



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

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Judgment No. 2015-UNAT-503

**Hepworth  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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**Before:** Judge Rosalyn Chapman, Presiding  
Judge Richard Lussick  
Judge Inés Weinberg de Roca

**Case No:** 2014-573

**Date:** 26 February 2015

**Registrar:** Weicheng Lin

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**Counsel for Mr. Hepworth:** Miles Hastie/OSLA

**Counsel for Secretary-General:** John Stompor

**JUDGE ROSALYN CHAPMAN, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2013/151, issued by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 29 November 2013, in the case of *Hepworth v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 28 January 2014, and Mr. Robert Hepworth filed his answer on 31 March 2014.

**Facts and Procedure**

2. Mr. Hepworth joined the United Nations Environment Programme (UNEP) in 2000 as Deputy Director, D-1, of the Division of Environmental Conventions in Nairobi, Kenya. He also worked on ecosystem management-related issues for the Division of Environmental Policy Implementation (DEPI).

3. In 2004, UNEP transferred Mr. Hepworth to the position of Acting Executive Secretary with the Secretariat of the Convention on the Conservation of Migratory Species of Wild Animals (CMS) in Bonn, Germany. In 2005, Mr. Hepworth applied for the post of CMS Executive Secretary, at the D-1 level. He was selected and granted a two-year fixed-term appointment, effective 26 July 2005. In 2007, the appointment was renewed for another two-year term, to expire on 25 July 2009.

4. In a letter dated 17 April 2008, the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU or Ministry), acting on behalf of Germany as the host country for the CMS Secretariat and the depository for the Convention, advised Mr. Hepworth of its concerns regarding the report of the 32nd meeting of the CMS Standing Committee and CMS' staffing and administration. In another letter, dated 2 July 2008 (BMU Letter), the Ministry expressed similar concerns about the CMS Secretariat to the UNEP Executive Director.

5. On 24 February 2009, the UNEP Executive Director met with Mr. Hepworth to discuss his desire to reassign Mr. Hepworth to the D-1 level position of Special Advisor on Biodiversity, DEPI, at UNEP Headquarters in Nairobi (Special Advisor post).

6. On 26 February 2009, Mr. Hepworth advised the UNEP Executive Director that he was not interested in being reassigned to the Special Advisor post, stating:<sup>1</sup>

[My wife] and [daughter] have made a major personal investment over the last 4 years to integrate and adapt [to life in Germany] [...] I do not want to have to move [my daughter] to a new secondary school for a second time in 4 years. [...]

The current security and transport situation in Nairobi, [...] together with the likelihood of further civil strife [...] is also something to which I do not wish to re-expose my wife and daughter, at this time. The Kenyan Government's attempts to seize my property, have not helped in that respect. [...]

The activities attributed to the new [Special Advisor] post [...] seem to me [...] to comprise a non-executive assignment suitable for a P4 or P5 in mid career. The assignment would be unattractive and indeed unsuitable in most respects. [...]

[...]

By contrast[,] I have a clear remit, and can deliver added value at CMS. I was sent here after a full open UN competition for the post. [...] I agreed to do this (i.e. to go through TWO separate D1 level open recruitment competitions in 4 years, both of which I won) on the clear and absolute understanding that I would then be allowed to complete my UNEP career at CMS, which also enables my daughter a settled period to complete her pre-university education in Germany.

The successes achieved under my leadership [...] are on the record. However, there are still challenges ahead [...].

A final, if secondary factor, is that I am just at the start of my year as elected chair of all the UN agencies in Germany. I am making considerable effort on this, [...] and I know that my efforts so far have been appreciated by the German Government and the City of Bonn. Abandoning this assignment (which could not be passed to my Deputy) at this stage would not be desirable or fair.

7. On 26 March 2009, Mr. Hepworth was informed by the Chef de Cabinet that the UNEP Executive Director intended to reassign him to the Special Advisor post. On the same day, Mr. Hepworth advised both the Chef de Cabinet and the UNEP Executive Director that he would not accept the reassignment and again stated his reasons therefore.<sup>2</sup>

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<sup>1</sup> Appeal Brief, Annex 6.

<sup>2</sup> Appeal Brief, Annex 7.

8. On 1 April 2009, the UNEP Executive Director formally advised Mr. Hepworth of his decision to reassign him to the Special Advisor post (D-1 level), effective 15 July 2009. Mr. Hepworth was informed that his main task was to contribute to the DEPI's efforts towards enhancing the implementation of global/regional biodiversity related processes within the context of the Ecosystem Management Programme and to lead the Great Apes Survival Partnership Secretariat from UNEP.<sup>3</sup>

9. On 15 May 2009, Mr. Hepworth advised the Chairman of the CMS Standing Committee and the UNEP Executive Director that, as he had stated over the past few months, he "would not accept" the Special Advisor post "on family and professional grounds, and that [he] believed [he] had a key job to finish at CMS".<sup>4</sup>

10. On 5 June 2009, Mr. Hepworth submitted a request for management evaluation of the decision to reassign him to the Special Advisor post.

11. On 15 June 2009, the UNEP Executive Director informed Mr. Hepworth that, "[i]n view of your decision not to come to Nairobi as instructed, [...] UNEP is not in a position to extend your current appointment beyond its expiration on 26 July 2009."<sup>5</sup>

12. On 15 July 2009, Mr. Hepworth submitted a request for management evaluation of the decision not to renew his appointment, and withdrew his previous request for management evaluation of the decision to reassign him to the Special Advisor post. The same day, he submitted to the UNDT a request for suspension of action of the decision not to renew his appointment.

13. On 25 July 2009, Mr. Hepworth's fixed-term appointment expired.

14. On 29 July 2009, the UNDT issued Judgment No. UNDT/2009/003, in which it rejected Mr. Hepworth's request for suspension of action of the decision not to renew his contract. In so doing, the UNDT found that the non-renewal of Mr. Hepworth's contract did not appear to be *prima facie* unlawful.

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<sup>3</sup> Appeal Brief, Annex 8.

<sup>4</sup> Appeal Brief, Annex 9.

<sup>5</sup> Appeal Brief, Annex 11.

15. On 25 August 2009, Mr. Hepworth was advised that the Secretary-General had decided to uphold the decision not to renew his appointment.

16. On 25 November 2009, Mr. Hepworth, represented by counsel, submitted an application to the UNDT challenging the decision not to renew his appointment. On 6 January 2010, the Secretary-General filed his reply to the application.

17. On 24 February 2010, the UNDT granted the Secretary-General's request to afford confidentiality to the BMU Letter and issued an Order on Confidentiality (Order No. 19 (GVA/2010)). On 19 April 2010, the UNDT granted the Secretary-General's request to afford confidentiality to a document entitled "Note to File" regarding a meeting on 22 August 2008 between representatives of the Ministry and the UNEP Executive Director (Note to File) and issued an Order on Confidentiality (Order No. 48 (GVA/2010)).

18. On 28 October 2010, the UNDT issued Judgment No. UNDT/2010/193, dismissing Mr. Hepworth's application on the ground that the "decision not to renew his contract was a valid exercise of the [Secretary-General's] discretion. The Organization considered that [Mr. Hepworth] was the best qualified to fill the post of Special Advisor on Biodiversity, DEPI, in Nairobi. [His] refusal to accept the position constituted a valid reason for the Organization not to renew his appointment as Executive Secretary, CMS, in Bonn."<sup>6</sup>

19. On 13 December 2010, Mr. Hepworth appealed Judgment No. UNDT/2010/193. The Secretary-General filed his answer to the appeal on 15 February 2011. Oral argument was held before the Appeals Tribunal on 14 October 2011, and on 21 October 2011, the Appeals Tribunal issued Judgment No. 2011-UNAT-178 (*Hepworth I*).<sup>7</sup> In *Hepworth I*, the Appeals Tribunal found, *inter alia*, that "the UNDT committed 'an error in procedure, such as to affect the decision of the case' under Article 2(1)(d)", when "Mr. Hepworth was not given an opportunity to call witnesses at trial". The case was remanded to the UNDT "for a determination of the facts and the merits of the application".<sup>8</sup>

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<sup>6</sup> *Hepworth v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/193, para. 39.

<sup>7</sup> *Hepworth v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-178.

<sup>8</sup> *Id.*, paras. 30-31, 33-34.

20. On 10 February 2012, the case was transferred from the Geneva Registry to the Nairobi Registry by Order No. 32 (GVA/2012).

21. On 19 and 21 March 2013, the UNDT held an oral hearing.

22. On 29 November 2013, the UNDT issued Judgment No. UNDT/2013/151, in which it concluded that the non-renewal decision was based on unlawful grounds. The UNDT awarded Mr. Hepworth “retirement benefits calculated as if [he] had retired from the Organization at the age of 62; [and] ... compensation in the amount of one year’s net base salary[.]” based on the “harm to his career in that the Non-renewal Decision deprived him of his livelihood at a time when he was near the mandatory retirement age”.

### **Submissions**

#### **The Secretary-General’s Appeal**

23. The UNDT erred in concluding Mr. Hepworth had a legitimate expectation that his appointment would be renewed again. The UNDT’s conclusion is inconsistent with Mr. Hepworth’s letter of appointment, the Staff Rules and resolutions of the General Assembly. Former Staff Rules 104.12(b)(ii) and 109.7(a), which were applicable to Mr. Hepworth’s appointment, provided that a fixed-term appointment expires automatically on the date in the letter of appointment and does not have any expectancy of renewal or conversion. The rules mirror the pronouncements by the General Assembly in resolution 63/250. The UNDT’s decisions are also required to conform with General Assembly resolutions on issues related to human resources management, as required by General Assembly resolution 68/254.

24. The UNDT’s erroneous legal conclusion also conflicts with Appeals Tribunal jurisprudence. The UNDT specifically found that UNEP did not make any express promise of renewal to Mr. Hepworth, but nevertheless concluded he had a legitimate expectation that his appointment would be renewed. In reaching this conclusion, the UNDT erroneously found that an Advisory Opinion of the International Court of Justice (ICJ) was equally as persuasive as an Appeals Tribunal judgment.

25. The UNDT erred in concluding that the Organization bore the burden of proving that the decision not to renew Mr. Hepworth's contract was not tainted by improper motives, given that Appeals Tribunal jurisprudence places the burden on the staff member.<sup>9</sup> Mr. Hepworth was well-aware that the reason his appointment was not renewed was because he refused to transfer to Nairobi to accept his reassignment to the Special Advisor post.

26. The UNDT erred in concluding that Mr. Hepworth's refusal to accept assignment to the Special Advisor post and transfer to Nairobi did not constitute a lawful basis not to renew his appointment. Under Staff Regulation 1.2(c), a staff member must accept an assignment to another duty station. This provision is not subject to the staff member's agreement or concurrence. Since Mr. Hepworth refused the assignment to Nairobi, UNEP acted lawfully in relying on his refusal as the basis for not renewing his appointment. It was a proper exercise of discretionary managerial authority not to renew Mr. Hepworth's fixed-term appointment based on his refusal to take up the new assignment in Nairobi, the place of UNEP's headquarters.

27. The UNDT further erred in the following regards: (i) in concluding that the decision to assign Mr. Hepworth to the Special Advisor post in Nairobi failed to satisfy the criteria to assign a staff member to a new post under Appeals Tribunal jurisprudence since both posts were at the D-1 level and the duties were commensurate with Mr. Hepworth's qualifications and skills in the specialty area of biodiversity; (ii) in concluding that UNEP failed to engage in meaningful discussions with Mr. Hepworth before deciding to reassign him when UNEP discussed the new assignment over the course of a month and even delayed the start date to accommodate Mr. Hepworth's daughter's school schedule; and (iii) in substituting its judgment for that of UNEP and erroneously finding that the new assignment was not in the best interests of the Organization.

28. The UNDT erred in law when it concluded that the non-renewal of Mr. Hepworth's appointment had been vitiated by an improper motive, i.e., the desire to placate the Ministry. The presumption that official acts have been regularly performed was not contradicted by any evidence establishing an improper motive. The UNDT's erroneous conclusion of an improper motive stemmed from pure speculation and was not a reasonable inference from the evidence.

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<sup>9</sup> *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201.

29. The UNDT erred in ruling that the BMU Letter and the Note to File were not confidential documents subject to protection. Thus, the Secretary-General requests that the Appeals Tribunal confirm the confidentiality of the BMU Letter and the Note to File, and redact the quotations from the BMU Letter and the Note to File found in paragraphs 25, 27, 59 and 61 of the Judgment.

30. The Secretary-General requests that the Judgment be annulled in its entirety.

**Mr. Hepworth's Answer**

31. The UNDT properly found that Mr. Hepworth held a legitimate expectation of continued service in Bonn, based on the circumstances of the case. In particular, the UNDT properly found there was a "written record" of an agreement with the former Executive Director of UNEP, which was made in 2004, to permit Mr. Hepworth "to complete his UNEP career at retirement in Bonn." The Deputy Executive Director of UNEP, who had been at the 2004 meeting, explicitly confirmed this understanding in an e-mail five years later. Thus, the UNDT's determination of a "legitimate expectation" was not manifestly unreasonable.

32. Mr. Hepworth contends that, at the time of the hearing, "the Administration's position on the reason for the non-renewal oscillated between non-responsive and evasive." Thus, the UNDT properly considered and addressed the situation in which UNEP gave no reason for the non-renewal decision, and placed the burden on UNEP to show the lack of an improper motive. The burden of proof is not an issue. The reason for not renewing the appointment was irrational: UNEP separated Mr. Hepworth from service because he would not accept the reassignment to the Special Advisor post in Nairobi. This absurdity shows that the true reason in removing Mr. Hepworth from Bonn was the influence of the Ministry. Thus, the UNDT could reasonably find that pressure from the Ministry was the reason for the decision not to renew Mr. Hepworth's contract. The failure of UNEP to propose alternative solutions to Mr. Hepworth, as was done in *Rees*,<sup>10</sup> highlights the improper motive for its decision.

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<sup>10</sup> *Rees v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-266.

33. Mr. Hepworth contends that Staff Regulation 1.2(c) does not give the Administration unfettered discretion to make reassignments; there are constraints on such discretion. The UNDT correctly found that UNEP could not end a staff member's lengthy career exclusively on the basis that he would not accede to an assignment which did not really exist at the time the decision to reassign him was made. At that time, there was no budget for the post or for any professional staff. Moreover, the proposed responsibilities were science-based, rather than policy-based, as was Mr. Hepworth's position in Bonn. The UNDT properly found that Mr. Hepworth had not been consulted about the transfer and that any consultations had been a charade. Finally, the UNDT correctly found that the decision was not in the best interests of the Organization, but was dictated by extraneous considerations.

34. Mr. Hepworth "takes no position on whether th[e Appeals] Tribunal should issue a new order or judgment preventing distribution of the documents or redacting the Judgment". He notes, however, that the Judgment has been published on the Internet, and is thus archived on a number of sites held by third parties. Moreover, "the content of the [BMU] letter is significant to the reasoning in the Judgment [...]. Stripped of this information, the scope of the precedential effect of the Judgment and th[e Appeals] Tribunal's ultimate judgment may become more uncertain."

35. Mr. Hepworth requests that the Appeals Tribunal dismiss the appeal and affirm the Judgment.

### **Considerations**

#### *Preliminary Request*

36. The Secretary-General requests that the Appeals Tribunal confirm the confidentiality of the BMU Letter and the Note to File, and redact the quotations from those confidential documents found in paragraphs 25, 27, 59 and 61 of the Judgment. To support his request, the Secretary-General relies on Order No. 19 (GVA/2010) and Order No. 48 (GVA/2010), issued on 24 February 2010 and 19 April 2010, respectively, by the Dispute Tribunal in Geneva before the case was transferred to the Nairobi Registry.

37. On appeal, the Secretary-General contends that the UNDT made an error of law in not treating as confidential the BMU Letter and Note to File, and in quoting from those confidential documents in the Judgment. Generally, when a case is transferred from one judge to another of the same tribunal, the judge who receives the case accepts it subject to prior existing orders. If the receiving judge disagrees with an existing order and wants to modify or vacate it, due process

requires the tribunal to give notice to the parties and afford them an opportunity to express their views. It is an error for the receiving judge to simply ignore an extant order because he or she disagrees with it. Thus, the UNDT made an error of law in breaching the confidentiality of the BMU Letter and Note to File and quoting from them in paragraphs 25, 27, 59 and 61 of the Judgment. Accordingly, the Secretary-General's motion to redact those paragraphs of the Judgment should be granted.<sup>11</sup>

### *The Merits*

38. On appeal, we must determine whether the Dispute Tribunal erred in law or fact when it ultimately concluded that UNEP's decision not to renew Mr. Hepworth's fixed-term appointment was unlawful. For the reasons discussed below, the Appeals Tribunal determines that the UNDT made several errors of law in reaching the conclusion that UNEP acted unlawfully. Since each error of law constitutes a sufficient ground to reverse the UNDT Judgment, we need not address each and every challenge raised by the Secretary-General on appeal.

39. Initially, the UNDT erred as a matter of law when it reviewed *de novo* UNEP's decision to assign Mr. Hepworth to the Special Advisor post in Nairobi and concluded that it was not in the best interest of the Organization. The *de novo* nature of the UNDT's review is shown by the UNDT's reasoning, which highlights Mr. Hepworth's "strong performance reviews" at CMS and its—the Dispute Tribunal's—opinion that his continued service would bring future value to CMS in Bonn. The UNDT clearly intruded into UNEP's managerial discretion in reviewing *de novo* the decision to reassign and transfer Mr. Hepworth and in concluding it was not in the Organization's best interest to do so.

40. As another matter of law, the Dispute Tribunal erred throughout the Judgment by failing to "recognize, respect and abide by" the Appeals Tribunal's jurisprudence, as it must.<sup>12</sup> "The principle of *stare decisis* applies, creating foreseeable and predictable results within the system of internal justice."<sup>13</sup> To begin with, the UNDT ignored our jurisprudence,

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<sup>11</sup> Although the Appeals Tribunal can order the Registry of the Dispute Tribunal to redact those paragraphs from the official version of the Judgment published on the UNDT website, it is doubtful that we can have an effect on third-party or non-UNDT publications of the Judgment. *Utkina v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-524, para. 19; *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-456, para. 19.

<sup>12</sup> *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-410, para. 24.

<sup>13</sup> *Id.*

as well as the Staff Rules, when it erroneously found that Mr. Hepworth had a legitimate expectation that his fixed-term contract would be renewed. In this regard, it reasoned:<sup>14</sup>

[The Appeals Tribunal] is correct in holding that a legitimate expectation [of renewal] can be created by an express promise on the part of the Organization. But a promise can also be implied from circumstances or from what is held out to an individual. [...]

... While the decision of [the Appeals Tribunal], that in the absence of an express promise a fixed-term contract comes to an automatic end, is of great persuasive authority, the [advisory] decision of the ICJ on the issue of a fixed-term contract is of equal persuasive authority and cannot lightly be brushed aside. The law enunciated by UNAT should be read together with that of the ICJ. This Tribunal considers that, given the special nature of fixed-term contracts within the Organization and the comments of the ICJ, an expectation of contract renewal may also be based on the surrounding circumstances, including the practices of the Organization.

41. The UNDT then proceeded to consider the “surrounding circumstances”, concluding:<sup>15</sup>

[B]ecause his contract with the Organization had been consistently renewed over the preceding nine years, the conditions of the employment relationship went beyond the specific terms of his employment contract. Given that there was a practice of renewing his fixed-term appointment, he was entitled to expect its continued renewal unless there was a legitimate reason for not renewing it.

42. This legal conclusion is wrong. It disregards former Staff Rules 104.12(b)(ii) and 109.7(a), which were in effect in 2009, the terms and conditions of Mr. Hepworth’s letters of appointment, and the jurisprudence of the Appeals Tribunal. Our jurisprudence holds that a fixed-term appointment has no expectation of renewal or conversion to another type of appointment.<sup>16</sup> Although a staff member may challenge the non-renewal of an appointment on the ground that the Administration made an *express* promise that gave rise to a legitimate expectation of renewal,<sup>17</sup> there is no legal authority for the proposition that an implied promise of

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<sup>14</sup> Impugned Judgment, paras. 40-41.

<sup>15</sup> *Id.*, para. 48.

<sup>16</sup> *Appellee v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-341; *Badawi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2012-UNAT-261; *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153; *Syed v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-061.

<sup>17</sup> *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-410; *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153.

renewal stems from the past renewals of an appointment.<sup>18</sup> Accordingly, the UNDT made an error of law when it found that the “surrounding circumstances” created an implied promise that Mr. Hepworth’s appointment would be renewed. Since this finding is erroneous, it cannot support the UNDT’s ultimate conclusion that the non-renewal decision was unlawful.

43. The UNDT also made an error of law and fact when it shifted the burden to UNEP to show that the decision not to renew Mr. Hepworth’s appointment was *not* motivated by improper reasons, purportedly because UNEP had *not* disclosed the reason for its decision not to renew Mr. Hepworth’s appointment. However, the evidence clearly shows that UNEP *had* disclosed the reason, as stated by the UNEP Executive Director to Mr. Hepworth in the memorandum of 15 July 2009, i.e., UNEP had decided not to renew his contract because “of [his] decision not to come to Nairobi as instructed”. Although some arguments by the Secretary-General’s counsel were unnecessarily equivocal about the reason for the non-renewal decision, argument is not evidence.<sup>19</sup> Thus, there was no basis for the UNDT to shift the evidentiary burden from Mr. Hepworth to UNEP to prove lack of improper motivation for the non-renewal decision, and doing so was an error of law.

