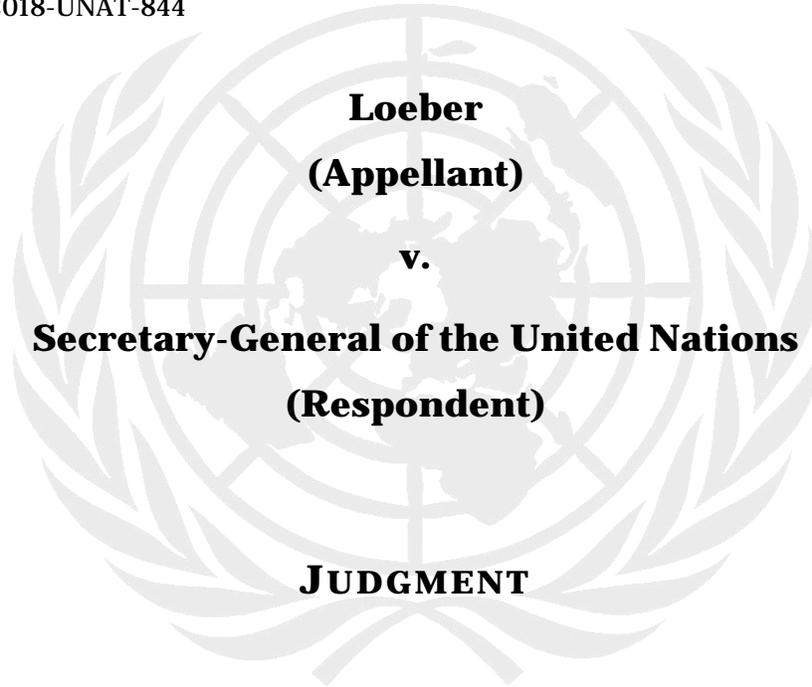




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-844



**Loeber
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Richard Lussick, Presiding Judge Sabine Knierim Judge Deborah Thomas-Felix
Case No.:	2017-1127
Date:	29 June 2018
Registrar:	Weicheng Lin

Counsel for Mr. Loeber:	Edward Patrick Flaherty
Counsel for Secretary-General:	Francisca Lagos-Pola

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/073, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 12 September 2017, in the case of *Loeber v. Secretary-General of the United Nations*. Mr. John Henry Frank Loeber filed the appeal on 14 November 2017, and the Secretary-General filed an answer on 15 January 2018.

Facts and Procedure

2. The following facts are taken from the impugned Judgment:¹

... The Applicant was selected for the P-5 post of Chief of Section (Procurement of Goods), [Procurement Management and Contracting Services (PMCS)], effective 2 March 2014, under a two[-]year fixed-term appointment (“FTA”) due to expire on 1 March 2016.

... By email of 1 August 2014, the Head, PMCS, informed the PMCS Goods team about changes in reporting lines, *inter alia*, that the mixed items team would now report to the P-4 Senior Supply Officer (“SSO”), who would also focus on field goods case submissions and serve as single point of contact for the field.

... In September 2014, the *Fritz Institute* was commissioned to undertake a re-evaluation of the supply chain at UNHCR, as a follow-up to a similar study undertaken in 2008 and in light of increasing demands on the Organization resulting from multiple emergencies as well as from an increase in the number of displaced persons.

... On 8 December 2014, the Applicant filed a complaint for harassment against the Head, PMCS, with the Inspector General’s Office (“IGO”), UNHCR, copied to the Ethics Office, UNHCR. He subsequently asked the IGO to put the complaint on hold, since he thought the matters would be resolved through managerial actions. At the [UNDT] hearing on the merits, he admitted that he never asked the IGO to take the matter up again, and that it had been overcome by events.

... A meeting took place in Budapest, in December 2014, between the Director, DESS, the Head, PMCS, and the Applicant, during which some of the concerns raised by the Applicant relating to the management decisions by the Head, PMCS, as well as the concerns raised by the Head, PMCS, with respect to the impact of the Applicant’s management style on staff were discussed. The Director, DESS, encouraged the two managers to improve their communication. It was also decided that any reorganization of the team should await the recommendations of the Fritz report.

¹ Impugned Judgment, paras. 5-22.

... The report of the *Fritz Institute* was presented in March 2015. It stressed the dramatic change that the Organization had undergone since the 2008 report, noting, for instance, that income and expenditure in response to a wide range of ongoing and protected emergencies had almost doubled.

... On 4 June 2015, a meeting was held, *inter alia*, between the High Commissioner, UNHCR, the Assistant High Commissioner for Operations, UNHCR, the Head, DESS, the Head, [PMCS], and the Head, Supply Management and Logistics Service (“SMLS”), UNHCR. In an email dated 11 June 2015, entitled “Note on HC’s meeting on the Supply Chain, 4 June 2015”, addressed to the members of the meeting and others, it is stated, *inter alia*, that:

DESS also requested to strengthen its staff in Budapest, for an additional cost of 800,000 USD. 20% of all audit recommendations in UNHCR were on procurement and procurement therefore needed to be transformed into a more robust service ([Headquarters (“HQ”)] section and Field section). The HC noted that this would be acceptable for 2016 as these concerns are valid and this function needs strengthening.

... The Head, DESS, sent a memorandum dated 16 June 2015 to the High Commissioner, entitled “Follow up to the Fritz Institute Review of the Supply Chain”. In that memo, the Director, DESS, noted four “priority actions and decision[-]making points for consideration by the High Commissioner”. One of them concerned “the transformation of procurement into a more robust service by reconfiguring the service into a HQ section and a Field section”. To that memorandum, the Head, DESS, annexed further explanations on the proposed restructuring, including an organigram on the proposed DESS new structure. The High Commissioner signed the memorandum off on 25 June 2015.

... The Head, PMCS, the Applicant’s supervisor, informed the latter during a meeting on 18 June 2015 of the intention to propose to the Budget Committee the restructuring of two services within DESS: PMCS and SMLS. This implied the proposal to discontinue the Applicant’s position and that of Chief of Section (Procurement of Services), and the creation of two P-5 level posts of Chief of Section (Procurement Field Support, on the one hand, and Procurement HQ, on the other hand); this was confirmed to the Applicant in writing by letter dated 22 June 2015.

... In a memorandum dated also 18 June 2015, and entitled *Follow up to the Fritz Institute Review of the Supply Chain*, the Director, DESS, submitted the new structuring proposal to the Secretary of the Budget Committee. It was received by the Budget Committee on 19 June 2015. During a meeting with staff of both services held also on 19 June 2015, the Heads of PMCS and SMLS presented the restructuring proposal, and responded to questions raised by staff, including the Applicant.

... In an email of 29 June 2015, to the Deputy High Commissioner, UNHCR, and others, the Applicant expressed his concerns and criticism about the submission to the Budget Committee with respect to the new/modified posts at SMLS/PMCS. He noted, particularly, that the new posts proposed as Section Chief HQ Procurement and Field Procurement were not grounded in the Fritz report, which was however used “to implement subliminal changes desired by PMCS leadership”.

... The Budget Committee had a first meeting on the matter of the restructuring on 2 July 2015, at which it decided to request additional information to be provided by DESS before a decision could be made, partly arising from the issues the Applicant raised in his email of 29 June 2015. That additional information was provided to the members of the Budget Committee on 9 July 2015.

... At its 10 July 2015 session, the Budget Committee approved the proposed PMCS restructuring, including the discontinuation of the position encumbered by the Applicant, effective 1 March 2016. The Applicant was informed of that decision by the Head, PMCS, in a letter dated 24 July 2015, which the Applicant signed on 27 July 2015.

... On 28 August 2015, the Applicant filed a request for management evaluation with the Deputy High Commissioner of the decision to abolish his post; in his request, he also asked to be provided with a copy of the Budget Committee Decision of 10 July 2015. The Applicant received no response with respect to such request.

... In the UNHCR September 2015 compendium, two P-5 posts were published in the newly called Procurement Service (“PS”), which was composed of two sections: the Procurement HQ Section and the Procurement Field Support Section. One of the P-5 posts published in September 2015 was that of Chief of Section (Procurement Field Support), whereas the other was that of Chief of Section (Procurement HQ). The Applicant did not apply to either of these positions.

... By memorandum dated 6 October 2015, the Applicant informed the Deputy High Commissioner about a possible opportunity for him to take a two-year loan to the Food and Agriculture Organization of the United Nations (“FAO”). The Applicant stressed that such loan would be possible only if his position at UNHCR remained in place, and asked for reconsideration of the decision to abolish the post he encumbered.

... On 16 February 2016, the Applicant received copy of a memo dated 15 February 2016, notifying him that he would be separated effective 2 March 2016. The letter stated: “[a] s you are aware your fixed-term appointment is due to expire on 01 March 2016. As we have so far not received any information for extending your services, or any notification that you have been selected for a new position within UNHCR, we regret to inform you that we are proceeding with your separation effective 02 March 2016”.

... On 25 March 2016, the Applicant filed a request for management evaluation of the 15 February 2016 separation decision.

3. Mr. Loeber subsequently filed three applications with the Dispute Tribunal in Geneva. The impugned Judgment disposed of two of them, namely, the application contesting the decision to discontinue the P-5 post of Chief of Section (Procurement of Goods) within PMCS that Mr. Loeber encumbered (first application), and the application concerning the decision not to renew his FTA beyond 2 March 2016 (second application).

4. In the impugned Judgment, the Dispute Tribunal concluded that Mr. Loeber's first application was not receivable *ratione materiae* as it was directed against an administrative decision not subject to judicial review. However, the UNDT found Mr. Loeber's second application receivable, because the decision not to renew his FTA resulted from the restructuring and the consequent abolition of his post. On the merits, however, the Dispute Tribunal rejected Mr. Loeber's second application in its entirety, after it found that the non-renewal decision had been lawfully taken. The UNDT found that the restructuring of PMCS following the issuance of the Fritz report was a "genuine restructuring exercise",² that the decision not to renew Mr. Loeber's FTA had been taken by the competent authorities,³ and that any procedural irregularity resulting from the order of the review of the restructuring had not had any impact on the outcome of the restructuring and had not prejudiced Mr. Loeber.⁴ The Dispute Tribunal rejected Mr. Loeber's assertions that he had a legitimate expectation of renewal of his FTA, and that his separation from service was based on extraneous factors.

Submissions

Mr. Loeber's Appeal

5. The Dispute Tribunal erred in concluding that Mr. Loeber's first application was not receivable *ratione materiae* on the basis of the *Lee* Judgment issued by the Appeals Tribunal.⁵ The *Lee* case and the present case are different, in that the *Lee* application was directed against a proposal to abolish her post, whereas Mr. Loeber's first application was directed against the decision to abolish his post already taken and communicated to him. The Appeals Tribunal's

² *Ibid.*, para. 73.

³ *Ibid.*, para. 61.

⁴ *Ibid.*, para. 52.

⁵ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481.

jurisprudence contains several examples where an appeal against a decision to abolish a post was received and decided upon.

6. The UNDT erred on several questions of fact by omitting essential facts of the case and representing certain facts in a misleading manner, leading it to make erroneous conclusions and a manifestly irregular decision. For instance, it failed to note the “suddenly switched position” of UNHCR in respect of the importance or relevance of the Fritz report leading to the restructuring exercise, the irregular and inverted flow of the review/approval process raising questions about whether the High Commissioner had properly approved the restructuring exercise and whether the Budget Committee had had adequate time to understand the intricacies of the restructuring exercise before it approved the restructuring proposal, the lack of information given to Mr. Loeber before submission of the restructuring proposal to the Budget Committee, and the fact that the High Commissioner of UNHCR had not approved the restructuring on 25 June 2015 or thereafter. These errors in fact and law and the procedural irregularities render the ensuing restructuring exercise unlawful and the resulting decisions to abolish Mr. Loeber’s post and to discontinue his service invalid.

7. The Dispute Tribunal erred in concluding that Mr. Loeber had no expectation of renewal. Contemporaneous evidence only confirms or reconfirms his understanding of an expectancy of renewal of his FTA.

8. Mr. Loeber requests that the Appeals Tribunal vacate the impugned Judgment, quash the decision to abolish his post and not to renew his contract, and order his reinstatement for a period of time corresponding to a normal expected extension of his contract. Alternatively, Mr. Loeber requests that the Appeals Tribunal award him compensation equal to his emoluments and entitlements for at least three years, moral damages in an amount of not less than six months’ salary, reimbursement of his legal fees in an amount of not less than 30,000 Swiss Francs, and any other remedies that the Appeals Tribunal may deem necessary and fair.

The Secretary-General’s Answer

9. The Dispute Tribunal correctly determined that Mr. Loeber’s first application was not receivable *ratione materiae*. The decision under challenge in the first application was a notification that the Budget Committee had approved the proposal to discontinue Mr. Loeber’s

post. It was an act leading up to the final decision not to renew his FTA. In any event, Mr. Loeber did not suffer any prejudice as a result of the Dispute Tribunal's ruling on the non-receivability of his first application.

10. The Dispute Tribunal correctly upheld the decision not to renew Mr. Loeber's FTA, as it was a genuine exercise of the Organization's discretionary power, and it was amply supported by the evidence on the record. In this regard, the Secretary-General notes that after Mr. Loeber's post and the post of Chief of Procurement of Services had been abolished, UNHCR created two equivalent positions at the P-5 level. However, Mr. Loeber chose not to apply for either of them, thus making it impossible for UNHCR to renew his appointment.

11. The Dispute Tribunal examined Mr. Loeber's claim of procedural irregularities in connection with the decision to restructure UNHCR's procurement services and found that the restructuring and the abolition of Mr. Loeber's post were taken by the competent authorities and did not prejudice his rights.

12. If the Appeals Tribunal were to determine that the procedural violations were such as to invalidate the restructuring exercise or abolition of Mr. Loeber's post, Mr. Loeber has not demonstrated that any harm has occurred from the procedural violations. Consequently, his request for compensation does not satisfy the statutory requirements for an award of compensation.

13. The Dispute Tribunal correctly concluded that Mr. Loeber did not have any legitimate expectation that his appointment would be renewed, as he was fully aware of the duration and nature of his FTA when he signed his letter of appointment.

14. The Dispute Tribunal's finding that Mr. Loeber had failed to prove any improper motivation behind the non-renewal of his FTA is supported by the record and should be affirmed.

15. The Secretary-General requests that the Appeals Tribunal dismiss Mr. Loeber's appeal.

Considerations

16. The Judgment of the Dispute Tribunal consolidates two applications by Mr. Loeber: an application contesting the decision to abolish his post as part of the PMCS restructuring, which coincided with the expiration of his fixed-term appointment, and an application contesting the decision to separate him from service.

The decision to abolish Mr. Loeber's post

17. With regard to his first application, the UNDT found that it was not receivable *ratione materiae* as it was directed against an administrative decision not subject to judicial review.

18. 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.⁶ 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.⁷

19. The Appeals Tribunal has consistently held that the key characteristic of an administrative decision subject to judicial review is that the decision must produce direct legal consequences affecting a staff member's terms and conditions of appointment. The administrative decision must have a direct impact on the terms of appointment or contract of employment of the individual staff member.⁸

⁶ *De Aguirre v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-705; *Khalaf v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-678; *Matadi et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-592; *Bali v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-450; *Simmons v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-425; *Pacheco v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-281; *Gehr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-236; *Liverakos v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-206; *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123; and *Dumornay v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-097.

⁷ *De Aguirre v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-705; *Matadi et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-592.

⁸ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481; *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058.

20. Mr. Loeber submits that the UNDT erred in concluding that his first application was not receivable on the basis of the Appeals Tribunal decision in *Lee*.⁹

21. There is no merit in Mr. Loeber's submission that *Lee* was different from the present case in that the *Lee* application was directed against a proposal to abolish her post whereas his first application was directed against the decision to abolish his post already taken and communicated to him. It makes no difference whether the restructuring was at the proposal stage or had already been adopted. The Appeals Tribunal held in *Lee* that¹⁰

even if the General Assembly had adopted such a resolution, that decision would not have changed anything. Both the Secretary-General's budgetary proposal and the General Assembly's adoption by resolution of the budget proposal are merely acts prefatory to or preceding an administrative decision that would 'produce[] direct legal consequences' to Ms. Lee's employment. Although Ms. Lee cannot challenge the discretionary authority of the Secretary-General to restructure the Organization or to abolish her post, she may challenge an administrative decision resulting from the restructuring once that decision has been made.

22. Mr. Loeber's further submission also has no merit. He argues that the UNDT was in error in holding that his application was not receivable because "the jurisprudence of this Tribunal contains several examples of cases where an appeal against the decision to abolish a post was received and decided upon". He offers no explanation for this submission but merely footnotes three cases: *Messinger*, *Pacheco* and *De Aguirre*.¹¹

23. Those decisions do not assist him, as they do not establish that a decision by the Secretary-General to restructure the Organization, including the abolition of posts, is an administrative decision subject to judicial review. In each of those cases, the administrative decision subject to judicial review was held to be the decision to separate the staff member following on from the restructuring.

24. The UNDT made no error in finding that the decision to abolish Mr. Loeber's post was not receivable *ratione materiae*.

⁹ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481.

¹⁰ *Ibid.*, para. 51.

¹¹ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123; *Pacheco v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-281; *De Aguirre v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-705.

25. Such decision was not reviewable as it had no direct impact on Mr. Loeber's terms of appointment or contract of employment. It merely constituted an act leading up to the final decision not to renew his fixed-term appointment, which was taken more than six months later.

Res Judicata

26. The UNDT went on to examine the legality of the underlying restructuring exercise and of the abolition of his post in order to assess whether the decision to separate him, and thus not to renew his FTA, was unlawful. The UNDT found that "the prefatory acts at the basis for [Mr. Loeber's] separation from service, and thus the non-renewal of his FTA, were taken by the competent authorities and did not prejudice [his] rights".¹² It concluded that "[his] separation from service, and the resulting non-renewal of his FTA, was based on a genuine restructuring exercise and the abolition of the post he encumbered".¹³

27. Mr. Loeber claims on appeal that the UNDT erred in fact and in law by not finding that procedural irregularities rendered the ensuing restructuring exercise unlawful and the resulting decision to abolish his post invalid.

28. We hold that these claims are barred by the doctrine of *res judicata*. The issues were decided by the Appeals Tribunal in *Loeber*, where the Appeals Tribunal concluded that there was no evidence whatsoever that the restructuring exercise was not genuine and that the post was correctly abolished.¹⁴

Expectancy of Renewal

29. The Appeals Tribunal has consistently affirmed that unless the Administration has made an express promise that gives a staff member an expectancy that his or her appointment will be extended, or unless it has abused its discretion, or was motivated by discriminatory or improper grounds in not extending the appointment, the non-renewal of a staff member's fixed-term appointment is not unlawful.¹⁵

¹² Impugned Judgment, para. 61.

¹³ *Ibid.*, para. 73.

¹⁴ *Loeber v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-836.

¹⁵ *Kacan v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-582; *Riano v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-529; *Munir v. Secretary-General of the United Nations*,

30. In deciding Mr. Loeber's claim that he had a legitimate expectancy that his contract would be renewed, the UNDT took into account the following facts: (i) Mr. Loeber "was on notice, at the latest on 24 July 2015, that his post was going to be discontinued and, hence, was aware that there was a possibility that his contract would not be renewed beyond 1 March 2016 against that position", and (ii) he "was fully aware of the duration and the nature of his appointment when he signed his letter of appointment".¹⁶

31. The UNDT accordingly concluded that his claim that he had a legitimate expectation of renewal must fail.

32. The UNDT also observed that Mr. Loeber's failure to apply for either of the two newly-created P-5 positions, namely that of Chief Procurement Headquarters and that of Chief Procurement Field Support, deprived the Organization of a real possibility to maintain him in service.

33. We agree with the UNDT's decision. On the facts, it could hardly have decided otherwise.

34. On appeal, Mr. Loeber raised an argument which had already been considered and rejected by the UNDT. He claims that his letter of recruitment contained a clause indicating that the "Standard Assignment Length (SAL) at this duty station is normally [five] years", and that his position would be "re-advertised at least once in six years".

35. The UNDT rejected this argument.

36. It held that "[t]he mere references in a letter of recruitment to the specifics applying under the relevant rules to a particular recruitment do not satisfy the requirements for a legitimate expectancy of renewal".¹⁷ The UNDT pointed out that the offer of appointment that Mr. Loeber received and signed in December 2013, that is, prior to receiving the letter of recruitment, specifically referred to the nature of the appointment, including its two-year duration.

Judgment No. 2015-UNAT-522; *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-411; and *Badawi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2012-UNAT-261.

¹⁶ *Ibid.*, paras. 64 and 66.

¹⁷ *Ibid.*, para. 64.

37. We find no error in this decision and Mr. Loeber's argument is entirely without merit.

38. It follows from our findings that Mr. Loeber has not established any errors in the UNDT Judgment, which found his first application not receivable and dismissed his second application on the merits. Accordingly, there is no basis for an award of compensation.

Judgment

39. The appeal is dismissed and Judgment No. UNDT/2017/073 is affirmed.

Original and Authoritative Version: English

Dated this 29th day of June 2018 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Knierim

(Signed)

Judge Thomas-Felix

Entered in the Register on this 10th day of August 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar