



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2023-UNAT-1404

Alan George Blythe
(Appellant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT

Before:	Judge Abdelmohsen Sheha, Presiding Judge Kanwaldeep Sandhu Judge Nassib G. Ziadé
Case No.:	2023-1771
Date of Decision:	27 October 2023
Date of Publication:	15 December 2023
Registrar:	Juliet E. Johnson

Counsel for Appellant: George G. Irving

Counsel for Respondent: Rupa Mitra

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).¹
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.² At the time of issuance of the impugned Judgment, he held a permanent appointment in the Secretariat of the United Nations.³ On 3 November 2002, he joined the Pension Fund as Chief, Financial Services Section, at the P-5 level. On 1 June 2008, he was promoted to the position of Chief of Operations of the Pension Fund at the D-1 level. On 1 August 2008, he was reassigned to the position of Chief of the Geneva Office of the Pension Fund at the D-1 level.
6. On 30 December 2019, the acting Chief Executive Officer (CEO) of the Pension Fund notified Mr. Blythe that the post he was encumbering in the Geneva Office would be relocated to New York and would become the Secretary of the Board (at the D-1 level) pursuant to General Assembly resolution 74/263 (Special subjects relating to the proposed programme budget for 2020). The acting CEO of the Pension Fund informed the Appellant that, as a result of this, he

¹ *Blythe v. Secretary-General of the United Nations*, Judgment dated 8 November 2022.

² Summarized from the impugned Judgment as relevant to the appeal.

³ Impugned Judgment, para. 4.

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

7. Mr. Blythe relocated to New York and undertook his temporary assignment as Secretary of the Board.⁵ Following the publication of the Job Opening No. 132990, intended to make a permanent selection for that position, Mr. Blythe submitted his application on 13 May 2020.⁶

8. On 28 July 2020, he was informed of the contested non-selection decision.⁷

9. On 3 August 2020, Mr. Blythe was informed of the contested reassignment decision.⁸ In it, the Chief, Business Partner Service of DMSPC, advised him of a temporary reassignment to a temporary position of PFO, at the D-1 level, in the OPPFB, DMSPC. The temporary reassignment was for a period of one year.

10. On 17 September 2020, Mr. Blythe submitted a request for management evaluation.⁹ On 22 December 2020, he filed his application with the UNDT.

11. On 13 January 2022, he was reassigned to the post of Chief of Client Services at the D-1 level in the Pension Fund in New York.¹⁰

The impugned Judgment

12. By Judgment No. UNDT/2022/120, the UNDT rejected the application, finding some of the contested decisions not receivable, and the others lawful.

13. The UNDT noted that Mr. Blythe relied on the unlawfulness of the 30 December 2019 decisions, related to his post redeployment and his relocation, as one of the main grounds to argue that the subsequent non-selection decision had been unlawful. While the 60-day statutory deadline to submit a request for management evaluation against the 30 December 2019 decisions expired on 28 February 2020, the request was not submitted until 17 September 2020. Therefore,

⁴ *Ibid.*, para. 6.

⁵ Appeal brief, para. 9; the Secretary-General's answer, para. 3.

⁶ Impugned Judgment, para. 7.

⁷ *Ibid.*, para. 8.

⁸ Impugned Judgment, para. 9.

⁹ *Ibid.*, para. 13.

¹⁰ *Ibid.*, para. 17.

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.¹¹ 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.¹² In addition, the Staff Rules addressing the retention of staff¹³ 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.¹⁴ 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.¹⁵ The e-mail was very short and cryptic, sent in a private,

¹¹ Impugned Judgment, para. 36.

¹² *Ibid.*, para. 39.

¹³ The UNDT cited Staff Rule 9.6(e) and Staff Rule 13.1(d).

¹⁴ Impugned Judgment, para. 48.

¹⁵ *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).¹⁶ 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,¹⁷ 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.

¹⁶ Impugned Judgment, para. 62.

¹⁷ 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-selection decision and the reassignment decision and requests rescission of both.

22. Mr. Blythe argues that the UNDT failed to properly address several other factual issues. He submitted that the UNDT erred in fact and in law in its interpretation of General Assembly resolution 74/263; the UNDT failed to recognize that he did not contest the substance of the Resolution but the way it was implemented. The Appellant also takes issue with the UNDT's analysis of the selection process that he finds superficial.

23. Mr. Blythe also submits that the UNDT did not address the issue of regularity. The Administration used terms such as redeployment, temporary arrangement, relocation, temporary assignment and reassignment on a temporary basis interchangeably with a lack of clarity from his perspective. The UNDT erred in law in failing to recognize Staff Regulation 4.4 and to determine that internal candidates should enjoy priority for selection under the legal framework. There is no indication that the Pension Board had considered Staff Regulation 4.4. The reassignment to a position that was outside of his recognized area of expertise, with no supervisory functions, left a negative mark on his otherwise unblemished career. There was no evidence of urgency to motivate the Administration's actions. Moreover, the Administration had started the external recruitment process several months before the end of the "temporary arrangement".

24. Mr. Blythe contends that more than two years of uncertainty took a toll on him and his family who had to remain in Geneva as visas were not processed in a timely manner. He incurred a financial burden in having to maintain two households. He also provided evidence of the effects of stress on his health. Isolated, he suffered from depression. Being close to retirement, his supplementary medical insurance arrangements are negatively compromised and will result in a potential financial burden in retirement.

The Secretary-General's Answer

25. The Secretary-General requests that the Appeals Tribunal dismiss the appeal and uphold the impugned Judgment.

26. The Secretary-General submits that throughout the appeal, Mr. Blythe continues to advance his arguments which constitute allegations of unlawfulness of the administrative decisions taken on 30 December 2019 and the UNDT rightly removed those claims from judicial review as not receivable. He was directly informed in December 2019 of the redeployment of his post from Geneva and the decision to undertake a competitive selection

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 did not make a proposal that no selection and evaluation process was needed; the General Assembly made no changes to the proposals of that Report and, at the same time, approved the “[r]edeployment [of a post] (from Pension Administration)” to “Secretary of the Pension Board D-1”. Contrary to his claim, Staff Rule 4.4 does not set out a blanket requirement that internal candidates be systematically accorded priority for selection but rather that the regard for internal candidates be subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels. The Appellant was given full and fair consideration and the Pension Board lawfully recommended the most suitable candidate for the position. There was no change of requirement during the selection process for the position of Secretary of the Board; the interviewers lawfully focused on the specific type of experience the applicants had, namely experience on pensions and social security. For the Respondent, the Appellant has not attempted to demonstrate any error in the UNDT’s finding on Mr. J.’s e-mail. The UNDT correctly addressed the issue of regularity.

28. The Secretary-General contends that the UNDT correctly found that the reassignment decision was lawful. The UNDT took into account that there was no vacant D-1 level position in the Pension Fund to which Mr. Blythe could have been assigned. As the non-selection decision was taken on 28 July 2020, there was insufficient time to find a more suitable D-1 position for his reassignment. It is also difficult to understand how he continues to argue on appeal that he was being “led to the door” when it is undisputed, not only that “at all times, he has remained employed by the Organization at the D-1 level and received all the respective benefits and entitlements, including those applicable to location,” but also that, in January 2022, he was reassigned to a D-1 level post in the Pension Fund in New York.

29. The Secretary-General asserts that Mr. Blythe is not entitled to compensation. He did not suffer any detriment due to the unlawfulness of any administrative decision.

Considerations

30. The present appeal raises three main issues. We first examine whether the UNDT erred in fact, resulting in a manifestly unreasonable decision, in determining that the Appellant contested the decisions of the acting CEO of the Pension Fund of 30 December 2019. Secondly, we address the lawfulness of the 28 July 2020 non-selection decision. Thirdly, we examine the lawfulness of the 3 August 2020 reassignment decision.

I. Whether the UNDT erred in fact, resulting in a manifestly unreasonable decision, in determining that the Appellant contested the decisions of the acting CEO of the Pension Fund of 30 December 2019

31. In the impugned Judgment, the UNDT determined three main issues challenged by Mr. Blythe. One of these issues was defined as the Applicant's challenge of "the 30 December 2019 decisions to: (a) redeploy the post financing the position of Chief of the Geneva Office (at the D-1 level) in the Pension Fund to the position of Secretary of the Board (at the D-1 level) within the Pension Fund, and (b) to laterally reassign the Applicant from the position of Chief of the Geneva Office (D-1) to the position of Secretary of the Board on a temporary basis pending the finalization of the selection exercise for that position".¹⁸

32. The Appellant contends that the UNDT committed an error of fact, resulting in a manifestly unreasonable decision, in its determination of the abovementioned issue. He asserts that "[h]e did not contest the decisions of the General Assembly or the decision of 30 December 2019 to relocate him".¹⁹

33. The question is therefore whether the UNDT properly identified the abovementioned administrative decisions as being part of the contested decisions.

34. The power of the UNDT to identify the impugned administrative decision(s) has been confirmed by our Tribunal on multiple occasions. In *Massabni*, we held:²⁰

(...) [T]he authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify

¹⁸ Impugned Judgment, para. 20(c).

¹⁹ Appeal brief, para. 19.

²⁰ *Massabni v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-238, para. 26.

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.²¹ As we have found in *ElShanti*:²²

The UNRWA Dispute Tribunal was not limited to the staff member's description of the contested or impugned decision; quite properly, it could consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed.

36. It follows that the UNDT enjoys a wide discretionary power to evaluate the different elements provided by the Applicant in his application for judicial review and subsequently to identify the contested decision(s). This Tribunal shall not intervene lightly in the UNDT's determination as far as it is supported by "primary legal or factual basis".²³

37. Although we agree that the Appellant did not formally contest the 30 December 2019 decisions, we find no fault in the UNDT's determination that they were among the contested decisions.

38. To start with, the UNDT was mindful of the absence of a direct challenge to the 30 December 2019 decisions.²⁴ Nevertheless, the Dispute Tribunal noted that Mr. Blythe did "refer to their alleged illegality as one of the main grounds to argue that the non-selection decision was unlawful".²⁵ Indeed, he made several references to the 30 December 2019 decisions, arguing against their lawfulness.²⁶ We understand that these claims were ultimately made to convince the UNDT with the consequent unlawfulness of the selection exercise and the resulting non-selection decision. However, arguing against the lawfulness of a prior administrative decision to attack a subsequent administrative decision is still a challenge of an administrative decision. For such challenge to be reviewed, all relevant rules and procedures shall apply, including the time limits for management evaluation and judicial review.²⁷ We

²¹ *Mohammed Abed AlRaheam ElShanti v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East* [UNRWA], No. 2020-UNAT-1022, para. 45. The Judgment concerns the UNRWA Dispute Tribunal but the same general principle is similarly applicable for the UNDT.

²² *Ibid.*

²³ *Farzin v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-917, para. 39.

²⁴ Impugned Judgment, para. 20(c).

²⁵ *Ibid.*

²⁶ Application form before the UNDT, Section VIII, para. 18, and Section IX, para. 29.

²⁷ See, *Abubakr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-272, para. 65.

therefore agree with the Secretary-General that “[t]he Appellant’s characterizations are not ‘facts’ but allegations of unlawfulness of administrative decisions”.²⁸ 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.²⁹

40. In his response to Order No. 062, the Appellant made exclusive references to General Assembly resolution 74/263.³⁰ 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.³¹

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 arguments relates to the UNDT’s determination on the principle of holding a competitive selection exercise for the post of Secretary of the Board. The second relates to the UNDT’s ruling that the Appellant, as an internal candidate, received full and fair consideration and was not entitled to priority consideration for the position.

43. We will address each of these matters separately below.

The competitive selection exercise

44. Mr. Blythe’s objected to the restructuring of the D-1 post he encumbered and to submitting the selection of Secretary of the Board to a competitive process.³² The UNDT

²⁸ Secretary-General’s answer to the appeal, para. 22.

²⁹ Appeal brief, para. 19 (internal citation omitted).

³⁰ Annex 9 to the appeal.

³¹ Impugned Judgement, para. 22.

³² *Ibid.*, paras. 34(b) and 38.

interpreted that contention as being a challenge to General Assembly resolution 74/263 mandating an administrative restructuring scheme of the Pension Fund. Since General Assembly resolutions are not reviewable administrative decisions, the UNDT refrained from reviewing the Resolution and the Appellant's contention made in this regard was dismissed.³³

45. According to the Appellant, this holding of the UNDT constituted both an error of fact and of law. He contends that he "had never contested the substance of the [General Assembly Resolution] but rather how it had been implemented by the Respondent"; a distinction that "was not recognized in the Judgment".³⁴ He further argues that the UNDT erred in misinterpreting the Resolution as it had not specifically mandated a competitive selection process.³⁵

46. While we believe that some of the Appellant's contentions in this regard are sound, our finding shall not reverse the final legal conclusions of the UNDT.

47. We recall first our Judgment in *Lloret Alcañiz*,³⁶ where we held that regulatory decisions are not subject to judicial review, unlike individual administrative decisions taken to implement them that are reviewable on limited grounds of legality.

48. We note that the UNDT recognized, at least implicitly, the distinction between regulatory decisions and individual implementation decisions when it addressed the receivability of the contentions in respect of the 30 December 2019 decisions directing that the post would be re-designed.³⁷ We believe therefore that the UNDT did not fail to consider that distinction.³⁸

49. On another level, we agree with the Appellant that the UNDT made an error of fact and of law when it assimilated his contention, pertaining to the launching of a competitive selection exercise, into a challenge of General Assembly resolution 74/263. The Appellant did not challenge the forementioned Resolution. He even asserted on multiple occasions that his challenge is not directed towards the Resolution, but rather towards the individual

³³ *Ibid.*, para. 41.

³⁴ Appeal brief, para. 30.

³⁵ *Ibid.*, para. 25.

³⁶ *Lloret Alcañiz et al. v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-840, para. 65.

³⁷ Impugned Judgement, paras. 21-27.

³⁸ *Ibid.*, paras. 39-41.

administrative decision implementing it.³⁹ 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 with regard to the position of the Secretary of the Board as follows:⁴⁰

[The General Assembly] decides that the Secretary shall be selected and evaluated by the Succession Planning Committee of the Board in accordance with relevant staff regulations and rules, while noting the redeployment of the D-1 from the Geneva Office as a temporary arrangement beginning in January 2020, requests the Board, through the Committee, to expedite the selection and nomination process[.]

53. We note first that, according to the Resolution, the Appellant could not continue to occupy the position of Secretary of the Board permanently. His reassignment was made on a temporary basis awaiting accomplishment of the selection process.

54. We observe, secondly, that according to the principle of plain meaning for statutory interpretation, “[w]hen the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation”.⁴¹

³⁹ Applicant’s response to Order No. 062 (NY/2022), para. 1.

⁴⁰ Section VIII(A) (Report of the United Nations Joint Staff Pension Board on the work of its sixty-sixth session), para. 11.

⁴¹ *Scott v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-225, para. 28.

55. The forementioned Resolution mandated clearly that an “evaluation”, “selection”, and “nomination” process was to be carried out to select a candidate for the position of Secretary of the Board. The plain meaning of such words, in line with the considerations of competence provided for in Article 101(3) of the United Nations Charter and the principle of competitiveness provided for in Staff Regulation 4.3, is to hold a competitive selection exercise for the purpose of creating a pool of suitable candidates, from which the Administration can nominate the most qualified candidate for the advertised position.

56. It follows that if the Administration decided in the present case to hold a competitive selection exercise for the position of Secretary of the Board, its decision fell squarely in line with General Assembly resolution 74/263. The contention of the Appellant is therefore without merit.

The alleged priority consideration and the right to the fullest regard

57. In the impugned Judgment, the UNDT rejected the Appellant’s contention that priority should have been given to him as an internal candidate in terms of Staff Regulation 4.4. The UNDT relied on Staff Regulation 4.2, which sets out that “the highest standards of efficiency, competence and integrity” in matters of appointment, transfer, or promotion are the relevant considerations, and held that, accordingly, the Pension Board recommended the candidate it considered “the most suitable for the position”.⁴²

58. The Appellant claims that the UNDT erred in law when it overlooked Staff Regulation 4.4 that prioritizes staff members with requisite qualifications and experience over external candidates.⁴³ He asserts that “[i]t is unclear on what basis the Board decided to recommend an external candidate in violation of Staff Regulation 4.4. The selection documentation provided by the Respondent gave no indication that this was a consideration weighed by the Board.”⁴⁴

59. We recall that Article 101(3) of the United Nations Charter underlines the necessity of securing the highest standards of efficiency, competence, and integrity as the paramount consideration in the employment of the staff in the Organization. In conjunction, Staff Regulation 4.4 provides that “[s]ubject to the provisions of Article 101, paragraph 3, of the

⁴² Impugned Judgement, para. 48.

⁴³ Appeal brief, para. 33.

⁴⁴ *Ibid.*

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:⁴⁵

(...) 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 in light of the written record of the case.⁴⁶

63. We agree with the UNDT that the Appellant had been given the fullest regard in all phases of selection, up to the final round of recommendation by the Pension Board. The Succession Planning Committee, through a duly substantiated record, examined the application of the Appellant and found him successful in all the steps of the selection exercise it was responsible for. Accordingly, the Committee considered the Appellant “suitable” and recommended him, along with three other candidates, for further consideration by the Pension Board.⁴⁷ The four candidates were invited to make short presentations and to respond to the questions of the members of the Pension Board before the recommendation of selection would

⁴⁵ *Rolland v. Secretary General of the United Nations*, Judgment No. 2011-UNAT-122, para. 26.

⁴⁶ *Marius Mihail Russo-Got v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1095, para. 33.

⁴⁷ Annex R/4 to the Secretary-General’s answer before the UNDT.

be made.⁴⁸ 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 is whether the reasoning provided enables the Tribunals to conclude that the “fullest regard” was given to Mr. Blythe in the final phase of the selection process. As recognized by the UNDT, the Appellant submitted that he was the most suitable candidate for the position of Secretary of the Board.⁴⁹ However, satisfied of the written record provided by the Administration, the Dispute Tribunal held that the Pension Board exercised its discretion lawfully in selecting the external candidate for that position.⁵⁰ The UNDT concluded that the Appellant did not demonstrate, or even allege that the selected candidate did not meet the requisite qualifications of the position.⁵¹

65. We disagree. We note that the recommendation report of the Pension Board, in relevant part, made a very brief reference to the selection:⁵²

After the presentations made by the recommended candidates and thorough discussions within the Groups, the Board decided by consensus, to recommend to the Secretary-General, in accordance with article 7 (c) of the Regulations of the Fund, that [name of candidate redacted] be appointed as Secretary [of] the Board.

66. Consequently, we find that the recommendation report does not provide any explanation allowing us to understand its rationale. The reference to procedural aspects such as “presentations” and “discussions” is insufficient to reveal the substantive reasons for selection.⁵³ Furthermore, no information was given in the course of these judicial proceedings as to why the external candidate was the most suitable candidate rather than the other candidates, and especially the Appellant. Indeed, it is within the discretion of the Administration to select the most suitable candidate, and we do not interfere lightly with that discretion or substitute our own decision for that of the Administration in the choice of its

⁴⁸ *Ibid.*

⁴⁹ Impugned Judgement, para. 49.

⁵⁰ *Ibid.*, paras. 48-49.

⁵¹ *Ibid.*, para. 49.

⁵² Extract: Appointment of the Deputy Chief Executive of Pension Administration and the Secretary to the Board, para. 15 (in Annex R/4 to the Secretary-General’s answer before the UNDT).

⁵³ The impugned Judgment referred also to the “documented experience” of the candidates (para. 36). However, this reference was only made with regard to the shortlisting undertaken by the Committee as evidenced by the Succession Planning Report (para. 24), not to the selection made by the Pension Board as documented in the Extract: Appointment of the Deputy Chief Executive of Pension Administration and the Secretary to the Board (para. 15).

preferred criteria or their application.⁵⁴ However, for the sake of reasonableness, fairness and transparency, it is also expected from the Administration to give relevant and true reasons supporting its ultimate choice.⁵⁵ The UNDT did not meet a minimum threshold of establishing the material facts forming the basis of the Administration's exercise of discretion (*établissement matériel des faits*). Therefore, absent any specific reason underpinning the selection decision, the Administration did not fulfill its burden to minimally show it gave the staff member full and fair consideration, and the presumption of regularity falls.

67. Therefore, we find that the UNDT made an error of fact, resulting in a manifestly unreasonable decision, and of law when it upheld the presumption of regularity of the contested non-selection decision.

Rescission as a remedy

68. Turning to the remedies, we note at the outset the general principle that if the candidate would have had a significant chance of selection, an irregularity will normally result in the rescission of a non-selection decision. However, as we held in *Ross*,⁵⁶ rescission might not be a proportionate remedy in all cases.

69. Under the specific circumstances of this case, we believe that rescission will not be a practical or a proportionate remedy. The selection exercise was concluded in July 2020. Our judgment comes more than three years after the non-selection. As stated by the Appellant and not denied by the Respondent, the incumbent of the position (the external candidate) resigned within two years of selection.⁵⁷ In these circumstances, the Administration may have filled that position afterwards through a selection exercise or by reassigning another staff member on a non-competitive basis. In either case, an order for rescission would not be proportionate as it would generate adverse consequences for third parties. Hence, albeit having found the contested non-selection decision unlawful, we do not rescind it, considering other options we have under Article 9(1) of our Statute.

⁵⁴ *Kinyanjui v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-932, para. 14; *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40; *Smith v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-785, para. 30.

⁵⁵ *Respondent v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1097, para. 44; *Islam v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-115, para. 29.

⁵⁶ *Ross v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-926, para. 49.

⁵⁷ Applicant's Response to Order No. 062 (NY/2022), para. 8.

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 administrative decision had an economic impact on the Appellant for the following reasons:

(a) The Appellant did not incur any loss of earnings due to the unlawful decision of non-selection because:

(i) He was retained in service in the position of Principal Finance Officer (D-1), in the OPPFB, DMSPC. Subsequently, he was retained in service in another position on the same level at the Pension Fund where he is serving until today.

(ii) He did not incur a reduction of earnings as the forementioned position of Principal Finance Officer was on the D-1 level/step 12,⁵⁸ hence on the same level and the same salary scale as the position of Secretary of the Board for which he was competing.

(b) The written records of the case do not show any substantiated harm suffered by the Appellant that is directly caused by the unlawful decision and could be considered as its “value”.⁵⁹

72. Considering the foregoing, we are of the view that compensation in lieu of rescission must not be granted in the present case, without prejudice to the compensation for harm to which the Appellant is entitled, as we explain below.

73. We turn now to the third issue of this appeal before deciding the question of compensation for harm.

⁵⁸ Personnel Action in Annex R1/1 to the Secretary-General’s answer before the UNDT.

⁵⁹ *Mihai v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-724, para. 21.

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.⁶⁰ He also submits that the UNDT committed an error of law in affirming the fairness of the temporary reassignment and the good faith of the Administration in this regard.⁶¹ None of these two contentions convinces us to reverse the UNDT's findings on the reassignment decision.

76. Concerning the first contention, we note that the Appeals Tribunal is established as the second instance of the two-tier formal system of administration of justice. Article 2(1) of the UNAT Statute reads:

The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case; or
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

77. In *Kule Kongba*,⁶² we affirmed our long-established jurisprudence as follows:

(...) The Appeals Tribunal emphasizes that the appeals procedure is of a corrective nature and, thus, is not an opportunity for a dissatisfied party to reargue his or her case. A party cannot merely repeat on appeal arguments that did not succeed before the lower court. The function of the Appeals Tribunal is to determine if the Dispute Tribunal made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Appeals Tribunal Statute. An appellant

⁶⁰ Appeal brief, para. 26.

⁶¹ *Ibid.*, para. 36.

⁶² *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 19.

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.⁶³ 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 2020.⁶⁴ Therefore, in his view, the Administration knew several months before about the end of his term, had the time necessary to be prepared, and could have better assisted him in finding a suitable position in the Organization.⁶⁵

81. We do not find any error in the Dispute Tribunal's Judgment with regard to those claims put forth by the Appellant.

82. In the impugned Judgment, the UNDT relied correctly on our Judgment in *Dieng* where we stated that "the exercise of the discretionary authority of the Administration to reassign staff members has to pass all of the relevant tests governing it, namely such a reassignment is lawful if it is reasonable in the particular circumstances of each case".⁶⁶

⁶³ Appeal brief, para. 34; Secretary-General's answer to the appeal, para. 44.

⁶⁴ Appeal brief, para. 36.

⁶⁵ *Ibid.*

⁶⁶ *Boubacar Dieng v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1118, para. 55.

83. In the present case, the UNDT examined the circumstances of the temporary reassignment. The Dispute Tribunal recognized that the Appellant was not selected for the position of Secretary of the Board, a position that he had been holding *ad interim* awaiting the nomination of a new incumbent. By appointing another candidate on 28 July 2020, and absent other vacant positions in the Pension Fund at the Appellant's D-1 level,⁶⁷ the Dispute Tribunal correctly concluded that "he no longer had a post and needed one urgently".⁶⁸ Hence, the Dispute Tribunal found that the Administration had to act quickly "to ensure the [Appellant]'s continued employment in the given circumstances"⁶⁹ and that it effectively found him a "suitable position in the Secretariat"⁷⁰ on 3 August 2020. Considering these circumstances, we do not find that the Dispute Tribunal made any error when it considered that the speedy action of the Administration was taken in good faith to cope with a situation of urgency.

84. The alleged fact that the Administration was aware that the Appellant's *ad interim* term would end on 30 September 2020 does not further support his claim. On the one hand, it is undisputed that the Administration placed the Appellant in the position of Secretary of the Board on *ad interim* basis. Thus, the Administration knew that it was a temporary assignment, and that the Appellant, if unsuccessful in the selection exercise, would need to be reassigned to a suitable position in the Organization. However, on the other hand, the Administration also knew that if the selection exercise for the position of the Secretary of the Board was not successfully concluded, it would probably have to consider an extension of the Appellant's *ad interim* term beyond 30 September 2020.⁷¹ This is a case of uncertainty. We have no reason to believe that the Administration knew, or decided in advance that the Appellant would be disqualified in the selection exercise. Also, the speedy action of the Administration is not *per se* a proof of bad faith. In these circumstances, it is reasonable to infer that the Administration, in acting rapidly to find a suitable position for the Appellant after the conclusion of the

⁶⁷ Impugned Judgment, para. 59.

⁶⁸ *Ibid.*, para. 63.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, para. 64.

⁷¹ 28 January 2020 e-mail of the Assistant Secretary-General for Human Resources (ASG/HR) to the Appellant (in Annex 15 to the appeal), regarding his request for extension of his temporary assignment from September 2020 to September 2021, para. 4. The ASG/HR informed the Appellant that his request was considered by the Chair of the Bureau who was "not in a position to agree" as the competitive process for a permanent appointment was to be carried out by the Succession Planning Committee and the Board in the following months. The ASG/HR's answer was tentative and implied a degree of uncertainty. This explains why it was decided not to extend the temporary assignment beyond the time necessary to complete the competitive process.

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,⁷² 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.⁷³

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)(b) of the UNAT Statute which provides:

The Appeals Tribunal may only order one or both of the following:

...

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Appeals Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

⁷² Appeal brief, para. 31.

⁷³ Appeal form, Section IV. The same request was made in the application before the UNDT, Section IX, para. 30.

90. Our jurisprudence on awarding compensation for harm is abundant. As we have stated in *Mihai*:⁷⁴

(...) Article 9(1)(b) of the Statute does not only allow compensation for non-pecuniary damage (i.e., procedural violations, stress, and moral injury) but also for pecuniary or economic loss other than the “value” of the rescinded administrative decision. Our case law requires that the harm be directly caused by the administrative decision in question. Pursuant to Article 9(1)(b), compensation may be awarded for harm suffered that is supported by evidence.

91. It follows that for the Appeals Tribunal to order compensation for harm, three tests must be satisfied cumulatively: (i) an unlawful administrative decision; (ii) harm; (iii) and a nexus between the harm and the unlawful decision.⁷⁵

92. The unlawful administrative decision was established in this case as the non-selection decision of 28 July 2020. Only three grounds for harm provided by the Appellant are attached to that decision, namely the reputational damage, the detrimental effect to his professional prospects, and the detrimental effects on his psychological wellbeing. The remaining three grounds for pecuniary and non-pecuniary harm are related to the 30 December 2019 decisions, the challenge of which was found not receivable by the UNDT. Hence, only the first three grounds for harm stand.

93. Considering the evidence, we have reviewed each of the three claimed grounds for pecuniary (detrimental effect to the Appellant’s professional prospects) and non-pecuniary harm (reputational damage, psychological wellbeing). Only the psychological wellbeing partially passes the test.

94. Contrary to what the Appellant claims, it does not seem that his professional prospects, within the Organization or outside, were affected by his non-selection. He was retained in service, following the decision of 3 August 2020, in the position of PFO at the Secretariat, on the same level (D-1); he was reintegrated into the Pension Fund on 13 January 2022 and was reassigned to the post of Chief of Client Services (at the D-1 level), where he is serving today. Further, it was not proven that the Appellant applied for positions outside the Organization,

⁷⁴ *Mihai* Judgment, *op. cit.*, para. 21 (internal citations omitted).

⁷⁵ *Kebede v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-874, paras. 20-21.

or that his applications were rejected due to his non-selection to the position of Secretary of the Board.

95. The claim of reputational damage is also unsubstantiated. We cannot agree with the Appellant that a mere rejection of an application leads automatically to a reputational damage. Even less so when an applicant is rejected after having been considered eligible and suitable, such as in the case of the Appellant.

96. We shall now consider the alleged non-pecuniary damage related to the psychological wellbeing of the Appellant (stress, anxiety, depression). We are satisfied, in line with our Judgment in *Asariotis*⁷⁶ and in light of the medical reports provided by the Appellant,⁷⁷ that he had indeed suffered mental and consequent physical setbacks. Although we believe that these damages are primarily connected to his reassignment from Geneva to New York in early 2020, we are of the view that the unlawful non-selection decision of 28 July 2020 prolonged the state of uncertainty for the Appellant, at least for one year and a half after the non-selection until his reintegration into the Pension Fund, and hence aggravated his psychological and physical health condition.

97. In light of the foregoing, we determine that the Appellant is entitled to compensation for moral damage in the amount of USD 15,000. We recognize that determining the quantum of moral damages is not an exact science. However, we have reviewed the range of moral damages awarded in prior Judgments and arrived at an appropriate amount that is near the middle of that range.

⁷⁶ *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309, para. 36(ii).

⁷⁷ Medical certificates of 1 March 2022 from a specialist of internal medicine and of 4 March 2022 from a specialist of neurology (Annex 21 to the appeal).

Judgment

98. Mr. Blythe's appeal is granted in part, and Judgment No. UNDT/2022/120 is hereby modified: Mr. Blythe's request for compensation for moral harm is granted at the amount of USD 15,000. The remainder of the appeal is dismissed.

99. The compensation shall be payable with interest at the US Prime Rate accruing from the date on which Mr. Blythe was notified of his non-selection to the date of payment. If the amount is not paid within the 60-day period counting from the date of issuance of this Judgment, interest at the US Prime Rate plus an additional five per cent shall accrue until the date of payment.

Original and Authoritative Version: English

Decision dated this 27th day of October 2023 in New York, United States.

(Signed)

Judge Sheha, Presiding

(Signed)

Judge Sandhu

(Signed)

Judge Ziadé

Judgment published and entered into the Register on this 15th day of December 2023 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar