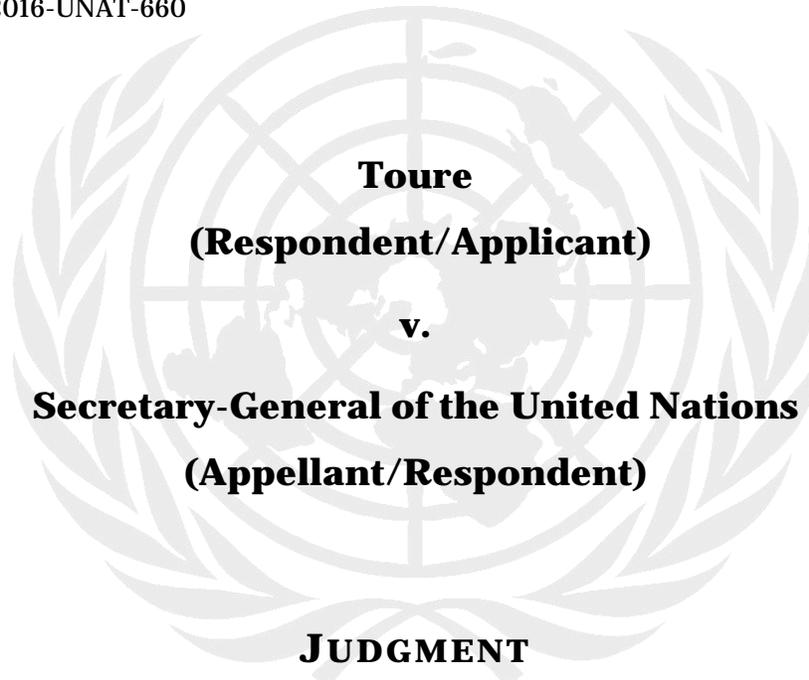




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-660



**Toure
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Inés Weinberg de Roca, Presiding Judge Sophia Adinyira Judge Luis María Simón
Case No.:	2015-870
Date:	30 June 2016
Registrar:	Weicheng Lin

Counsel for Ms. Toure:	Alexandre Tavadian
Counsel for Secretary-General:	Rupa Mitra Ernesto Bondikov

JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2015/081, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 9 September 2015, in the case of *Toure v. Secretary-General of the United Nations*. The Secretary-General appealed on 9 November 2015, and Ms. Amy Toure answered on 7 December 2015.

Facts and Procedure

2. The facts as found by the Dispute Tribunal read as follows:¹

... [Ms. Toure] began to work in the United Nations on 30 November 2009 as a Regional Advisor at the P4 level with the [United Nations Economic Commission for Africa (ECA)]. She was posted to the sub-regional office of the ECA in Yaoundé, Cameroon.

... Her contracts, which were renewed periodically between 2009 and 2012, were all fixed-term contracts.

... [Ms. Toure's] post and those of other Regional Advisors were funded under the Regional Programme of Technical Cooperation (RPTC). ...

... In September 2012, a new Executive Secretary, Mr. Carlos Lopez, was appointed to the ECA. Soon after he came on board, the new [ECA] Executive Secretary announced his intention to restructure part of the ECA. Thereafter, in late November and early December 2012, the ECA Staff Union met with the new [ECA] Executive Secretary to discuss proposals for the restructuring he had spoken about and to express their concerns that staff members should not lose their jobs.

... On 12 December 2012, the [ECA] Executive Secretary then called a Town Hall meeting of all staff members of the ECA. At the ... Town Hall meeting, he made a power-point presentation The essential message of the presentation was that there would be “no post reduction but significant realignment to re-profiled functions”. Part of the message of the presentation was that staff members would be retrained if necessary so that they could move into their new functions.

... Two days after the Town Hall meeting, [Ms. Toure] received a letter purporting to abolish her post. The contents of the said letter implied that all Regional Advisor posts were similarly abolished.

¹ Impugned Judgment, paras. 4-13.

...

... [Ms. Toure] received her separation notification dated 11 February 2013 and was separated on 31 March 2013.

... On 11 February 2013, [Ms. Toure] sent a management evaluation request with regard to the abolition of her post to the Management Evaluation Unit (MEU). Thereafter on 26 June 2013, she [filed her application with the UNDT].

... On 17 and 18 September 2014, the matter was heard by the [Dispute] Tribunal. Two witnesses testified for [Ms. Toure] and one witness testified for the [Secretary-General] while a fourth witness was called by the [Dispute] Tribunal.

3. By Order No. 120 (NBI/2015), dated 20 April 2015, the UNDT ordered the Secretary-General to produce the RPTC Programme Budget of ECA for the 2012-2013 biennium and also directed the parties “to provide comments on [the] budget and to make submissions as to whether the [ECA] Executive Secretary ... had the authority to amend the budgetary provisions of the 2012-2013 biennium half-way through and before the end of that biennium”.²

4. On 9 September 2015, the UNDT issued its Judgment, holding that the ECA Executive Secretary had “acted *ultra vires* when he unilaterally abolished [Ms. Toure’s] post in December 2012”.³ It found that the ECA Executive Secretary:⁴

... had neither the authority nor the discretion to abolish Regional Advisor RPTC-funded posts which were set up to implement already approved programmes for the 2012-2013 biennium without seeking and obtaining approval as provided for in [R]egulation 6.2 [of ST/SGB/2000/8 (Regulations and Rules Governing Programme Planning, the Programme Aspects of the Budget, the Monitoring of Implementation and the Methods of Evaluation)].

5. In reaching its decision, the UNDT noted that it was “not in doubt that the [ECA] Executive Secretary [had] the delegated authority to see to the implementation and delivery of ECA’s mandate”.⁵ It also noted that “it is not a matter of contention that these implementations are carried out only at the instance and guidance of African member States with their approval given through the [Conference of African Ministers (COM)] and with the additional approval of the General Assembly”.⁶ The UNDT found dispositive the fact that:⁷

² *Ibid.*, para. 37.

³ *Ibid.*, para. 86.a.

⁴ *Ibid.*, para. 86.b.

⁵ *Ibid.*, para. 77.

⁶ *Ibid.*

... The approvals obtained by the [ECA] Executive Secretary from the COM in March 2013 and later from the General Assembly for a refocusing and reprioritizing of the ECA programmes only related to the ECA's previously approved 2014-2015 biennium, not the 2012-2013 biennium that had only nine more months to come to its end.

In the UNDT's view, the ECA Executive Secretary "had decided, based on his own personal initiative and whim, to restructure and reorganize the programmes and budget of the ECA",⁸ resulting in the abolition of Ms. Toure's post.

6. The UNDT awarded compensation equivalent to the net salary Ms. Toure would have earned had her contract continued through December 2013 (i.e., nine months, starting from April 2013). Considering "the unlawful abolition of [her] post was of such a fundamental nature", the UNDT also awarded Ms. Toure "one month's net base salary as moral damages for the failure of the Administration to follow its own guidelines, rules and procedures in abolishing her post and not extending her contract in the middle of a biennium without the required approvals".⁹

Submissions

The Secretary-General's Appeal

7. The UNDT erred in law and fact in finding that the ECA Executive Secretary had acted *ultra vires* in deciding to discontinue funding for Ms. Toure's fixed-term, General Temporary Assistance (GTA)-funded position, without first obtaining prior approval from both the COM and the General Assembly. Not only was the UNDT incorrect when it characterized the ECA Executive Secretary's decision to reconfigure the delivery of RPTC's Regional Advisory services as a reformulation of "an entire subprogramme" within the meaning of Regulation 6.2 of ST/SGB/2000/8, but its conclusion means all 13 Regional Advisors with GTA positions in December 2012, including Ms. Toure, had a right to expect their positions would be extended through the end of 2013. This contradicts the very nature of a fixed-term appointment, which does not carry any expectancy, legal or otherwise, of renewal or conversion. Moreover, Ms. Toure had no legitimate expectancy of renewal of her fixed-term appointment.

⁷ *Ibid.*, para 86.c.

⁸ *Ibid.*, para. 81.

⁹ *Ibid.*, paras. 88 and 90.

8. The UNDT erred in conflating Regional Advisor GTA-funded positions with regular established posts. Regional Advisor appointments—as noted in the 2012 RPTC Inter-Regional Guidelines and Principles (RPTC Guidelines),¹⁰ the 2004 RPTC Report (RPTC Report)¹¹ and Proposed 2012-2013 RPTC Budget¹²—are GTA-funded and are intended to be temporary, short-term positions and are not automatically tied to the entire two-year budgetary period. It also erred in framing its analysis when it said that the 2012-2013 budget “made ... provision for [Ms. Toure’s] post for the entire biennium”.¹³ No such provision was ever specified in the 2012-2013 budget.

9. The ECA Executive Secretary did not need the General Assembly’s authorization in order to create or discontinue a Regional Advisory GTA-funded position, even in the middle of the biennium. In formulating its proposal for the RPTC budget, the ECA Executive Secretary only estimates the number of work-hours that might be required for advisory services in any biennium. The General Assembly approved the biennial budget, including the use of GTA funds, and thereby approved the ECA Executive Secretary’s discretion in deploying them to create short term positions and hire Regional Advisors under fixed-term contracts that can be renewed as required throughout the biennium. Were the UNDT’s findings to be upheld, the terms of all Regional Advisory positions set up in a biennium would have to be continued for an entire biennium unless an approval to the contrary was given by the COM and the General Assembly. The time required for such a process would nullify and invalidate the very concept of Regional Advisors and the allocation of GTA funding for the RPTC.

10. The UNDT erred when it characterized the ECA Executive Secretary’s decision as “personal whim”. It was, instead, a managerial decision regarding the use of already-approved funding for individual activities during the biennium that does not require additional approval from governing and advisory bodies.

11. The ECA Executive Secretary’s decision was procedurally proper. It was neither absurd nor perverse for the ECA Executive Secretary to decide that delivery of the RPTC’s Regional Advisory services should be reconfigured to reflect changing priorities and made shorter-term.

¹⁰ RPTC Inter-Regional Guidelines and Principles for Effective Delivery of Capacity Development Support for 2012, para 1.4.

¹¹ 2004 Report to the General Assembly on the “Review of the regular programme of technical cooperation and the Development Account” (A/59/397).

¹² Proposed 2012-2013 RPTC Programme Budget, Section 23, para. 23.34.

¹³ Impugned Judgment, para. 38.

The ECA Executive Secretary referred to both of these reasons when he informed Ms. Toure of the decision to terminate her position. The need for a senior panel review—which the UNDT found was required for a decision to extend or not a Regional Advisor—was never before the UNDT and the parties did not make submissions thereon. Senior level panel review is only a practice, not a legal requirement.

12. As the contested decision was lawfully made, the awards of compensation and moral damages should be reversed. The UNDT exceeded its competence by awarding moral damages as it cited no evidence in support thereof and none was presented. Basing the award on “the failure of the Administration to follow its own guidelines, rules and procedures” suggests the award is punitive.

13. The UNDT Judgment should be vacated in its entirety.

Ms. Toure’s Answer

14. The Secretary-General fails to demonstrate that the UNDT exceeded its jurisdiction, erred on a question of law, committed a procedural error, or erred on a question of fact, resulting in a manifestly unreasonable decision. The Secretary-General’s appeal fails to refer to *viva voce* evidence heard before the UNDT and effectively asks the Appeals Tribunal to rule, *inter alia*, on questions of fact without the testimonial evidence on both the ECA Executive Secretary’s restructuring exercise and the economic and moral harm to Ms. Toure. The Secretary-General’s appeal should be dismissed.

15. The statutory framework governing the financial management of the United Nations is clear about the General Assembly’s role in approving the budget and about the Secretary-General’s obligation to provide detailed information in its proposed budget programme, not only of the amount of funds requested but also the way they will be spent. After the General Assembly adopts the programme budget, the Secretary-General is not permitted to make changes to it without first submitting a revised and supplementary programme budget to the General Assembly. These rules apply not only to established posts but also to posts funded through the RPTC.

16. The General Assembly adopted the proposed 2012-2013 programme budget submitted by the Secretary-General on 24 May 2011, in which the Secretary-General had requested \$11,307,600 for regional advisory services provided by ECA to African member states. A

significant portion of this funding was to cover salaries of Regional Advisors, including that of Ms. Toure. The Secretary-General's proposal did not indicate an intention to abolish posts of Regional Advisors, nor did the Secretary-General submit a revised or supplementary budget seeking the General Assembly's approval to do so.

17. The 6 February 2012 memorandum shows that "GTA resources are to be used only for the staff recruited as Regional Advisor" and his failure to seek approval prior to making such a drastic change is in violation of the statutory framework, most notably Regulation 6.2 of ST/SGB/2000/8. The ECA Executive Secretary reformulated not just one subprogramme, but an entire programme encompassing several subprogrammes.

18. The crux of this case is about the lawfulness of the abolition of Ms. Toure's post along with those of 12 other Regional Advisors. The non-renewal of Ms. Toure's fixed-term appointment was merely a consequence of her post's abolition. As the only reason provided for the non-renewal was the abolition of Ms. Toure's post, it was correct for the UNDT to assess the lawfulness of its abolition. It concluded that the abolition was unlawful and, therefore, the UNDT correctly ruled that the decision not to extend Ms. Toure's appointment was necessarily unlawful as well.

19. GTA-funded posts cannot be discontinued at any point in a biennial budget cycle without the approval of the General Assembly. Doing so would contradict Financial Regulation 2.10 (Resolutions with programme budget implications) and deprive of their meaning both Financial Regulations 2.8 (Revised and supplementary programme budget requirements) and 2.9 (Revised and supplementary programme budget proposals, presentation and submission). The implication of the Secretary-General's position is that RPTC funds can be requested of the General Assembly for a specific purpose and then be used for a different one. This makes a mockery of Article 17.1 of the Charter (which states that the General Assembly shall consider and approve the budget of the Organization) and the Financial Regulations and Rules. The ECA Executive Secretary effectively abolished an entire subprogramme and the UNDT was correct to apply Regulation 6.2 of ST/SGB/2000/8.

20. The UNDT's damage awards should be upheld. With respect to moral damages, the UNDT based its award on the basis of the "fundamental nature" of the illegality which does not require evidence of harm. The evidentiary requirement set forth in the amendment to Article 10(5) of the Statute of the Dispute Tribunal (UNDT Statute or Statute) does not specify the

form of evidence required and, as such, testimonial evidence provided can suffice. There was a hearing before the UNDT in which Ms. Toure testified, and her testimony is evidence within the meaning of Article 10(5). Finally, the amendment cannot apply retroactively. The award of moral damages was, therefore, within the discretionary power of the UNDT and consistent with its Statute and applicable jurisprudence.

21. The UNDT Judgment should be affirmed and the appeal dismissed in its entirety.

Considerations

22. The Secretary-General appeals the UNDT's finding that the non-renewal of Ms. Toure's fixed-term appointment was unlawful on the grounds that the ECA Executive Secretary acted *ultra vires* when he abolished Regional Advisor RPTC-funded posts, including Ms. Toure's, set up to implement already approved programmes for the 2012-2013 biennium period without seeking and obtaining approval as provided for in Regulation 6.2 of ST/SGB/2000/8.

22. Based on our review of the record and the applicable regulations, we hold that the UNDT erred in fact and law. We vacate the UNDT Judgment and award.

No legitimate expectancy of renewal

24. We first note that in her request for management evaluation, Ms. Toure challenged the non-renewal of her fixed-term appointment only on the grounds that she had a legitimate expectation of renewal in light of discussions with the Staff Union and general assurances made at the Town Hall meeting, in connection with the ECA Executive Secretary's proposed restructuring. Ms. Toure pointed to the fact that the ECA had been directed to regularize former 200 Series staff members (temporary posts, such as Ms. Toure's) which meant undertaking the necessary actions, such as advertising positions, reviewing applications and competition vetted by the appropriate body. In her application before the UNDT, Ms. Toure added that the abolition of her post was arbitrary, and during the course of the proceedings she also argued it was unlawful.

25. It is uncontested that Ms. Toure had a fixed-term appointment. The Appeals Tribunal has consistently affirmed the principle that there is no expectancy of renewal of fixed-term and temporary contracts. In order for a staff member's claim of legitimate expectation of a renewal

of appointment to be sustained, it must not be based on mere verbal assertion, but on a firm commitment to renewal revealed by the circumstances.¹⁴

26. Ms. Toure cannot rely on general statements made at the Town Hall meeting on 12 December 2012, and the message of the presentation made therein, to assume that her contract would be renewed. The broader context of efforts to regularize former 200 Series staff members is of little consequence as there is nothing in such a process that guarantees staff members, who must apply for published posts and be vetted through a competitive process, a particular outcome.

27. Two days after the Town Hall meeting, Ms. Toure received notice of the non-renewal of her fixed-term contact in an interoffice memorandum directed to her, dated 14 December 2012, from the ECA Executive Secretary. The memo informed her that “the post [she] currently encumber[ed], funded under the RPTC resources, [would] be abolished. As you are aware[,] RPTC posts are established based on a set of identified focus areas for cooperation under RPTC for a limited period of time”. It also informed Ms. Toure that her contract, which expired on 31 December 2012, would be extended for three months, through 31 March 2013, and further indicated that it served as a “notice of non-extension of [her] appointment beyond 31 March 2013 considering that the post will be abolished as of 1 April 2013”. The memo also “strongly encouraged” Ms. Toure to apply for positions that would be published in the coming weeks.

Lawful and proper exercise of managerial discretion

28. Ms. Toure’s contract was not renewed due to the abolition of her post. The reasons given in the 14 December 2012 memo related to the fact that “[g]oing forward, the delivery of regional advisory services under RPTC will be guided by the principles of providing ... focused capacity development in support of the limited set of high priority development areas which are complementary to the overall work of a restructured ECA”. The document also made clear that “funds available under RPTC will also be used for shorter-term advisory services rather than only for continued involvement for extended periods”.

¹⁴ *Munir v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-522, para. 6.

29. Both the Appeals Tribunal and the Administrative Tribunal of the International Labour Organization (ILOAT) have held that it is well settled jurisprudence that “an international organization necessarily has 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”.¹⁵

30. When judging the validity of the Administration’s exercise of discretion in administrative matters, the Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal 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 Tribunal to consider the correctness of the choice made by the administration amongst the various courses of action open to it. Nor is it the role of the Tribunal to substitute its own decision for that of the administration.¹⁶ 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 Ms. Toure’s post to determine whether the impugned decision was tainted by abuse of authority.¹⁷

31. The UNDT embarked on this analysis by asking, first, whether the ECA Executive Secretary had the authority to abolish the post in question in December 2012 “despite an existing RPTC biennium budget for 2012-2013 which made provision for the post in question up till the end of that biennium”;¹⁸ and, then, by considering “[i]n view of Regulation 6.2” whether he could do so “on his own initiative and without recourse to and approval of ... the COM and the General Assembly”.¹⁹ The UNDT erred in its framing of the issues.

¹⁵ *Pacheco v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-281, para. 22; *Gehr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-236, para. 25.

¹⁶ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

¹⁷ See ILOAT Judgment No. 3172 (2013), para. 16.

¹⁸ Impugned Judgment, page 8 (between paras. 38 and 39).

¹⁹ *Ibid.*, para. 63.

32. First, the UNDT's question was based on an erroneous interpretation of a document in evidence, the 6 February 2012 memorandum regarding ECA's resources approved for the 2012-2013 biennium. That document, entitled "Allocation of approved resources for [RPTC] for 2012", only authorizes expenditures in connection with regional advisors "in the first year of the biennium" – not "for that biennium" in its entirety, as the UNDT incorrectly found and relied upon in framing its analysis.

33. Second, that the biennium budget provided funding for regional advisory services does not mean those funds will be fully used during the biennium. Unlike posts authorized in budgets approved by the General Assembly, which are specifically identified (by category and step), Regional Advisory services "are expressed in the form of work-months estimated to be needed ... during the biennium ... [which] are engaged on a temporary basis".²⁰ Furthermore, there is no regulatory requirement that all amounts approved by the General Assembly must be fully expended within the budget biennium; to the contrary, regulations provide that approved funds are available and can be used "to the extent they are required" and that unused balances "will be surrendered".²¹

34. Ms. Toure's RPTC-funded regional advisory position was fully-funded through 2012 and, in fact, was extended through 31 March 2013. Her "post" was abolished effective 1 April 2013 in connection with the restructuring proposed and begun during the last quarter of 2012. Although not necessary for our holding, we note that this restructuring was effectively approved by the COM in March 2013 and, ultimately, by the General Assembly by way of its approval of the RPTC 2014-2015 biennium, which reflected the restructuring and refocusing of priorities.

35. Finally, we find no abuse in the abolition of Ms. Toure's post nor any evidence that the decision was arbitrary or unfair. All 13 Regional Advisors' posts that were encumbered in December 2012 were abolished and the people that encumbered them, including Ms. Toure, were encouraged to apply for posts that would be published. The record shows that some of them applied and secured other positions within the Organization. It is not clear from the record before us, nor would it change the outcome of the case, whether Ms. Toure presented her candidacy to any published positions.

²⁰ RPTC biennium budget for 2012-2013 (para. 23.24). See also RPTC Report, Annex V (discussing concerns about the use of advisors and noting various differences between advisors and regular staff).

²¹ Financial Regulations 5.3 and 5.4 of ST/SGB/2003/7 (in effect at the time, which are substantively the same as the provisions currently in effect, ST/SGB/2013/4).

36. As noted above, Ms. Toure served as a Regional Advisor, in a post funded through the RPTC programme. This programme is for temporary projects and needs, as set forth in the 2012 RPTC Inter-Regional Guidelines and Principles for Effective Delivery of Capacity Development Support (para. 1.4), the 2004 RPTC Report (on “Review of the regular programme of technical cooperation and the Development Account” A/59/397) and the proposed 2012/2013 RPTC Programme Budget (Section 23, para. 34). Ms. Toure did not hold a regular-budget established post but one of a temporary nature that could be discontinued without the need for the ECA Executive Secretary to seek prior approval.

37. The UNDT held that the ECA Executive Secretary acted *ultra vires* because he lacked the authority and discretion to abolish the Regional Advisor RPTC-funded posts, including Ms. Toure’s, set up to implement approved programmes without prior approval of the General Assembly.²² Having considered (erroneously in our view) that the ECA Executive Secretary’s decision to discontinue the use of RPTC GTA-funded Regional Advisors was a reformulation of an “entire subprogramme”, the UNDT relied principally on Regulation 6.2 of ST/SGB/2000/8, which provides:

An entire subprogramme shall not be reformulated nor a new programme introduced in the programme budget without the prior approval of an intergovernmental body and the General Assembly. The Secretary-General may make such proposals for review by the relevant intergovernmental body if he or she considers that circumstances so warrant.

38. This Regulation has to be read in context, notably with Rule 106.2 of ST/SGB/2000/8, which states in relevant part:

Programme implementation shall be monitored under the following procedures:

...

(b) Within any subprogramme, heads of departments or offices shall have the discretion with full justification to modify the approved programme budget by reformulating final outputs, postponing delivery of outputs to the following biennium or terminating outputs, provided that such changes are in pursuance of the objective and strategy of the subprogramme as set out in the medium-term plan. Such proposed changes shall be reported through the Central Monitoring and Inspection Unit;

...

(d) Changes in the programme of work requiring net additional resources may not be implemented before they are approved by the General Assembly.

²² Impugned Judgment, para. 86.b.

39. The UNDT erred not only in finding that Regulation 6.2 applied in this case, but also when it decided that the ECA Executive Secretary lacked authority to abolish Ms. Toure's post since only changes requiring additional resources required approval by the General Assembly.

40. Having found no illegality or abuse in the decision to abolish the Regional Advisor post encumbered by Ms. Toure and to, accordingly, not renew her fixed-term appointment beyond 31 March 2013 as the post in question was abolished effective 1 April 2013, the appeal of the Secretary-General is upheld.

Judgment

41. The Secretary-General's appeal is upheld. Judgment No. UNDT/2015/081 is vacated.

Original and Authoritative Version: English

Dated this 30th day of June 2016 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Simón

Entered in the Register on this 24th day of August 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar