

Judgment No. 2023-UNAT-1404



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JUDGE ABDELMOHSEN SHEHA , PRESIDING .

1. Mr. Alan George Blythe, Principal Finance Officer (PFO) in the Office of Programme Planning Finance and Budget (OPPFB), Department of Management, Strategy, Policy and Compliance (DMSPC) at the time of filing his application, contested a decision not to select him for the post of Secretary of the Board of the United Nations Joint Staff Pension Fund (Pension Fund) (contested non-selection decision), and a subsequent decision to reassign him to the temporary post of PFO at the DMSPC (contested reassignment decision).
2. By Judgment No. UNDT/2022/120, the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) dismissed the application (impugned Judgment).<sup>1</sup>
3. Mr. Blythe lodged an appeal of the impugned Judgment with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT).
4. For the reasons set out below, the Appeals Tribunal grants the appeal in part, modifies the impugned Judgment, and grants compensation for moral damages.

#### Facts and Procedure

5. Mr. Blythe is a current staff member of the Pension Fund.<sup>2</sup> At the time of issuance of the impugned Judgment, he held a permanent appointment in the Secretariat of the United Nations.<sup>3</sup>

On 3 November 2002, he joined (em)6.3 (b)11.4 (er)67eomU.7 (n)6..7 (i)28 (so)-1.7 (n)6 d[(F)3.5 (u)1.7 (n)6d9 (u)

would be temporarily reassigned to the position of Secretary of the Board until a permanent selection was done.<sup>4</sup>

7. Mr. Blythe relocated to New York and undertook his temporary assignment as M .h( .001 0 Td()9.58 (m)

his claims in relation to the 30 December 2019 decisions are not receivable and cannot be reviewed further as a ground for invoking the unlawfulness of the subsequent contested decisions.

14. Turning to the contested non-selection decision, the UNDT found that following Mr. Blythe's application for the post of Secretary of the Board, the Succession Planning Committee had recommended him for further consideration of the Pension Board, along with three other shortlisted candidates.<sup>11</sup> On 9 July 2020, each of the four shortlisted candidates participated in an interview with the Pension Board. On 20 July 2020, at the sixty-seventh session of the Pension Board, the four candidates, including Mr. Blythe, made a presentation and responded to questions from the Pension Board. After consideration of the candidates' presentations, documented experience, and discussions within the Constituent Groups (Governing Bodies, Executive Heads, and Participants), the Pension Board decided by consensus to recommend another candidate to the Secretary-General for selection.

15. The UNDT noted that the decision to "re-design" and "advertise" the post was the result of General Assembly resolution 74/263 that was not reviewable.<sup>12</sup> In addition, the Staff Rules addressing the retention of staff<sup>13</sup> are not applicable to Mr. Blythe's situation as his appointment was not terminated. Furthermore, there has been no abolition of a post or reduction of staff at the Pension Fund. The post that funded his prior position was redeployed, not abolished. He had no right to be offered the position without a competitive recruitment process.

16. The UNDT found no basis for Mr. Blythe's suggestion that internal candidates enjoyed priority for selection under the legal framework.<sup>14</sup> He does not demonstrate, nor even allege that the selected candidate did not meet the requisite qualification for the position. Mr. Blythe may indeed have had relevant experience for the D-1 position; however, it is within the discretion of the Administration to select the candidate that was found to be the most suitable for the position.

17. The UNDT considered the evidentiary weight of an e-mail from a Mr. J., regarding the recruitment exercise, to be very low.<sup>15</sup> The e-mail was very short and cryptic, sent in a private,

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<sup>11</sup> Impugned Judgment, para. 36.

<sup>12</sup> *Ibid.*, para. 39.

<sup>13</sup> The UNDT cited Staff Rule 9.6(e) and Staff Rule 13.1(d).

<sup>14</sup> Impugned Judgment, para. 48.

<sup>15</sup> *Ibid.*, paras. 50-51. The UNDT referred to a personal two-line e-mail from Mr. J. who served as First Vice-Chair of the Board, representing the Participants' Representatives Constituency Group, from July 2020 to July 2021, stating the following: "We should chat sometime. Clearly, knowing something about the Fund—almost anything—could not have been a factor in the selection process".

personal exchange and provided a personal opinion without any context. Mr. J. was not acting in his official capacity when sending it and did not have authority to act officially on behalf of the Pension Board. The e-mail has no probative value nor any relevance. Mr. Blythe has presented no evidence of improper motive. He was afforded full and fair consideration and the non-selection decision was lawful.

18. Concerning the reassignment decision, the UNDT noted that Mr. Blythe did not dispute that he could successfully fulfill the responsibilities of the PFO position during the project's current phase and that he had the requisite professional certifications, accounting, leadership, and policy skills, and experience with International Public Sector Accounting Standards (IPSAS).<sup>16</sup> The fact that he had expertise in the Pension Fund does not negate that his professional skills are transferable to other roles outside of the Pension Fund, especially since there was no position at the D-1 level in the Pension Fund. The UNDT further held that the reassignment had been made in good faith.

*Procedure before the Appeals Tribunal*

19. On 9 January 2023, Mr. Blythe filed an appeal of the impugned Judgment, to which the Secretary-General filed an answer on 10 March 2023.

Submissions

Appellant's Appeal

20. Mr. Blythe requests that the Appeals Tribunal rescind the contested decisions of non-selection and, implicitly,<sup>17</sup> of the subsequent reassignment, or, alternatively, order compensation in lieu of rescission in the amount of two years' net base salary and compensation for material and moral damage in the amount of two years' net base salary.

21. Regarding the 30 December 2019 decisions, he contends that the UNDT confused receivability and relevance by refusing to examine them. The procedural irregularity of those decisions led to his subsequent relocation, and they are relevant.

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<sup>16</sup> Impugned Judgment, para. 62.

<sup>17</sup> Although Mr. Blythe states that he requests the rescission of the "selection decision", we understand from his submissions in the appeal brief that he appeals the impugned Judgment in respect of both the non-

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process for the new position of Secretary of the Board, and he failed to timely request management evaluation of those decisions.

27. The Secretary-General argues that the UNDT correctly found that the non-selection decision was lawful. On appeal, Mr. Blythe merely repeats his argument made before the UNDT. The Report of the Pension Fund submitted to the General Assembly of 2022 (A/77/4) (11 de-4.1

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what is in fact being contested and subject to judicial review, which could lead to grant, or not to grant, the requested judgment.

35. In exercising its power to identify the impugned or contested decision(s), the Tribunal examines the different elements of the Application.<sup>21</sup> A

therefore agree with the Secretary-General that “[t]he Appellant’s characterizations are not ‘facts’ but allegations of unlawfulness of administrative decisions”.<sup>28</sup> Thus, we find that the UNDT’s determination in this regard relied on verifiable legal and factual elements and was made within its discretionary power.

39. The Appellant’s contention that the Dispute Tribunal erred when it “claimed (...) that [he] failed to address the Respondent’s arguments on receivability, whereas [he] addressed them in detail in his [response to Order No. 062(NY/2022)]” is also without merit.<sup>29</sup>

40. In his response to Order No. 062, the Appellant made exclusive references to General Assembly resolution 74/263.<sup>30</sup> The response did not contain any information addressing the issue of receivability of the specific decisions of 30 December 2019. Therefore, the UNDT did not err when it considered that the Appellant failed to address the Respondent’s arguments on receivability.<sup>31</sup>

*II. Whether the UNDT erred in fact or in law in finding the non-selection decision lawful*

41. In the impugned Judgment, the UNDT affirmed the lawfulness of the 28 July 2020 decision not to select the Appellant for the position of Secretary of the Board. The Appellant provides two main arguments supporting his contention that the UNDT erred in fact and in law in this regard.

42. The first of these is that the UNDT erred in fact in finding that the Appellant had not demonstrated a sufficient interest in the position of Secretary of the Board. The UNDT found that the Appellant had demonstrated a sufficient interest in the position of Secretary of the Board because he had been a member of the Board for a significant period of time and had been involved in the work of the Board. The UNDT found that the Appellant had demonstrated a sufficient interest in the position of Secretary of the Board because he had been a member of the Board for a significant period of time and had been involved in the work of the Board.

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administrative decision implementing it.<sup>39</sup> As we noted before, this distinction is important and entails legal consequences in terms of reviewability. Therefore, the UNDT, having refrained from examining the individual administrative decision of holding a competitive selection exercise for the position of Secretary of the Board, failed to exercise the jurisdiction vested in it, and erred in fact and in law.

50. For the sake of judicial economy, we shall respond to this challenge on the merits without remand.

51. The question is on what basis the Administration decided to conduct a competitive exercise to fill the position of Secretary of the Board while the position was encumbered by the Appellant.

52. In its decision to hold a competitive examination, the Administration relied on General Assembly resolution 74/263. In that resolution 74/263 on the agenda item “Proposed programme budget for 2020”, the United Nations General Assembly, in relevant part, stated  
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Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations”.

60. The reading of Staff Regulation 4.4 in line with Article 101(3) of the Charter means that internal candidates must be allowed to apply for vacancies without any disadvantage during the selection process. Their applications must be fully considered by the Administration to verify if they have the requisite qualifications and experience, and potentially to select and appoint them if they are found to be the most suitable for the position.

61. In this regard, we recall that the Appeals Tribunal has constantly held that 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:<sup>45</sup>

(...) There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant’s candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

62. To assess whether an internal candidate received the fullest regard in terms of Staff Regulation 4.4, the Tribunal reviews the whole selection process (o)-12.435 0 Td( 4-3.1 (9w)-6. 0 Td( 0 10 Td[v.

be made.<sup>48</sup> Therefore, the fullest regard had been effectively given to the Appellant during these steps.

64. However, the fundamental question related to the lawfulness of the contested non-selection decision

preferred criteria or their application.<sup>54</sup> However, for the sake of reasonableness, fairness and transparency,



70. In light of the foregoing, we find no reason to review the other contentions raised by the Appellant regarding the unlawfulness of the non-selection decision.

*In-lieu compensation*

71. As we have not rescinded the contested non-selection decision pursuant to Article 9(1)(a), we do not award compensation in lieu as required by this Article. In any case, we are not satisfied that the loss of the favorable

*III. Whether the UNDT erred in fact or in law in finding the reassignment decision lawful*

74. In the impugned Judgment, the UNDT affirmed the lawfulness of the 3 August 2020 decision to reassign the Appellant to the temporary position of PFO, at the D-1 level, in the OPPFB, DMSPC for a period of one year, effective 1 September 2020.

75. The Appellant contends that the UNDT committed both an error of fact and of law in finding that his temporary position at the DMSPC was commensurate with his previous experience and skills.<sup>60</sup> He also submits that the UNDT committed an error of law in affirming the fairness

has the burden of satisfying the Appeals Tribunal that the judgment he or she seeks to challenge is defective. (...)

78. We agree with the Respondent that the Appellant is merely presenting the same arguments made before the UNDT again before us.<sup>63</sup> He does not show that the UNDT erred in fact in its determination of the lawfulness of the reassignment decision on this specific point. We understand that the Appellant disagrees with the Dispute Tribunal. However, a mere disagreement is not enough. It is the responsibility of the Appellant to satisfy us that the UNDT's Judgment is defective on any of the grounds provided for in Article 2(1) of the Statute of our Tribunal; a burden that has not been discharged herein.

79. We next consider the Appellant's second contention that the UNDT erred in law, and implicitly in fact, in affirming the fairness of the reassignment decision and the good faith of the Administration in taking this decision.

80. The Appellant submits that the Administration acted speedily by finding him another post on 3 August 2020, directly after the 28 July 2020 decision of non-selection for the post of Secretary of the Board. The Appellant argues that in acting speedily, the Administration was not acting in good faith, but rather with a premeditated action plan. To support his argument, the Appellant contends that it was agreed that his position of *ad interim* acting Secretary of the Board would end on 30 September 2020...

83. In the present case, the UNDT examined the circumstances of the temporary reassignment.

selection exercise for the position of Secretary of the Board and the selection of another candidate, acted in good faith.

85. As to the Appellant's argument that the temporary reassignment at the DMSPC was irregular since he should have been permitted to return to his original position as Chief of the Geneva Office immediately after his temporary tenure as *ad interim* Secretary of the Board had ended,<sup>72</sup> we shall not examine it as nothing in the written records indicates that the argument was made before the UNDT.

86. Therefore, we uphold the finding of the UNDT that the reassignment decision was lawful.

*Compensation for harm*

87. The Appellant requests the Appeals Tribunal to order compensation in the amount of two years' net base pay for material and moral damage.<sup>73</sup>

88. The request for compensation made by the Appellant here, and previously before the UNDT, relies on two sets of harm: pecuniary (financial cost of holding two households in Geneva and in New York, complications in medical insurance transfer, handicap to potential prospects) and non-pecuniary (separation from family, reputational damage, anxiety and depression).

89. Ordering compensation for harm by the Appeals Tribunal is governed by Article 9(1)In

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or that his applications were rejected due to his non-

