accept those facts without any further review (see, *Ogorodnikov* 2015-UNAT-549).

9. The disputed factual issues are reproduced as follows (emphasis and references to footnotes, submissions, and annexes in original omitted):

... FACTS THAT THE PARTIES DO NOT DISPUTE, BUT THE RESPONDENT SUBMITS ARE IRRELEVANT WHILE THE APPLICANT SUBMITS THAT THESE FACTS ARE RELEVANT.

... The parties do not dispute that since about 2020, UNOPS has been undergoing a managerial and financial crisis, involving allegations of losses of around USD. This scandal ignited an investigation by the [United Nations] Office of Internal Oversight Services (OIOS), leading first to the placement on administrative leave of [VV, name redacted for privacy purposes] (who was the Chief Executive of the UNOPS Sustainable Infrastructure Investments and Innovation Initiative (S3i), and who prior to that was Deputy Executive Director of UNOPS) in December 2021, and then the resignation of the UNOPS Executive Director, [GS, name redacted for privacy purposes] in May 2022. The above crisis was acknowledged by UNOPS, stating that “UNOPS accepts there are significant challenges and failures that have occurred...” and more explicitly by [United Nations] itself, as [SD, name redacted for privacy purposes], a spokesman for [the Secretary-General], said that “{t}he next steps include possible administrative sanctions or referral to the relevant judicial authorities in the case of potential criminal wrongdoing.” {The Respondent disputes the Applicant’s assertion that the foregoing was a cause of the contested decision and that the foregoing rendered the contested decision unlawful.}

... DISPUTED FACTS

... The Respondent submitted in the Reply that the contested decision (i.e. the non-renewal of the Applicant's fixed-term appointment) was lawful because it was due to the following:

(i) OICT obtains support services from UNOPS, and OICT takes payments to UNOPS for these services. (As noted [in the agreed facts], the parties agree that the Applicant was assigned by UNOPS to OICT under a [United Nations]-UNOPS Financial Agreement (the "FA")).

(ii) UNOPS hired the Applicant to provide some of these services (the Reply used the term "the Services" as shorthand for the services that the Applicant was providing (on behalf of UNOPS) to OICT).

(iii) The OICT budget crisis meant that OICT had to reduce the payments it makes to UNOPS.

(iv) This reduction meant that the support services that OICT obtains from UNOPS had to be reduced (including discontinuation of the Services).

(v) The posts that UNOPS had established to provide such services to OICT had to be consequently reduced (in other words, some of said posts needed to be abolished).

(vi) The post that the Applicant was encumbering was one of those that had to be abolished as part of the reduction of services that UNOPS provides to OICT.

The Respondent submitted in the Reply that the above is supported by:

a) The Vacancy Announcement that resulted in the selection and hiring of the Applicant ...

b) The Applicant's Letter of Appointment ...

c) The specific Financial Agreement (FA) between OICT and UNOPS ...

d) "Amendment No. 4" (for the period up to 31 August 2022) of the aforementioned Financial Agreement ...

e) A memorandum dated 5 June 2022 from [the United Nations] (Financial) Controller (Assistant Secretary-General [CR, name redacted for privacy purposes] to [BM] ...

f) A memorandum dated 8 June 2022 from [BM] to the Director of the UNOPS New York Service Cluster (NYSC) ...

...

The Applicant disputes the above because:

- a) Lack of funding from OICT is not a valid reason to terminate an UNOPS Appointment ...
- b) Having assured that there was no crisis, the UNOPS is now estopped from invoking a crisis as the reason to terminate appointments ...
- c) If there was a financial crisis, this was a self-inflicted crisis due to negligence or corruption ...
- d) UNOPS was the actual and legal employer, therefore it shall pay the salaries and indemnities ...

The Applicant submitted in the Application that the above is supported by:

- [General Assembly] decision 48/501 of 19 [September] 1994 on the Office for Project Services, and GA decision 65/176 on Renaming of the Executive Board of the United Nations Development Programme/United Nations Population Fund to include the United Nations Office for Project Services, and <https://www.unops.org/about/governance/mandate-and-reforms>
- Letter of Appointment ...
- [United Nations]-UNOPS Financial Agreement ...

... The Applicant has asserted that the OICT financial crises have been provoked and originated by mismanagement directly attributed to the OICT leadership. [Counsel for the Respondent is unable to ascertain whether there has been any mismanagement by OICT (UNOPS being separate from OICT). Regardless: as the Respondent has submitted in ... the Reply, the OICT crises was a *fait accompli* as far as UNOPS was concerned, and therefore not relevant for the purposes of this case.]

... ASSERTIONS MADE BY THE APPLICANT, BUT WHICH COUNSEL FOR THE RESPONDENT IS NOT ABLE TO ESTABLISH WHETHER THEY ARE TRUE OR NOT. REGARDLESS, COUNSEL FOR THE RESPONDENT SUBMITS THAT THEY ARE NOT RELEVANT FOR THE PRESENT CASE

... The Applicant has also asserted that the issues at UNOPS summarized in paragraph 13 above are being investigated by the Denmark national police, and there are allegations of corruption and potential criminal offences. [Counsel for the Respondent is not able to ascertain whether the foregoing is true or not. However, the Respondent submits that this issue is not relevant for the purposes of the present case.]

... The Applicant notes that the criminal investigations referred to above [are] of public domain, being reported in major press media

(as established in the Application ...), and that this is relevant for the case.

10. The Applicant gave evidence, and he also called two witnesses (BM and JW) to support his case.

11. The Respondent invited two witnesses (NG and AM) to dispute the Applicant's claims and allegations. He insisted that the non-renewal of the Applicant's fixed-term appointment was lawful, procedurally regular, fair and non-discriminatory.

The parties' submissions

Applicant's submissions

12. The Applicant's submissions may be summarized as follows (references to footnotes omitted):

a. UNOPS was "responsible for the management" of the Applicant's contract, for the "Human Resources Administration" of the contract, including the "payment of salary" and "separation of personnel". Accordingly, if UNOPS was responsible for the "payment of the salaries" and the "separation of personnel", the Respondent cannot then claim that the Applicant's post was abolished due to "the reduction of OICT support requirements and funding".

b. Since 2020, both UNOPS and OICT have undergone "serious management and financial crises". Regrettably, "these crises have been provoked and originated by mismanagement directly attributed to the OICT leadership, on the one hand; and for mismanagement and even alleged corruption attributed to the UNOPS leadership, on the other hand".

c. In the case of OICT, since February 2021, the "Office of the Financial Controller ["the Controller"] has been warning and kept asking OICT to adopt a series of measures in order to fix its financial situation, informing OICT that urgent action was needed to adapt spending plans to

approved budgets with a particular focus on UNOPS Financial Agreements”. OICT, however, “simply ignored all the warning signals, until it was too late”. The Respondent does “not dispute the fact that OICT had entered into a financial crisis despite the warnings from the Controller”. By this, the Respondent recognizes that “the OICT crisis was self-inflicted, caused by the very OICT negligence in adopting the preventive measures requested by the Controller”.

d. In the case of UNOPS, since about 2020, UNOPS has also “a self-imposed managerial and financial crisis, involving allegations of misstatements or direct alleged corruption involving the amount of more than [USD60 million]”. This “scandal ignited a series of internal and external investigations, eventually leading to the dismissal of the UNOPS Deputy Executive Director, [VV, name redacted for privacy reasons] in December 2021, and the order to recover from him the amount of [USD]63,626,806; [followed] by the resignation of [its] very same Director, [GF, name redacted for privacy reasons] in May 2022.

e. As in the case of OICT, the “UNOPS mismanagement crisis did not come as surprise”. Various United Nations “internal control bodies have repeatedly warned UNOPS of the deficiencies of its own control mechanisms, but UNOPS simply ignored those recommendations”.

f. It has therefore been established that if “OICT and UNOPS underwent financial crises, these crises were self-inflicted due to their own negligence or direct willful misconduct”. The “consequences of these mismanagement by the employers cannot and should not be paid by the employee”. These “mismanagement and financial crises led—of course—to money shortfalls and the need to desperately cut expenditures, without following any rational plan”, and the “situation naturally generated rumors and fears that posts would be cut among the staff”.

g. On 10 March 2022, however, “in a Town Hall meeting, [BM], in an attempt to bring some calm to the staff, made [some] clear, express, public,

and recorded promises” regarding OICT not being “in a financial crisis, so there is no risk of losing jobs for anyone”, “there is no risk of job cuts because we don’t have budgetary issues in that front”, “we want to get out of these three months [contracts] and the way to get out of these three months contract is to fund the FA with UNOPS in such a way they get into one year”, “these are things we are discussing with UNOPS ... some of you will be asked to be transferred from UNOPS to [the United Nations International Computing Centre], some will stay in UNOPS”.

h. Contrary to the “express promises, on 29 July 2022, the Applicant was notified of the UNOPS’ decision to ‘abolish’ his post ... that he will be ‘separated from service ... Further... your appointment will not be renewed...’”. The “abolishment of the post is allegedly based on the ‘reduction of OICT support requirements and funding’”.

i. A fixed-term appointment, such as the Applicant’s, carries no expectancy of renewal, “unless there is a legitimate expectation of a renewal or improper motives existed in the decision not to renew the appointment, which taints the decision with illegality” (referring to *Houenou* 2021-UNAT-1091, para. 25). The Appeals Tribunal has held that, “‘legitimate expectations ... that his or her fixed-term contract may be renewed or extended...’ (referring to *Frechon* 2011-UNAT-132, para. 44) are given, for example, when ‘the Administration has made an ‘express promise ... that gives a staff member an expectancy that his or her appointment will be extended (referring to *Ahmed* Judgment No. 2011-UNAT-153, para. 47)’”.

j. BM, as the ASG of CITO, in “an open, public, and recorded (and not-disputed) Town Hall meeting held on [10] March 2022 expressly and concretely stated that ‘there is no risk of losing jobs for anyone’, that ‘message here is that there is no risk of job cuts,’ and that ‘... we want to ... to fund the FA with UNOPS in such a way they get into one year’”. This “sole but crystal-clear statement, which is not contested by the Respondent, would suffice ... to determine the illegality of the decision not to renew the Applicant’s appointment”.

k. The Applicant's employment was with UNOPS and not with the Secretariat. UNOPS is a "self-financing" and "separate and identifiable entity" established by General Assembly decision 48/501 of 19 September 1994. "Thus, it was UNOPS (but not OICT) the entity that hired the Applicant, and consequently UNOPS is legally responsible for paying the Applicant's dues". That "the employer (UNOPS) is responsible for paying the salary is the basic obligation arising out of an employment contract, an obligation that is confirmed by the submission of the contract to the 'UNOPS policies,' and also by express reference in FA stating that 'UNOPS is responsible for ...Human Resources Administration ... payment of salary ... and separation of personnel)[']".

l. The "alleged reason to 'abolish' the Applicant's position is a 'reduction of OICT support requirements and funding'". The "alleged 'reductions of funding' from OICT to UNOPS cannot harm the Applicant's rights under the Letter of appointment and the FA, given that both documents make UNOPS (but not OICT) the 'responsible' for 'paying of salary,' and the 'separation of personnel'".

m. The Appeals Tribunal in *Elmira Ela Banaj 2022-UNAT-120*, paras. 49 and 53, "established that when a staff member has signed a contract with one [United Nations] agency (UNDP in this precedent), but is then assigned to another [United Nations] agency (UNODC), under a Working Arrangement between both agencies establishing that 'All personnel contracts will be administered by UNDP pursuant to the UNDP policies'" (para 49); then, the staff member's "underlying employment relationship was with the UNDP [but not with UNODC], including the setting of and amendments to the Terms of Reference or contents of her job description and similar fundamental incidents of her employment" (para 53).

n. If "UNOPS wanted to abolish the Applicant's post, UNOPS (the employer) should have provided valid reasons related to UNOPS, but not invoking the financial problems of a third party, and agreements to which

the Applicant is foreign. Accordingly, the alleged reasons given by UNOPS are not valid reasons under the UN Staff Regulation 9.3”.

o. Even if it were true, “hypothetically, that the Applicant’s appointment was legally conditioned to the availability of funds from OICT, which [it] is not ... this alleged lack of funding is still not a valid reason as to abolish his contract”. “Again, on [10] March 2022, only four months before the date of the Termination Letter, [BM], the highest authority of the OICT, has expressly assured that ‘... we are not in crisis, we are not in a financial crisis.’ and that ‘we don’t have budgetary issues in that front’”. Having “assured” this, “the Administration is thus now prevented from invoking the exact opposite situation, i.e. that there is a now a financial crisis, as alleged the reason to abolish the Applicant post”.

p. Referring to the “long-standing jurisprudence” of the Appeals Tribunal, and more specifically *Kortes* 2019-UNAT-925 (paras. 15-16), “once the Administration has made a representation, upon which a staff member has reasonably relied, the Administration is then ‘estopped from reneging on its representation’ to the detriment of the staff member”. The “necessary elements pertaining to the estoppel doctrine” were identified therein as follows: “i) a representation was made by one party, (ii) which the other party reasonably relied upon, (iii) to her detriment”.

q. In the present case, “it would be detrimental and inequitable to reverse the determination that there was no financial crisis, just to allege now that there was a financial crisis and a correlated lack of funding as the reason to abolish the Applicant[‘s] post”.

r. The Respondent recognized that “while the Applicant was hire[d] by UNOPS he was assigned to the OICT, [United Nations] Secretariat”. All “the witnesses concord in that UNOPS was in charge of the formal and administrative aspects of the contract, while [the Applicant’s] substantive obligations were owed to OICT, as he reported to an OICT officer, [AM],

sat in an OICT office, and conducted tasks related to the OICT mandates. It is then clear that the Applicant reported both to UNOPS and OICT”.

s. In accordance with “the formal contract the Applicant had signed with UNOPS, UNOPS should have been responsible for the ‘separation of personnel’”. Instead, “however, it was OICT, but not UNOPS, the party that took the substantive decision to abolish his post”. This “decision by OICT to abolish the Applicant’s post determines then the joint liability of both UNOPS and OICT toward the Applicant”.

t. That “the decision to abolish the Applicant’s post was taken by [OICT] is proven by the testimony of [NG], a Senior Portfolio Manager from UNOPS, who declared that “... where part of a project came to an end and, here, for example, OICT said,

We do no longer need UNOPS support in these partnership activities that we have, and therefore, we will not include this in the next project extension or new project and there won't be any funding for that either”. UNOPS had “no role and mandate to continue those activities and also no money”.

u. In “the same vein, [JW], former UNOPS Executive Director replied,

The way it works is that it is true OICT had significant financial problems at that time and that was known—known to me. And therefore, OICT significantly reduced the contract they had with us, and, as a consequence of that, we—we don't—we're not asked to provide the service anymore and then we will cease the service and then that means that if the service was personnel, then regrettably we would have to either not renew or—or in cases where the shortfall is imminent, we will have to foreshorten contracts and would do that.

...

The abolishment of the services—or the stop of the services to OICT was at the request of OICT.

v. Similarly, BM, confirmed that, “Yes, we—we reduced—the agreement with the UNOPS, the financial 20 agreement. That impacted a number of UNOPS resources...”.

w. The “decision to abolish his contract is discriminatory, and has directly violated” staff rule 9.6(e).

x. Despite the Respondent alleging that “the decision to abolish the Applicant’s position, together with that of more than 30 additional UNOPS staff members, [was] based on a ‘reduction of funding’”, it is “not clear why, among more than 4000 UNOPS employees, the Respondent has chosen to abolish only the positions of these 30 persons”. The “criteria established by [staff rule 9.6 were] not followed”.

y. When asked, what were “the criteria utilized by UNOPS to select those 30 staff of around 4,000 around the world”, NG replied that,

The criteria for those 30 were that they were under specific projects with a specific project partner, when the project came to an end, did not extend the project. Just saying, “This project is done.” And so we closed it, including letting people go

...

The process was indeed OICT internally initiated. They had to reduce -- they didn't -- they couldn't afford continuing everything as it was before. They internally reviewed what support requirements to reduce from UNOPS site, and that was communicated to us. That meant that we got a communication that's just like, "In the current FA, these components need to be downsized or eliminated 1 -- 1, 2, 3, 4, 5."

z. NG’s testimony “clearly [shows] that the decision to abolish the positions was taken by OICT and then just ‘communicated to’ UNOPS”. NG concluded by stating.

What I'm trying to say is that there is—two decisions were made. One was on the OICT side regarding what—what support, what scope of support they would like UNOPS to provide to OICT beyond 31st of August. And they made—they applied their conditions to their decision-making, which I was not part of. From the UNOPS point of view, the decision was relatively straightforward because we were informed by the funding source and partner that they no longer require the services, which—for which we only had one resource, beyond 31st of 24 August.

aa. This “strict financial criteria, which directly breached the legal criteria established in [staff rule 9.6(e)] was then confirmed” by JW, who declared that (emphasis in original omitted),

So that—the answer is very easy. That is because—when the funding—the underlying funding and the agreement for the services are ceased or reduced, then there's a corresponding reduction on that contract specifically, and that's how the decision is taken.

bb. BM reconfirmed this when stating that,

Basically, I gave a target to my—the managers that are in different areas because we have UNOPS contracts in -- in different divisions. So I give them the target of reduction that I needed and then—and then they could prioritise themselves where -- which areas of services they could afford to reduce, to not have a great – I mean, the biggest impact in delivering that service [...]

Because if I needed -- just sometimes I needed to reduce \$11 million in terms of expenses, so I gave targets to each vendor—20 per cent, 30 per cent, 40 per cent—depending on the

cc. AM “also confirmed that the criteria to abolish post was based on financial ‘targets’ and ‘core’ vs. ‘non-core’ services, but not mention of the legal criteria established” in staff rule 9.6(e). Specifically, he testified that

... [M]y division was given financial targets to meet with regard to these reductions and then I had to work within an envelope to meet—meet those targets.

So essentially to make those targets, I had to look at the activities within my division that would either be reduced or stopped; that was the only way that we could actually meet those targets. So essentially, the criteria that I used to come to those particular decisions were based on, let's say, what the core activities of the division would be. And the core activities are around the provision—let's say, of operational infrastructure for a global secretariat: the networks that 20 connect the various different parts, the OICT networks, the local area networks, the data centres, the hosting of information and the platforms on which the organisation operates is kind of the core activities.

...

... [T]he activities that are seen as non-core and -- are normally quite vulnerable in these situations.

[Question]. ... So coming back a little bit to what you were saying before, you—you mentioned that when you needed to decide what positions to cut, non-core positions will take priority and you will try to keep the core positions. I understood you correctly?

[AM's answer]. I wouldn't actually say that my decision-making was around positions. My decision-making would be around services.

...

... [A] decision that reducing a particular type of service, reducing the scope of that service, or terminating that service and not doing it anymore, would be the decision and then that information would be transmitted to UNOPS ...

...

... At the end of the day, I'm the one that would be responsible. I would be the one who would be responsible for, let's say, the decisions around that. And then my submission gets forwarded to the CITO, along with the submissions from the other directors, and then those—those, let's say, a final determination is sent out through the CITO's office to UNOPS. So that's—that's basically the process.

dd. UNOPS “is required to ‘give reasons’ for the abolition of the post and the termination of the appointment”. The “alleged reason given by UNOPS is the ‘reduction of funding’ from OICT to UNOPS”, but this is “not a valid reason”.

ee. BM “expressly assured that there was not a financial crisis, and no budgetary issues”. Even if such a crisis existed, it “was not born out of objective or external and unexpected events and irresistible forces, such as a global cash crisis, a war, the sudden reduction of monetary contributions from member states, or the like”. “OICT may be undergoing a financial crisis, but this crisis is not originated from the ‘necessities of service requir[ing] abolition of the post;’ on the contrary, the OICT crisis is self-inflicted”.

ff. BM “was, or should have been, aware of what was the OICT financial situation, since this is one of the main responsibilities of an [Assistant-Secretary-General], and even more since he has been expressly warned by the Financial Controller since February 2021, and this fact is not disputed by the Respondent”. BM, however, “chose to take no action for over a year and a half, he decided to ignore the crisis, to the point he expressly stated that there was no crisis, not budgetary issues ... until it was too late”. “Only on August 2022, after 19 months after the first warning he suddenly decided to take some action; but instead of assuming responsibility, the OICT leadership decided to fire the weakest”.

gg. The “decision to abolish the Applicant’s post is not based on a valid reason, since the shortage of funds was generated by OICT[‘s] own incompetence: it is the leadership who should be held responsible and accountable for this, not the employees”.

hh. The “same is true in case of UNOPS”, which “was the legal and formal employer of the Applicant, underwent also a self-imposed financial crisis, which was established by the [United Nations’] own internal control office and recognized by [JW], former UNOPS Executive Director”. When “asked about reasons of this crisis”, JW replied,

In a nutshell, around that period of time, that means May 2022, the OIOS had finalized their audit of the organization -- or special audit of the organization and they found extreme

irregularities surrounding the use of sub-funds inside 23 UNOPS.

[and that]

... correct, it's around 58 to 60 million -- they were fundamentally given as a loan into companies without any security or anything, and the companies were owned by the same family, although there were six different companies. And I think even to this day, most of the funds are considered lost.

ii. Similarly to “what happened with OICT, various [United Nations] bodies such as the Board of Auditors and the Joint Inspection Unit kept warning UNOPS to adopt measures in order to strengthen and improve UNOPS own internal control mechanisms”. Like OICT, “UNOPS just ignored those warnings. Until it was too late”.

jj. In particular, “the very UNOPS Executive Board in a decision of 2022 [acknowledged] the complete lack of independence of the UNOPS’s internal control mechanisms”. JW confirmed this by declaring that,

What it said was that there were some deficiencies, with which I agree, and the idea was to re-establish connection between the audit unit and the board and to also make sure there was a connection between the Audit Advisory Committee and the board, Executive Board, independent of my role. So that was important. They should have independent access to the board's structure.

So then later, we had additional recommendations because it was very important for me at the time to make sure that the audit functions followed, you know, the independence level 24 or you can say and—and had the capacity to do its job.

...

It's hard for me to say. I—generally speaking, because I cannot speak to this in detail, generally speaking, the unit, the main problem with the unit was its independence from the leadership.

...

But I can see where you're going, but that's—the problem with the investigation entity was that it was not independent of the top management and it was the top 10 management that had signed these loan agreements, which were highly

irregular, 11 in a way. And—but it had nothing to do with the day-to-day work.

kk. When answering the questions from the Respondent, the “witnesses made great efforts to try to explain that [the Applicant’s] position was somehow linked or attached to a ‘budget ledger’ or budget line financed exclusively by OICT project budgets”. The Applicant’s post was, however, “not conditioned or limited to the availability of funds from one particular project, or to the availability of funds in one particular line of the OICT or UNOPS budgets”. No “single rule” exists in the Staff Rules or Financial Rules “establishing that a regular fixed-term appointment should be conditioned to a particular budget line”.

ll. UNOPS and OICT, as the employers, “are responsible and should respond with their entire capital, with the totality of their assets. And they have plenty of money”. BM “publicly recognized ‘... we are not in crisis, we are not in a financial crisis’ and that ‘we don’t have budgetary issues in that front’”. This is “corroborated by” NG, “stating by abolishing [the Applicant’s] position UNOPS saved around ‘a staff position is like probably, [USD]200,000, 300,000 a year’”. When “asked if after around 2022, mid-2022, at the time the contract of [the Applicant] was terminated or not renewed, since that time UNOPS has rehired new staff for their own, he replied”,

Yeah, I mean, UNOPS has for sure hired more people because new projects were signed. I have seen this, including in my portfolio. For example, there is a project, a new one in Helsinki where we had the Futures Lab, so there was new requirements. We advertised, we competitively selected people and we hired.

mm. When NG was asked “how many more people UNOPS hired at that time?”, he replied: “In 2023, I would have to guess, maybe 20 or so”.

nn. UNOPS therefore “decided to terminate 30 contracts, without following any legal criteria, alleging financial problem, just to immediately

afterwards re-hire 20 new additional staff”. If “a big shortfall” had occurred NG responded that “the deficit that would have been caused would have had to be covered by the operational reserve that UNOPS keeps. Like every other [United Nations] agency, the operational reserve of UNOPS was sufficient”.

oo. As related to OICT, AM confirmed that,

Sir, the two programmes that were under my management are still continued with some slight adjustments. Would you confirm that those programmes are still benefiting from additional extra-funding from those partners that I brought in the—in the picture during my four years in the United Nations?

...

There was new partnerships which you'd generated. You were able to increase the funding from certain partners, certain partners then reduced their funding, et cetera. So it's like an ongoing situation. But, yes, I mean, we had partners that contribute[d].

Respondent's submissions

13. The Respondent's submissions may be summarised as follows:
 - a. The evidence “clearly shows that there was a genuine, large scale restructuring due to severe budget cuts, and this resulted in more than thirty (30) UNOPS personnel being separated from service”. Accordingly, the Respondent has with a minimal showing substantiated the lawfulness of the contested decision and the presumption of regularity stands satisfied.
 - b. The abolition of the Applicant's post was “part of a genuine large-scale organizational restructuring due to a budget crisis at ... OICT, which in turn resulted in a reduction in the amount of services that OICT obtained from UNOPS (and pays UNOPS for), which in turn resulted in the abolition of the UNOPS positions (including the post that the Applicant was encumbering) that were established (in the past) to provide the services that

were (now) no longer needed, which in [turn] resulted in the ending of the contracts of the persons encumbering those positions (including the non-renewal of the Applicant's fixed-term appointment)".

c. At the hearing, BM and AM stated that "there was a reduction in the OICT budget, and when deciding what activities to continue and what activities to reduce (so that OICT budget does not exceed its reduced budget), OICT's priority was providing core ICT services to ensure that the [United Nations] Secretariat remains operational, e.g. e-mail, cybersecurity, laptop computers, data centres, servers, networks, and communications (such as the Microsoft Teams platform)". The Applicant stated that "I was not in charge of any maintenance of any information system in the United Nations". The explanations of BM and AM "are not only reasonable, but cogent" as "[n]othing in their explanations is unlawful: they were making decisions in the [United Nations'] best interests in light of the reduced OICT budget".

d. The "OICT decision in turn resulted in UNOPS concluding that the UNOPS post that the Applicant was encumbering (which had been created earlier specifically to provide the services that OICT now no longer sought) was redundant, and had to be abolished". The Applicant testified that "[a]s far as I am aware, the position that I was holding within the UNOPS/OICT financial agreement has been abolished, and since the 1st of September 2022, it seems that there was no new similar position advertised. So as far as I know, I have not been replaced". As NG testified, "From the UNOPS point of view, the decision was relatively straightforward because we were informed by the funding source and partner that they no longer require[d] the services, which—for which we only had one resource" by which he referred to the Applicant. Regarding a vacancy announcement published in August 2023, AM stated that it was for work that was different from that done by the Applicant.

e. The Applicant has not managed to rebut the minimal showing of the presumption of regularity with clear and convincing evidence.

f. As otherwise argued by the Applicant, the present case is not about the “Respondent failing to pay the Applicant’s salary during the period of his letter of appointment (the Respondent paid the Applicant’s salary and benefits in full throughout the period of the letter of appointment), but rather the Respondent’s decision not to renew the Applicant’s letter of appointment when it expired [on] 31 August 2022”. In effect, if following the Applicant’s argument, “the Administration must [then] pay the Applicant forever, even if there is no longer any need for the services which the Applicant was recruited to perform”.

g. The Applicant’s argument that the reason provided for the abolition of his post was not valid, is flawed—the Applicant “was hired by UNOPS specifically to provide specific services to OICT; once OICT no longer sought those services from UNOPS, the post that the Applicant was encumbering was redundant, and had to be abolished”.

h. The argument of the Applicant that “[h]aving assured that there was no crisis, the Administration is now estopped from invoking a crisis”, is groundless. The Appeals Tribunal has “confirmed that a crucial element of estoppel is that there must be detrimental reliance (the making of the statement by the Administration and the belief in that statement by a staff member is not enough)” referring to *Cranfield* 2013-UNAT-367, para. 49. At the hearing, the Applicant stated that he did not watch the town hall meeting, and that “[he] was not in a position to take any action or to react to what [BM]] stated in the town halls”. There was therefore no reliance. Also, “a statement of an official of another [United Nations] entity (in this case, the [United Nations Secretariat]) cannot create legal obligations on the part of UNOPS”.

i. The Applicant contends that “[i]f there was a financial crisis, this was a self-inflicted crisis due to negligence or corruption”. This “argument assumes that OICT’s spending in one period reduces the funds available in a subsequent period. However, this assumption is wrong”. At the hearing, BM explained that, “If the OICT does not spend the allocated budget in the corresponding year, the balance of the unspent budget goes back to the member states. So we have to return the funds to the member states. So we are not allowed to overspend, but if we underspend, we are not allowed to carry the savings to the following fiscal year, we have to return funds to the member states”. BM “stated that this was a rule established by the General Assembly”.

j. The alleged mismanagement of USD60 million dollars in UNOPS and withholding of funds from major donors did not impact the Applicant’s post according to JW and NG. JW explained that “if UNOPS had not lost the US\$63 million, UNOPS would have had to return said amount to the donors and partners ([JW] had actually returned millions of excess UNOPS funds to donors and partners)”. NG stated that “projects will have to be implemented nevertheless because UNOPS has committed to doing so, and the management budget shortfall cannot be covered by taking money from the project budgets, but would instead have to be covered by UNOPS operational reserves”.

k. In *Toure* 2016-UNAT-660, the Appeals Tribunal held that “the Administration may abolish a post that is no longer needed (and decide not to renew a contract) even if there are funds available to pay for said post”. Further, even “if *Toure* is disregarded: requiring the Administration to extend unnecessary contracts so long as there is funding available is contrary to the well-established principle that the Administration has a broad discretion to restructure”.

l. Since “the Applicant was not at the meeting, the Applicant could not have been promised anything”. Even “if the Applicant’s absence is disregarded: the statements at the 10 March 2022 meeting were superseded by what [BM] stated in a subsequent town hall of 9 June 2022, including “...my dream that I shared with you in—I think it was April or earlier in the year—was shattered by the budget deficit situation that we face in 2022, so therefore some measures need to be taken”.

m. As the Appeals Tribunal has “confirmed that changed (financial) circumstances (subsequent to the act that a staff member claims created an expectancy of renewal) mean that there can be no expectancy of renewal (*Houenou* 2021-UNAT-1091 (see [especially]. para 31)), the Applicant’s argument must be dismissed. Even if *Houenou* is “disregarded: a statement of an official of another [United Nations] entity (in this case, the [United Nations] Secretariat [footnote omitted]) cannot create legal obligations on the part of UNOPS”. The Dispute Tribunal has also “dismissed two applications filed by two UNOPS staff members seeking to rely on the same statements: *Delgado* UNDT/2023/094 (see paras. 30-36) and *Fernandez* UNDT/2023/106 (see paras. 30-36)”.

Consideration

Preliminary

14. In *Nastase* 2023-UNAT-1367, the Appeals Tribunal underscored the law and the scope of judicial review in cases, like the present one, regarding abolition of post and non-renewal of a fixed-term appointment, which are two related but separate administrative decisions. The decision of separation from service, is, on the other hand, solely a consequence of the appointment not being renewed and therefore not an independently reviewable decision. Therefore, the contested decisions for review in this application are the decision to abolish the Applicant’s post leading to the second decision not to renew his fixed term appointment (hereinafter referred to as the contested decisions).

The issue

15. The issue for the Tribunal's consideration is whether the abolishment of the Applicant's post and subsequent separation from service, due to non-renewal of his appointment was unlawful, unreasonable, unfair or discriminatory.

16. The Tribunal addresses the issue based on the relevant legal framework and an analysis of the parties' pleadings, relevant evidence given at trial and relevant closing submissions.

17. The relevant legal framework governing the grounds of challenge, namely (a) legitimate expectations, (b) lack of funding, (c) estoppel, (d) discrimination and (e) payment of salaries and compensation, is outlined below, after which the law and jurisprudence on the following general principles is presented, (f) the role of the Dispute Tribunal in judicial review, (g) presumption of regularity, and (h) non-renewal of fixed-term appointment.

Legal framework

18. The starting point is to understand the law governing organizational restructuring due to operational requirements. The law is settled that the Administration has broad discretion to reorganize its operations and departments to meet changing needs and economic realities (see, *Timothy* 2018-UNAT-847, para. 25 and *Russo-Got* 2021-UNAT-1090, para. 29).

19. This position is also couched in the following manner (see, *Hossain* 2023-UNAT-1359, para. 51, citing *Nouinou* 2019-UNAT-902, para. 34):

[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.

20. Bearing this in mind, this Tribunal:

... should not interfere with an organizational restructuring exercise unless there is evidence that the discretion was exercised unreasonably, unlawfully or without due process. In this regard there is always a presumption that effective official acts have been regularly performed. The presumption of regularity is however rebuttable. If the Administration is able to minimally show that the staff member was given full and fair consideration, then the evidentiary burden shifts to the staff member to show that he or she was subject to an act of unreasonableness or unfairness. [See, *Nastase* 2023-UNAT-1367, para. 25, citing *Rolland* 2011-UNAT-122, para. 26].

21. It follows from the above jurisprudence that an organization has the power to restructure its departments or units to meet its operational requirements. In doing so, it has an obligation to act within the law. A staff member may therefore challenge the decision arising from a restructuring if it can be shown that it was unlawful. There are several grounds for challenging a decision resulting from a restructuring process. Some of those grounds have been raised by the Applicant in the case at bar, as follows:

(a) Legitimate expectation

22. The Applicant alleges that the Administration had made express promises to renew his fixed-term appointment thereby raising a legitimate expectation in him that his job was safe. The established position of the law on the matter is (see, *Hossain*, para. 53, citing *Toure* 2016-UNAT-660, para. 25, *He* 2018-UNAT-825, para. 41, *Muwambi* 2017-UNAT-780, para. 25, *Ncube* 2017-UNAT-721, para. 15, *Igbinedion* 2014-UNAT-411, para. 26, and see also *Ahmed* 2011-UNAT-153, para. 47):

... 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, but also that this promise at least be in writing* [emphasis added].

23. UNAT has also found that, based on the circumstances of a case, an express promise of contract renewal made to a staff member is not an absolute necessity for a legitimate expectation to be created (see, *Loose* 2020-UNAT-1043).

(b) Lack of funding

24. The Appeals Tribunal found in *Nastase* that lack of funding would be an operational requirement necessitating an organizational restructuring (similarly, see, the Appeals Tribunal in *Nouinou, Abdeljalil* 2019-UNAT-960, *Abu Ouda* et al. 2020-UNAT-1018, and *Bantan Nugroho* 2020-UNAT-1042).

(c) Estoppel

25. A staff member may plead the doctrine of estoppel where the Administration is alleged to have made a representation which a staff member reasonably relied upon to his/her detriment. Since this is an equitable remedy, a party relying on it must come to the Tribunal with clean hands (see, *Kortes* 2019-UNAT-925, para. 38).

(d) Discrimination

26. Where discrimination is alleged, the onus is on the staff member to substantiate the allegation with evidence. Mere speculation is not enough (see, *Kisia* 2020-UNAT-1049, para. 38, *Najjar* 2021-UNAT-1084, para. 34, and *Azzouni* 2010-UNAT-081, para. 35).

(e) Payment of salaries and compensation

27. The letter of appointment sets forth the “terms and conditions of the employment contract” (see, *Slade* 2014-UNAT-463, para. 26). This includes the salaries and compensation of the staff member. The organization, which offers a staff member a letter of appointment, is therefore also responsible for payment of the salaries and compensation.

(f) Role of the Dispute Tribunal in judicial review

28. The role of this Tribunal in reviewing the administrative decision is enunciated in *Sanwidi* 2010-UNAT-084, para. 42, holding that:

... In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

(g) Presumption of regularity

29. When exercising its role, the Tribunal understands that there is always a presumption that official acts have been regularly performed. If the Administration is able to minimally show that the staff member was given full and fair consideration, the burden shifts to the staff member to show that he or she was subject to an act of unlawfulness, unreasonableness or unfairness. The staff member must rebut the presumption of regularity through clear and convincing evidence. (See, for instance, the Appeals Tribunal in *Nastase*, para. 25, *Rolland* 2011-UNAT-122, para. 26, and *Lemonnier* 2017-UNAT-762, para. 32).

(h) Non-renewal of fixed-term appointments

30. Regarding a review of a case concerning non-renewal of a fixed-term appointment, the law is clear under staff regulation 4.5(c) and staff rule 4.13(c), providing that a fixed-term appointment does not carry any expectancy of renewal. This legal position was expressly put to the Applicant in his letter of appointment, stating that:

This appointment does not carry any expectancy, legal or otherwise, of renewal or conversion to any other type of appointment, irrespective of the length of service. This appointment shall expire automatically and without notice on the expiration date specified herein, subject to any subsequent agreement of the parties to the contrary. Separation as a result of the expiration of any such appointment shall not be regarded as a termination within the meaning of the [United Nations] Staff Regulations and Staff Rules...

Under the presumption of regularity, has the Respondent demonstrated the lawfulness of the contested decisions with a minimal showing?

31. In addressing this question, the Tribunal is guided by the specific contentious issues outlined above and discussed below.

The Administration made express promises of renewal, giving rise to a legitimate expectation

32. According to the undisputed facts, BM (the ASG/OICT) made the following statements at the 10 March 2022 townhall meeting:

... to address the issue of contracts of UNOPS ... the FA with UNOPS that are being renewed at a very short period of time ... this is disruptive ...

... we need to adjust a couple of variables, one of them is moving to service management type of contracts with the entity ...

... discussions which are taking place already, discussions with UNICC to see how to transfer some of the contract services with the colleagues which are involved ...

... we are not in crisis, we are not in a financial crisis, so there is no risk of losing jobs for anyone ...

... the proposed cut did not go through ... so we kept the level budget ...

... So, the question is how to move for the perception of staff ... type of contract service management ... so some of you will be approached by UNOPS and UNICC ... but the message here is that there is that there is no risk of job cuts because we don't have budgetary issues in that front ...

... we want to get out of these three months [contracts] and the way to get out of these three months contract is to fund the FA with UNOPS in such a way they get into one year ...

... these are things we are discussing with UNOPS ... some of you will be asked to be transferred from UNOPS to [the United Nations International Computing Centre], some will stay in UNOPS ...

33. The Respondent asked the witness whether: (a) BM was a UNOPS staff member, and the witness answered in the negative; (b) BM had delegated authority from UNOPS, and the answer was negative; and (c) BM had any authority to make any statements on behalf of UNOPS, and the response was still negative.

34. The Respondent showed through this witness that the statements made on 10 March 2022, which the Applicant relied upon as express promise, did not have any legal effect, since they were made by an official, other than an UNOPS official, the Applicant's employer.

35. It is clear that since BM did not have the delegated authority to speak on the renewal of the Applicant's fixed-term appointment, his statements, however construed by the Applicant, were ultra vires, made in error and did not bind UNOPS. (See, *Houenou* 2021-UNAT-1091, para. 26). In order to be binding the express promise or circumstances leading to a legitimate expectation should originate from an authorized official (see, for instance, *Houenou*, para. 26 and *Kazazi* 2015-UNAT-557, para. 35).

Lack of funding from OICT is not a valid reason to terminate an UNOPS appointment

36. The Respondent's witness, NG, a Senior Portfolio Manager for UNOPS New York Portfolio's Office, was the relevant witness who shed light on this ground of review.

37. The crux of NG's testimony is that in his position within UNOPS, he supported a large portfolio of projects with various partners, including OICT. The projects were implemented through UNOPS contracted personnel and an annual budget. He

was responsible for delivery of project activities toward specifically agreed project targets. A project was always time-bound, with a specific start and end date.

38. He informed the Tribunal that:

Over the past few years, OICT had repeatedly communicated to UNOPS that they were experiencing difficulties in securing the budget necessary to maintain the scope of support requirements through UNOPS and other partners. This had already led, in part, to “rationalization” exercises in 2019-2021 when OICT had to prioritize services and activities and the means to implement them and then requested a reduced scope of support from UNOPS as a consequence, leading to non-continuation of various project streams, the abolishment of the associated UNOPS posts that were no longer required and funded, and the non-renewal of contracts of incumbents of such affected project positions.

...

[...] OICT/Operational Support Division’s decision was explained to be due to reduced availability of standard support account and missions’ budgets and to OICT’s preference to prioritize the use of such funding on OICT core operational activities rather than (non-core operational) activities around partnerships.

39. The above testimony was corroborated by another witness of the Respondent, AM, former Director of Operations Support in OICT. The essence of his evidence relevant to this issue is summarized in the below abstracts from his written witness statement dated 1 February 2024:

UNOPS provides OICT with specified technology support as defined in Financial Agreements agreed by both parties. The objectives and scope of the support is determined by OICT and included in Financial Agreements between OICT and UNOPS. UNOPS then provides technical support as requested in this Financial Agreement through UNOPS personnel. As Director of Operations Support, I performed the role of UN Secretariat Program Manager for the Financial Agreements ...

[The OICT] has implemented several cost reduction plans from 2021 to date. OICT has seen a reduction in its income in recent years as the number and size of Peacekeeping Missions have declined ... These cost reductions [in OICT] have resulted in reductions in the two major staffing resource suppliers to OICT, a commercial company and UNOPS.

40. The Respondent concluded that lack of funding from OICT impacted UNOPS appointments on projects because “OICT’s budget was reduced in 2022, and that if OICT did not make any changes, it would overspend its reduced budget by US\$3-4 million. To avoid a budget deficit situation, [BM] instructed his team to make reductions. These reductions meant cutting down on services procured from UNOPS and other vendors.

Having been assured that there was no financial crisis, the Administration is estopped from invoking a financial crisis

41. The Respondent denied that any representation was made to the Applicant that he relied upon to his detriment. In this judgment, the Respondent through BM showed that if any statements were made, they were not made by UNOPS and further, that the Applicant did not provide evidence that he relied upon the statements to his detriment.

Discrimination and *ulterior* motive

42. According to the jurisprudence of the Appeals Tribunal, as cited above (*Kisia, Najjar, and Azzouni*), the onus of proving discrimination and/or ulterior motive is on the staff member making the allegation. The evidence in the case at bar does not disclose that this was the case. AM clarified on whether the then on-going disciplinary processes connected to media reports against the Applicant had influenced the contested decisions. AM asserted that “... it [was] the service that [was] being reduced ... whatever media activity that was going on, did not have any impact on the decision that I was making”.

UNOPS, the actual and legal employer, shall pay salaries and compensation

43. The Tribunal finds that of all the witnesses that testified at the hearing, it was the Applicant’s witness, JW, who was the acting Executive Director of UNOPS from May 2022, whose evidence was relevant to this issue.

44. The Applicant alleges that UNOPS and not OICT was obliged to pay his salaries, compensation and indemnities. Therefore, the financial crisis in OICT should not have resulted in not renewing his fixed-term appointment with UNOPS.

The Respondent clarified through JW that:

If you are under a UNOPS contract and—the money is drying up, and—then non-renewal is within [my—our] authority. We have no authority to continue the contract. UNOPS has no legal basis for a staffing table. In other words, we don't have other funds than the funds that are provided to us by our clients.

Under the presumption of regularity, the Tribunal's overall finding on the Respondent's evidence

45. The Tribunal finds on the facts that the Respondent has discharged the evidentiary burden of minimal showing that the decisions regarding abolition of the Applicant's post leading to non-renewal of his fixed-term appointment and separation were lawful. The witnesses were credible, their evidence was cogent, reliable, consistent and corroborative. It was not contradicted in any meaningful manner as will be shown below.

Shifting the burden to the Applicant to show through clear and convincing evidence that the contested decisions were unlawful

46. The Tribunal rounds up the allegations raised by the Applicant, in the subheadings below, and analyzes how the Applicant's testimony failed to reach the clear and convincing evidence threshold under the presumption of regularity principle, in *Nastase*, *Rolland*, and *Lemonnier* (as cited above).

The Applicant had a legitimate expectation of renewal

47. The Applicant has not adduced any written material in which an express promise to renew his contract was made in order to substantiate his allegation that he had a legitimate expectation of renewal. He did not contradict BM that he was not a relevant decision-maker in UNOPS.

48. Even in the absence of a written promise, the Applicant was not able to show that the circumstances under which the alleged express promise was made supports a finding of legitimate expectation. He did not dispute the fact that BM's statements were unwarranted and of no legal effect considering that he had no authority to speak for UNOPS.

49. Further, the circumstances under which the statements were made, that is, made verbally and generally at a town hall meeting targeting not any individual staff member, howsoever construed, do not constitute a firm commitment of contract renewal, (see, *Toure* at para. 25 and *Loose* is distinguishable).

50. Finally, the Applicant is precluded from drawing any conclusion of legitimate expectation from utterances made by an OICT staff member when it is his case that his employer was UNOPS.

The non-renewal decision was arbitrary and motivated by bias, prejudice or improper motive

51. The Applicant inferred that because UNOPS would not let him negotiate with Member States to raise funds for the renewal of his post, therefore the contested decisions were arbitrary and made in retaliation due to the disciplinary process he was going through. The Applicant was not able to substantiate the inference with cogent evidence in any form.

52. If retaliation was indeed the motive, the Applicant ought to have invoked the management process for dealing with retaliation stipulated in UNOPS's relevant regulatory framework, namely, UNOPS's Operational Instruction Ref. OI.Ethics.2022.01 (Protection against Retaliation), effective 19 August 2022 which superseded Operational Instruction Ref. OI.Ethics.2018.01 of 22 February 2018 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations or other fact-finding activities). The record has no evidence that such processes were initiated.

53. It is also noted that AM asserted that his decision to discontinue the Applicant's scope of work was necessitated by the operational requirements of OICT. He did not target an individual but considered posts that were not required. His decision was not influenced by any external factor. The Applicant did not offer any satisfactory evidence to the contrary. The assumption that he may have been targeted due to the investigations around him was speculative.

54. Furthermore, in examination-in-chief, his witness, BM, as reproduced by the Applicant "emphasized" that, "Yes, we—we reduced—the agreement with the UNOPS, the financial agreement. That impacted a number of UNOPS resources...". This assertion is consistent with the Respondent's case that the reason for the impugned administrative decision was valid. The Tribunal finds that this reduction was the catalyst of the restructuring in UNOPS leading to the abolition of the Applicant's unique post whose services were no longer procured by OICT.

55. The Applicant thought there was a link between the contested decisions and the disciplinary process. He said:

... I mean, to explain or to justify that—those facts are completely linked. But it's only my opinion and I leave it to the Tribunal to make its own—its own opinion about that.

56. In light of the jurisprudence on the role of this Tribunal in judicial review as quoted above, it should be added that the Tribunal does not operate on an opinion because an opinion is subjective. The Tribunal is guided by only relevant facts and not opinions.

Violation of staff regulation 9.3 and staff rule 9.6(e)

57. The Applicant further argued that the decision to abolish his post violated staff regulation 9.3 and staff rule 9.6(e). This is not correct. A separation after the expiry of a fixed-term appointment is not a termination under the staff rules and regulations. Staff regulation 9.3 and staff rule 9.6(e) apply only to termination of contracts and not separation due to effluxion of time. For instance, a termination occurs where a fixed-term appointment is discontinued before its expiry date due to operational requirements of the Administration. In this case, the fixed-term

appointment had run its course and ended due to effluxion of time as determined by the project requirements.

Satisfactory performance

58. Throughout his testimony, the Applicant was not able to show how his satisfactory performance, honesty, good negotiating and fund-raising skills were relevant factors for the renewal of his fixed-term appointment under the circumstances leading to his separation. His “hope” that “if there is a financial crisis ... you are going to select people who have less impact than ... me” is misplaced. It is misplaced because the Respondent explained that the Applicant held a unique post encumbered only by him. There was nobody, let alone with less impact to select.

59. The letter of appointment is clear that as a holder of a fixed-term appointment, the Applicant’s services were tied to the contract duration. In cases where his appointment was renewed, there was evidence of existence of three enabling factors, namely (a) need for services, (b) funding for the services, and (c) satisfactory performance.

60. The Applicant has not managed to show that his services were required by UNOPS. The four witnesses that testified were unanimous in their testimony that the Applicant’s unique post of Strategic Partnerships and Technology Innovation Officer was abolished due to the reduction of OICT support requirements from and funding to UNOPS.

61. It follows that if the services were no longer required due to operational needs of OICT, UNOPS no longer had work to assign to the post. Satisfactory performance, honesty and other good attributes were not the only relevant factors for a renewal of the fixed-term appointment, see generally, *Abu Ouda* et al, cited above at para. 28.

Abolition of post not genuine and lack of funds not valid reason

62. The Applicant did not adduce evidence in the form of a name or advertisement to show that another individual was offered his post after his separation. He informed the Tribunal that he was in touch with former colleagues of UNOPS who were sharing information with him. These colleagues would have shared such crucial information with him if it existed.

63. Similarly, the Applicant's argument that Member States continued to fund his programmes and that "his" two programmes are still running is not conclusive evidence that his post was reinstated. According to the Respondent's undisputed evidence, the abolition of the post followed a genuine restructuring process due to the Applicant's services no longer being required and lack of funds. Both are valid reasons for restructuring, see, Appeals Tribunal jurisprudence in *Hossain* and *Nouinou* and also *Abu Ouda* et al, para. 29 and *Abdeljalil*, para. 31 (as quoted above).

Mismanagement of funds

64. The Applicant failed to show the Tribunal that funds earmarked for his post were mismanaged through what he termed fraudulent, criminal, corrupt or negligent actions of the Administration's staff members. He did not make any cogent connection between the funds' alleged mismanagement and the decisions to abolish his post and not to renew his fixed-term appointment. His narrative, in this regard, was speculative and without any probative value to his case. It was an irrelevant factor. The Applicant could have addressed the issue of whether peacekeeping missions where his services were required were indeed reduced thereby affecting the support of the United Nations to these missions. The Applicant did not seem to challenge this valid contributing factor to the dwindling of funds.

Discrimination

65. Furthermore, the Applicant has not cited a single ground for the assertion that he or any other staff member affected by the restructuring was discriminated against. The fact that the Applicant was not informed or was not aware of how his

post was selected for abolition is not in and of itself enough to prove discrimination. It is well-established that a staff member alleging discrimination bears the burden of proving the ground and circumstances of discrimination. It is therefore not enough to merely make an allegation of discrimination without substantiating it (see above, for instance, *Kisia, Najjar, and Azzouni*).

66. It is on record that on 29 June 2022, the Applicant had a meeting with the Senior Portfolio Manager and the Senior Programme Manager at which he was informed of the impending decision to abolish his post due to support requirements of OICT and funding. This fact was not contradicted.

Disciplinary processes

67. Further there is no correlation between the Applicant's disciplinary processes and the non-renewal of his fixed-term appointment. The Applicant assumes that his separation was connected to the investigations but has not given any tangible evidence to establish a connection. The Applicant's allegation on this matter is based on his opinion and not facts.

Estoppel

68. The Applicant's assertions that the Respondent made representations that he reasonably relied upon and turned out to be detrimental to him were not substantiated to the requisite evidentiary standards. The elements of the doctrine of estoppel have not been fulfilled. For example, the Applicant stated that after he heard about BM's statement of 10 March 2022 assuring staff members that there was no financial crisis, he did not do anything in reliance upon the statement. He said he did not have his official laptop to access UMOJA (the Secretariat's online platform for administrative matters). The Tribunal does not accept this reasoning, because the record shows that during the disciplinary process, the Applicant was communicating using his "private mailbox" with his Director, AK (name redacted for privacy reasons) on work-related matters.

69. In *Bah* 2024-UNAT-1437, para. 59, the Appeals Tribunal has reiterated that (quoting *Nguyen* 2023-UNAT-1347, paras. 147-148):

... [W]here a staff member claims to have acted upon a misrepresentation to his or her prejudice, such a claim is akin to one of estoppel, with the burden resting on the staff member to produce evidence that the misrepresentation was made and acted upon to his or her prejudice.

70. The Tribunal does not find that the Applicant has discharged the burden of proof to establish estoppel.

71. Accordingly, after examining the Applicant's and his witnesses' testimonies, the Tribunal is not convinced that the Applicant has made a clear and convincing case to rebut the presumption that the abolition of his post leading to the non-renewal of his fixed-term appointment and eventual separation was lawful. Consequently, the application must fail.

Conclusion

72. The application is dismissed in its entirety.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 30th day of September 2024

Entered in the Register on this 30th day of September 2024

(Signed)

Isaac Endeley, Registrar, New York