44. Our jurisprudence places the burden on the *staff member* to show a legitimate expectancy of renewal or that the non-renewal of his fixed-term appointment was arbitrary or motivated by bias, prejudice or improper motive against the staff member.<sup>20</sup> Erroneously shifting the burden to UNEP tainted many of the UNDT’s findings of unlawfulness. For example, the UNDT’s finding that UNEP’s non-renewal decision was improperly motivated by political pressure from the Ministry was based on this erroneous shifting of the burden:<sup>21</sup>

... The Tribunal concludes [...] *that the burden resting on the Respondent to establish on a preponderance of probabilities that he was not motivated by extraneous factors in not renewing the contract of [Mr. Hepworth] was not met.* Given the tense relationship between BMU and [Mr. Hepworth], the Respondent should have offered reasons for the Non-renewal Decision in order to allay any concerns about improper motivation.

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<sup>18</sup> *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-411, paras. 25-26.

<sup>19</sup> *Hushiyeh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-435, para. 34.

<sup>20</sup> *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201; *Jennings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-184.

<sup>21</sup> Impugned Judgment, para. 71 (emphasis added).

Since this finding is based on an error of law, it cannot support the UNDT's ultimate conclusion that the non-renewal decision was unlawful.

45. Furthermore, Staff Regulation 1.2(c) provides: "Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations." Traditionally, the reassignment of staff members' functions comes within the broad discretion of the Organization to use its resources and personnel as it deems appropriate.<sup>22</sup> As we have stated in the seminal case of *Sanwidi*:<sup>23</sup>

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute 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 Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

46. Mr. Hepworth's application directly raised the question of whether his refusal to accept the assignment to the Special Advisor post and transfer to Nairobi—in and of itself—was a valid reason for UNEP not to renew his contract. The Dispute Tribunal opined that UNEP was required to consider *numerous* factors, not only the staff member's refusal to transfer, in making the decision not to renew the appointment, stating:<sup>24</sup>

The critical point is that a staff member's refusal to accept a transfer cannot be the only relevant factor. [...]. Such an outcome would be inconsistent with the Administration's duty to deal in good faith with staff members.

...

[...] The fact that a staff member refuses to transfer to another position does not, *ipso facto*, mean that he or she is no longer suitable for the position currently occupied.

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<sup>22</sup> *Gehr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-236; *Kamunyi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-194; *Allen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-187; *Kaddoura v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-151.

<sup>23</sup> *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

<sup>24</sup> Impugned Judgment, paras. 108 and 110.

This sweeping conclusion is without legal authority and, in the circumstances of this case, we consider it is incorrect.

47. As a manager, Mr. Hepworth was required to set an example for UNEP staff and Organization personnel. In 2001, the General Assembly adopted the International Civil Service Commission's Standards of Conduct for the International Civil Service, and these standards applied to Mr. Hepworth as a manager. Paragraphs 16 and 17 of the Standards of Conduct highlight that "[m]anagers and supervisors are in positions of leadership" and "are also responsible for guiding and motivating their staff [...]". Additionally, "[m]anagers and supervisors serve as role models [...]".

48. Judicial review of the decision not to renew a staff member's appointment, especially a manager at the D-1 level who has refused an assignment and transfer to a new post at the same level, requires more than merely comparing the nature of the two posts. It also requires scrutiny of the reasons proffered by the staff member for his refusal. Mr. Hepworth proffered primarily personal and family reasons for his refusal to accept the assignment and to transfer, and none of those reasons would have adversely affected his salary, career or retirement; he simply did not want to relocate. Yet, General Assembly resolution 53/221, paragraph 7, "*emphasizes* the requirement of mobility of all internationally recruited staff of the Organization as an integral part of their obligation".

49. For all these reasons, the Appeals Tribunal determines that the UNDT made numerous errors of law and fact when it concluded that it was unlawful for UNEP not to renew Mr. Hepworth's appointment, and the UNDT Judgment should be reversed.

### **Judgment**

50. The Registry of the Dispute Tribunal shall redact paragraphs 25, 27, 59 and 61 from Judgment No. UNDT/2013/151.

51. The Secretary-General's appeal is granted and Judgment No. UNDT/2013/151 is vacated.

Original and Authoritative Version: English

Dated this 26<sup>th</sup> day of February 2015 in New York, United States.

*(Signed)*

Judge Chapman, Presiding

*(Signed)*

Judge Lussick

*(Signed)*

Judge Weinberg de Roca

Entered in the Register on this 17<sup>th</sup> day of April 2015 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar