



UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2025-UNAT-1568

Giuseppe Fusco
(Respondent/Applicant)

v.

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

JUDGMENT

Before:	Judge Gao Xiaoli, Presiding Judge Leslie F. Forbang Judge Kanwaldeep Sandhu
Case No.:	2024-1966
Date of Decision:	27 June 2025
Date of Publication:	14 August 2025
Registrar:	Juliet E. Johnson

Counsel for Mr. Fusco:	Robbie Leighton, OSLA
Counsel for Secretary-General:	Angélique Trouche

JUDGE GAO XIAOLI, PRESIDING.

1. Mr. Giuseppe Fusco (Mr. Fusco), a former staff member of the United Nations Children's Fund (UNICEF), contested the decision to separate him from service (separation decision) and the decision not to select him for the post of Director, D-1, Brussels Office, Public Partnership Division (PPD), UNICEF, (Post) (non-selection decision).
2. By Judgment No. UNDT/2024/071 (impugned Judgment),¹ the United Nations Dispute Tribunal (UNDT) rescinded both contested decisions and set the amount of compensation in lieu of rescission at two years' net base salary.
3. The Secretary-General 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 and reverses the impugned Judgment.

Facts and Procedure²

5. Mr. Fusco joined UNICEF in March 2003 as a Deputy Director, at the D-1 level, in the Private Fundraising and Partnerships Division (PFPD) based in Geneva. In May 2012, he was granted a permanent appointment retrospectively from 30 June 2009.³
6. In 2013, Mr. Fusco was informed that his unit would be closing and the post he encumbered was to be abolished. He began to apply for other posts at the D-1 level, including the post of Deputy Director, Private Sector Engagement, PFPD, and that of Deputy Director, Fundraising, PFPD.⁴
7. In September 2014, Mr. Fusco received a letter from the Director of PFPD, notifying him that following a budget review process and a reconsideration of organizational priorities, his post was among those proposed for abolition by 31 March 2015. The abolition was later postponed to 30 June 2015 and then to 30 September 2015, when it became effective. Mr. Fusco was advised that formal notice would follow and was encouraged to apply for other posts. He was also advised that UNICEF would support him in his search for a new assignment and that his name would be

¹ *Fusco v. Secretary-General of the United Nations*, Judgment dated 2 October 2024.

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

³ Impugned Judgment, para. 7.

⁴ *Ibid.*, para. 8.

“added on shortlists of vacancies of potentially suitable posts”. In addition, the notification letter granted him “a general waiver regarding the minimum time-in-post requirement or the minimum period of time [he was] expected to serve at a duty station”.⁵

8. From 2014 to September 2022, Mr. Fusco held various assignments of temporary duration, including at the P-5 level and in different duty stations, in anticipation of a more permanent position at the D-1 level consistent with his status as a staff member on a permanent appointment whose post was abolished due to organizational requirements.⁶ On 18 August 2020, he applied for the post of Deputy Director, Country Relations, PFPD, but was not selected.⁷

9. Mr. Fusco also participated in the 2021 and 2022 editions of the Senior Staff Rotation and Reassignment Exercise (SSRRE), which allowed senior staff members to be reassigned periodically to other suitable and available posts within UNICEF. On each occasion, he expressed interest in the available posts for which he considered himself suitable, but he was not selected for any of them.⁸

10. On 29 December 2021, Mr. Fusco received an offer of a temporary assignment to the post of Senior Adviser in PPD, at the P-5 level, for the period from 1 January 2022 until 30 December 2022 (Offer Letter).⁹ The Offer Letter also advised him:¹⁰

I understand your willingness to accept this temporary assignment and that you accept the conditions of this assignment. During your assignment as Senior Adviser we encourage you to apply to suitable vacancies in line with your profile and skill[]set. In addition, you will be afforded the same status and preferential treatment as staff on abolished posts in accordance with PROCEDURE/DHR/2018/001. Should you not be successful in securing a new appointment before the end of this assignment, you will be separated from the organization. At that time, you will be entitled to a termination indemnity[.]

11. In March 2022, Mr. Fusco was notified that Senior Management had decided not to have a 2022 edition of the international forum on children and youth that he had led in New York. Therefore, he was reassigned to work at the UNICEF PPD Office in Brussels.¹¹

⁵ *Ibid.*, para. 9.

⁶ *Ibid.*, para. 10.

⁷ *Ibid.*, para. 77.

⁸ *Ibid.*, para. 11.

⁹ *Ibid.*, para. 12.

¹⁰ 29 December 2021 Offer Letter.

¹¹ Impugned Judgment, para. 13.

12. On 20 May 2022, Mr. Fusco applied for the post of Principal Adviser, PFPD, at the P-6 level. On 29 May 2022, he applied for the Post.¹²

13. In August 2022, he expressed a preference for five posts in the 2023 SSRRE, including Deputy Representative, Operations, Kabul, Afghanistan, but did not receive any communication about the status of his 2023 SSRRE applications.¹³

14. On 30 September 2022, Mr. Fusco received a letter informing him that unless he is selected for a different post within UNICEF before 31 December 2022, his permanent appointment with UNICEF would be terminated and he would be separated from service (Termination Letter).¹⁴ The Termination Letter read:¹⁵

Dear Mr. Fusco,

Following communications in December 2021 and June 2022, the post you currently encumber will expire on 31 December 2022 and is not subject to further extension.

In the period between the date of this letter and 31 December 2022, you are encouraged to apply for all available posts within UNICEF for which you believe you have the required skills and competencies. You will be afforded the same status as staff on abolished post.

Your Human Resources Business Partner (...) will assist you and keep you informed of the posts for which you are applying and being reviewed. However, as selection and appointment to another post in UNICEF cannot be guaranteed, I encourage you to also explore opportunities in other United Nations agencies as well as outside the United Nations system.

If you have not been selected for a different post within UNICEF before 31 December 2022, your permanent appointment with UNICEF will be terminated and you will be separated from service due to reduction of the staff in accordance with the Staff Regulations and Rules and the terms applicable to your current supernumerary post assignment as listed in the letter (...) dated 29 December 2021. (...)

...

15. On 24 October 2022, Mr. Fusco learned of the appointment of another candidate to the position of Director of the PPD Office in Brussels for which he had applied on 29 May 2022.¹⁶

¹² *Ibid.*, paras. 14-15.

¹³ *Ibid.*, paras. 16 and 85.

¹⁴ *Ibid.*, para. 17.

¹⁵ 30 September 2022 Termination Letter.

¹⁶ Impugned Judgment, para. 18.

16. On 18 November 2022, Mr. Fusco submitted a request for management evaluation (MER) of the contested decisions. On 19 December 2022, he received a response to his MER.¹⁷ In the response letter, the Deputy Executive Director noted that Mr. Fusco's MER in respect of the separation decision was not receivable and that the non-selection decision was lawful.¹⁸

17. On 31 December 2022, Mr. Fusco was separated from service.¹⁹

18. Effective 1 April 2023, he was employed by a non-governmental organization based in Geneva as the Executive Director.²⁰

19. On 16 March 2023, Mr. Fusco filed the application with the UNDT.

The impugned Judgment

20. The UNDT granted the application and decided:

- a. The decision to terminate the Applicant's permanent appointment without applying appropriate priority consideration for suitable available posts in which his services could effectively be utilized is rescinded;
- b. The decision not to select the Applicant for the post of Director, Brussels Office, Public Partnership Division is rescinded;
- c. The Respondent may opt to pay the equivalent of the Applicant's two years' net base salary in lieu of reinstatement for the two violations; and
- d. The compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensations. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable.

21. The UNDT held that the application in respect of the separation decision was receivable. Unlike the 30 September 2022 notice, the 29 December 2021 notice lacked finality. The 30 September 2022 notice stated that Mr. Fusco's appointment was "not subject to further extension". This phrase was missing in the 29 December 2021 notice. Before September 2022, he

¹⁷ *Ibid.*, para. 8.

¹⁸ 19 December 2022 letter of the Deputy Executive Director.

¹⁹ Impugned Judgment, para. 20.

²⁰ Mr. Fusco's 20 November 2023 submission before the UNDT, para. 1.

had received at least four notices of separation and on those prior occasions he had not been separated.²¹

22. Turning to the merits, the UNDT noted that the parties agreed that the reorganization of UNICEF and abolition of the post Mr. Fusco encumbered were lawful.²²

23. Citing *Nega*,²³ the UNDT found that it was settled law that shortlisting a staff member under Mr. Fusco's circumstances was a tacit acknowledgement on the part of the Administration that the staff member was suitable for an available post. Therefore, as a staff member with a permanent appointment whose post was abolished, Mr. Fusco was entitled to be offered a post without subjecting him to a competitive selection process. The argument that the UNICEF selection procedures were different has no merit.²⁴

24. The UNDT held that the Secretary-General had also acted contrary to UNICEF Procedure DHR/PROCEDURE/2022/002 (Termination of appointment for reasons of abolition of post or reduction of staff) and UNICEF Administrative Instruction CF/AI/2016-005 (Staff Selection). The Human Resources (HR) Partner ought to have kept Mr. Fusco informed of developments regarding posts for which he was being reviewed, including the Post. The Secretary-General did not adduce any evidence to show that it was done.²⁵ The Secretary-General also failed to act transparently when in several instances it failed to inform him, during the review process, of how his core and functional competencies did not align with the vacancy announcements.²⁶ Furthermore, the failure to place Mr. Fusco in an appropriate tier for selection purposes jeopardized his chances of being given priority consideration. The Secretary-General conceded to having incorrectly identified him as a staff member not facing abolition of post. Therefore, his candidature for the SSRRE post of Deputy Representative, Operations, Kabul, Afghanistan, was not given full and fair consideration. These omissions constitute material irregularities.²⁷

²¹ Impugned Judgment, paras. 34 and 36.

²² *Ibid.*, para. 60.

²³ *Berhanemeskel Nega v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1393.

²⁴ Impugned Judgment, paras. 72-74.

²⁵ *Ibid.*, paras. 75-76 and 81-83.

²⁶ *Ibid.*, paras. 77-80.

²⁷ *Ibid.*, paras. 83-85.

25. The UNDT concluded that the Secretary-General had failed to minimally show that Mr. Fusco, as a staff member holding a permanent appointment facing abolition of post, had been accorded proper, reasonable and good-faith consideration to be retained in employment.²⁸

26. The UNDT found that pecuniary loss or gain was not a relevant factor in determining the amount of compensation in lieu of rescission. Relevant factors in this case are that Mr. Fusco had been holding a permanent appointment since 30 June 2009, and he would have retired comfortably in 2028 with full pension and medical benefits. After almost two decades in the service of UNICEF, it would have been difficult for him to secure new employment that would have given him the same level of remuneration or satisfaction. He has demonstrated that he relentlessly applied for posts (at least 11 posts between 2019 and 2022) and that he was qualified for a number of posts under SSRRE.²⁹

Procedure before the Appeals Tribunal

27. On 19 November 2024, the Secretary-General filed an appeal of the impugned Judgment with the Appeals Tribunal, to which Mr. Fusco filed an answer on 17 January 2025.

Submissions

The Secretary-General's Appeal

28. The Secretary-General requests the Appeals Tribunal to reverse the impugned Judgment and uphold the contested decisions.

29. The Secretary-General argues that the UNDT erred in law and in fact in finding that the application in respect of the separation decision was receivable. The relevant part of the 2022 Termination Letter was a mere reiteration of the 2021 Offer Letter, which contained all the relevant information on the termination.

30. The Secretary-General submits that the UNDT erred in law and fact in finding that the non-selection decision was unlawful. The UNDT disregarded the UNICEF legal framework. Contrary to the UNDT's finding, shortlisting does not equal suitability in the UNICEF legal framework. Pursuant to the CF/AI/2016-005, shortlisting is a step prior to the assessment of suitability. Suitability of shortlisted candidates is assessed by a selection panel. Furthermore, the UNDT

²⁸ *Ibid.*, para. 86.

²⁹ *Ibid.*, paras. 94-98.

manifestly erred in fact in finding that Mr. Fusco was assessed competitively against other candidates for the Post. His profile was never compared to the profiles of other candidates. His candidature did not reach that stage because his profile was found not suitable.

31. The Secretary-General contends that the UNDT erred in law when it awarded two years' net base salary as in-lieu compensation. As the non-selection decision was lawful, there is no basis for compensation. Should the Appeals Tribunal find differently, the UNDT erred because Mr. Fusco had offset his loss by securing new employment. The UNDT erred by failing to consider the salary of his new employment. The mitigation should be accounted for. His new salary appears higher than his United Nations net base salary. There is no basis for the UNDT's finding that it would be difficult for him to secure equal employment. Also, it cannot be held against the Organization that Mr. Fusco had been on temporary assignments since 2014. They allowed him to continue in service for more than seven years after his post was abolished.

Mr. Fusco's Answer

32. Mr. Fusco requests the Appeals Tribunal to uphold the impugned Judgment.

33. Mr. Fusco argues that the UNDT did not err in finding that the time limit for requesting management evaluation started to run on 30 September 2022. If he had received the separation decision in the 2021 Offer Letter, there would have been no need to issue the 2022 Termination Letter and in it give him three months' notice. At the time of the Offer Letter, UNICEF had not yet failed to give him priority consideration. Even if communications prior to the Termination Letter were considered as having finality, the failure to provide priority consideration in and of itself represents a reviewable contested decision.

34. Mr. Fusco submits that as one of the shortlisted candidates for Deputy Director, Country Relations, PFPD, he was found highly suitable but the hiring manager was not even informed of the circumstances triggering priority consideration. No document suggests that he was found unsuitable for the post of Principal Adviser, PFPD, at the P-5 level; instead, the reason for his non-selection was given as not being one of the top four highest scored candidates to be invited to the panel interview. The UNDT's findings regarding priority consideration were not appealed.

35. Mr. Fusco contends that the UNDT did not err in finding that he had not been afforded priority consideration in the recruitment for the Post. The rules governing shortlisting are the same in UNICEF and the Secretariat. UNICEF administrative issuances must be consistent with

Staff Rule 9.6 but they are not. Interviewing Mr. Fusco in the competitive recruitment process was inconsistent with his rights.

36. Mr. Fusco argues that the UNDT did not err in awarding compensation. He was subsequently successful in securing a job only on substantially less favourable terms than those he had at UNICEF. If his post-separation income were to be deducted from the amount of compensation, it should be increased by the sum representing the Organization's contributions to his health insurance, contributions to his pension fund and the tax payable on his earnings.

Considerations

Non-selection decision

37. Concerning judicial review of the non-selection decision, we recall what we have said in *Lemonnier*:³⁰

(...) Judicial review of a staff selection decision is not for the purpose of substituting the Dispute Tribunal's selection decision for that of the Administration. Rather, as we stated in *Abassi*, the Dispute Tribunal's role in reviewing an administrative decision regarding an appointment is to examine: "(1) whether the procedure laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration". The role of the UNDT is "to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner".

(...) As the Appeals Tribunal has explained, the starting point for judicial review is a presumption that official acts have been regularly performed: ... But this presumption is a rebuttable one. If the management is able to even minimally show that the [staff member's] candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter, the burden of proof shifts to the [staff member] who must show through clear and convincing evidence that [h]e was denied a fair chance of promotion.

38. Therefore, the issue is whether the Secretary-General met the statutory obligations to act fairly, justly and transparently with regard to Mr. Fusco and follow the requisite procedures during the recruitment process.

³⁰ *Lemonnier v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-762, paras. 31-32 (internal citations omitted).

39. Staff Rule 9.6(e) governs the retention of staff members in case of termination of appointment for abolition of post and reduction of staff as follows:³¹

(e) Except as otherwise expressly provided in paragraph (f) below and staff rule 13.1, *if the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post or the reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in the following order of preference:*

(i) *Staff members holding continuing appointments;*

(ii) *Staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment;*

(iii) *Staff members holding fixed-term appointments.*

When the suitable posts available are subject to the principle of geographical distribution, due regard shall also be given to nationality in the case of staff members with less than five years of service and in the case of staff members who have changed their nationality within the preceding five years.

40. In relation to the type of Mr. Fusco's appointment, the Staff Rules provided that permanent appointments were to be governed by the terms and conditions applicable to continuing appointments.³²

41. UNICEF DHR/PROCEDURE/2022/002 (Procedure on separation from service) sets out the following with respect to the period of notice of termination for reasons of abolition of post and the suitability of posts:³³

...

46. During the period of notice, staff members are expected to apply for all available posts for which they believe they have the required competencies. *HR managers will assist staff in identifying and applying for available and potentially suitable posts at the same grade level (see paragraphs 48 and 49). Every effort will be made to keep affected staff members informed of the posts for which they are being reviewed.*

...

³¹ Secretary-Generals Bulletin ST/SGB/2018/1/Rev.2 (Staff Regulations and Rules of the United Nations), emphasis added.

³² Staff Rule 13.1(a).

³³ Effective 20 September 2022, emphasis added.

49. A post is “suitable” if the staff member on an abolished post has *the core and functional competencies required for the post, as assessed in the respective staff selection process* (see CF/AI/2016-005 (as amended) on Staff Selection).

...

42. CF/AI/2016-005 provides, in the relevant part:³⁴

Section 5 - Assessment of candidates

Consideration for staff on abolished post

5.1 In accordance with CF/AI/2010-001 Amend. 2 on Separation from Service, the organization will assist staff members whose posts are abolished in identifying available and potentially suitable posts at their grade level. *Hiring managers and selection panels must give due consideration to these staff members’ application.*

...

Shortlisting

5.4 *Shortlisting is based on criteria reflected in the VA*, such as required qualifications, skills, knowledge and experience for the type and level of appointment. To the greatest extent possible, all shortlists should include a balance of qualified female and male candidates from diverse geographical background.

...

Assessment of shortlisted candidates

5.6 To ensure a fair, transparent and competitive process, normally at least three candidates should be assessed for the same vacancy and the assessment shall follow the same structure for each evaluated candidate.

5.7 A combination of evaluation methods and techniques may be used (e.g. written tests, competency-based and/or technical interviews, presentations). Passing criteria of each assessment shall be assigned in advance (e.g. relative weighting, minimum passing marks, etc).

...

Section 6 Recommendation

Selection recommendation

6.1 *The selection panel shall give due consideration to internal candidates, especially those on abolished post assessed as suitable.* The selection panel shall ensure that, in making the recommendation, the panel has taken into account UNICEF’s selection principles and goals in terms of diversity, such as gender parity and wide geographic distribution.

³⁴ Emphasis added.

...

43. In our view, the purpose of Staff Rule 9.6(e) is to mitigate the effects of retrenchment on staff members holding non-temporary appointments, to the greatest extent possible, through retaining affected staff members. However, Staff Rule 9.6(e) does not detail the process for doing so. By emphasizing that “due regard shall be given in all cases to relative competence, integrity and length of service”, the rule implies that the candidate’s qualifications remain the Organization’s primary concern for the sake of good administration.

44. We have elaborated on this principle in our reasoning in *Galati* which applies in the present case:³⁵

[The Rules make] it abundantly clear that the preference afforded to redundant staff members who hold indefinite appointments applies only to those who have relative competence and skills and are thus able to use their skills effectively in the identified suitable post. Once a redundant staff member has applied for a post, due regard must be given by the Administration to the relative competence, integrity and length of service of the staff member. Only where a permanent appointment holder meets the skill and competence requirements for the identified suitable post will he or she be given due consideration for recruitment to that post. When permanent appointment holders, sitting on abolished posts, have been determined not suitable, then a non-permanent staff member who applied for the post can be considered. Priority consideration is premised on candidates first establishing themselves as eligible and suitable for the position. Only then does priority consideration operate to permit their selection. To hold otherwise would require preference to be given to redundant staff members holding permanent appointments despite their lack of skills to effectively perform the tasks of the identified post. That would indeed lead to an untenable and unjustifiable situation, contrary to the requirements of [the Staff Regulations and Rules] to secure “the highest standards of efficiency, competence and integrity”.

45. As we have held in *Timothy* with regard to determining the suitability of the staff member for the post:³⁶

(...) Undoubtedly, the Administration is required by Staff Rule 9.6(e) to consider the indefinite position holder on a preferred basis for the available suitable position, in an effort to retain him or her in service. However, this requires, as per the clear language of this provision, determining the suitability of the staff member for the post, considering the staff member’s competence, integrity and length of service, as well as other factors such as

³⁵ *Federico Giuseppe Galati v. Secretary-General of the World Meteorological Organization*, Judgment No. 2022-UNAT-1218, paras. 41.

³⁶ *Timothy v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-847, para. 38 (internal citations omitted).

nationality and gender. If the redundant staff member is not fully competent to perform the core functions and responsibilities of a position, the Administration has no duty to consider him or her for this position.

46. We reiterate what we stated in *Megerditchian*: “[Priority consideration] cannot be interpreted as a promise or guarantee to be appointed or receive what one is considered in priority for. To hold otherwise would compromise the highest standards of efficiency, competency, and integrity required in selecting the best candidate for staff positions under Article 101 of the Charter.”³⁷

47. Our jurisprudence has clearly established that when affording priority consideration to staff members on abolished posts during a selection process, their suitability for the vacant post should first be assessed as a precondition. Priority consideration cannot be interpreted as a guarantee of selection. While due consideration should be given to candidates on abolished posts, as CF/AI/2016-005 provides, these candidates must meet the threshold of being “assessed as suitable”, which means they must undergo an assessment. Simply meeting the minimum vacancy requirements is usually not sufficient to be selected. Under Section 5.5, the “selection focal point” prepares the “shortlist”. The selection focal point (usually a Human Resources specialist) reviews the candidates’ profiles to see whether on paper the candidates have the required professional experience and education. Afterwards, the “assessment” of those shortlisted candidates is carried out by the “selection panel” pursuant to Sections 5.6 and 5.7.

48. In this case, we find that UNICEF conducted the selection process fully consistent with its administrative legal framework. Mr. Fusco was shortlisted and a selection panel was established under paragraph 5.8 of CF/AI/2016-005 which, after interviewing four candidates, including Mr. Fusco, provided detailed reasons for considering him unsuitable for that position:³⁸

Based on his profile and experience[,] he lacks the knowledge and direct experience at country level which is an important element required for this role. His answers were very generic, and the panel found that he had not articulated in practical terms what could be done for a quantum leap in resources although he claimed during the interview that it needed a quantum leap in resources mobilized through the EU institutions. The panel also added that he lacks resourcefulness in identifying solutions and would delegate upwards the problems to be solved. The panel appreciated his honesty on areas for development, however [was] not convinced that he [was] suitable and [did] not recommend him for this position.

³⁷ *Megerditchian v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-088, para. 28.

³⁸ Interview panel report, Annex 21 of Application.

49. Therefore, we find that Mr. Fusco's candidature received full and fair consideration.

50. Under the principle of the presumption of regularity, if the management is able to even minimally show that Mr. Fusco's candidature was given full and fair consideration, the burden of proof shifts to Mr. Fusco to show through clear and convincing evidence that he was denied a fair chance of selection. We do not see that he has done so. There is no evidence to show bias or ill-motive against him in the selection process.

51. As for UNICEF's failure to notify Mr. Fusco of its decision not to select him, we find that it was a procedural flaw. However, only a substantial procedural irregularity will render an administrative process and the resulting decision unlawful. Therefore, even if this was considered a procedural defect, it was immaterial and did not violate Mr. Fusco's rights to due consideration. Minor procedural errors cannot conclusively alter the lawfulness of a decision, as we held in *Krioutchkov*.³⁹

52. In conclusion, we find that the non-selection decision is lawful. The UNDT erred in finding that UNICEF had failed to act transparently, which had constituted material irregularities, during the selection process.

Separation decision

a. Receivability

53. The Secretary-General argues that the UNDT erred in law and in fact in finding that the Offer Letter "lack[ed] finality" and that the Termination Letter constituted an appealable decision.

54. Addressing the determination of whether a decision is an appealable administrative decision, we said in *Fasanella*:⁴⁰

(...) 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. Additionally, the Dispute Tribunal may consider "the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision".

³⁹ *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-744, para. 35.

⁴⁰ *Fasanella v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-765, para. 16 (internal citations omitted).

55. In other words, only a final administrative decision taken at the conclusion of the process will have direct legal consequences for an applicant's terms of appointment and constitutes an appealable administrative decision.⁴¹

56. Accordingly, in the present case, we must first review the legal consequences of both the Offer Letter and the Termination Letter on Mr. Fusco's terms and conditions of appointment and then determine which one constitutes a final administrative decision directly resulting in the termination of Mr. Fusco's appointment.

57. Having examined the contents of the Offer Letter, we consider it to be an offer of appointment rather than a notice of termination. It included essential information typically found in an offer of employment, such as a reference to a temporary assignment being offered, its duration, the conditions for the staff member (retaining his permanent appointment, current level and step, and the attached terms of reference), and the Organization's expectation of formal confirmation from the staff member.

58. Although the Offer Letter reminded Mr. Fusco of the possible outcome of not securing a new appointment before the end of the new assignment, it did not constitute notice or a decision on termination. Conversely, in offering a temporary assignment, it is common and reasonable to touch on some of the legal consequences expected of the end of the appointment.

59. In contrast, the Termination Letter was not merely a reiteration of the Offer Letter but a decision implying the definite termination of Mr. Fusco's appointment. First, it stated at the outset that the post encumbered by Mr. Fusco would not be extended, which meant he could not retain his employment at UNICEF through another extension. Obviously, this would lead to material legal consequences for Mr. Fusco—unless he found a new appointment by the end of this assignment, he would be separated. Second, the Termination Letter outlined the steps UNICEF and Mr. Fusco would take, such as the assistance Mr. Fusco would receive to secure a new appointment and his entitlement to a termination indemnity if unsuccessful.

60. Therefore, the purpose of the Offer Letter was clearly to offer a temporary assignment rather than to inform Mr. Fusco of a definite decision of termination.

⁴¹ *Nguyen-Kropp & Postica v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-509, para. 33.

61. Further, based on Ms. Fusco's experience and the Organization's practice, upon the expiration of the fixed-term appointment, termination was not the only possible outcome as he might alternatively have been granted a renewal or an extension. He had been kept in service by several job extensions.

62. The Offer Letter offered Mr. Fusco a temporary assignment with a specified duration but did not clarify what would transpire afterward. The wording of the Offer Letter was not sufficiently unequivocal in terms of its immediate legal effect on his employment status. Accordingly, we consider that it was reasonable for Mr. Fusco to have expected the Organization's subsequent decision on termination or possibly something other than termination, bearing in mind his previous experience in similar situations.

63. Therefore, we agree with the UNDT that the communication prior to the Termination Letter lacked finality. Mr. Fusco requested management evaluation of the Termination Letter within the statutory time limit. Accordingly, the UNDT was correct in finding that Mr. Fusco's application contesting the separation decision was receivable.

b. Lawfulness of the separation decision

64. We note that Mr. Fusco did not challenge the lawfulness of the reorganization at UNICEF or the abolition of the post he encumbered. In the application form, Mr. Fusco identified the contested decision(s) as a decision to "separate [him] by termination without applying appropriate priority consideration for suitable available posts and [a] decision not to select [him] for [the Post]".⁴² He relied on grounds that his status "required priority consideration for all SSRRE exercises and stand[-]alone vacancy announcements for which he [had] applied".⁴³

65. The Secretary-General has not provided submissions on whether the separation decision was lawful, arguing only that the application in that respect was not receivable. As we have upheld the UNDT's decision that Mr. Fusco's challenge to the separation decision is receivable, we are bound to decide whether the separation decision is lawful or not.

66. It is undisputed that before resorting to the internal justice system, Mr. Fusco sought management evaluation of the separation decision and the non-selection decision. Though he argued that beyond his application for the Post, he had submitted applications for other vacancies

⁴² Application form, Section V.

⁴³ *Ibid.*, Section VIII, para. 18.

within the Organization, none of which resulted in employment, he did not request management evaluation of those non-selection decisions.

67. Article 8(1)(c) of the UNDT Statute provides that an application is receivable if the “applicant has previously submitted the contested administrative decision for management evaluation, where required”. Since Mr. Fusco did not request management evaluation of the other non-selection decisions, the Tribunals do not have jurisdiction to review them. Therefore, we are unable to decide on the lawfulness of those non-selection decisions.

68. Whether priority consideration was afforded should be analyzed in the specific circumstances of the selection process. Except for the non-selection decision for the Post addressed in the first part of this Judgment, we will not review whether the Secretary-General afforded Mr. Fusco priority consideration in the SSRRE exercises and other recruitment exercises in which he had applied, since he did not request management evaluation of the respective decisions. We note further that for the vast majority of the posts he applied for, it was determined that his profile did not align with the vacancy announcement.⁴⁴

69. In addition, Mr. Fusco argues that he was never given guidance on what posts were appropriate and was “never considered for any post other than the limited number he was permitted to express interest in”⁴⁵, as grounds to show that UNICEF failed to meet the obligation to assist him “in identifying and applying for” potentially suitable posts.

70. As we held in *Timothy*, the affected staff member bears the primary responsibility for making the appropriate efforts to be retained in service:⁴⁶

[We] find erroneous the UNDT’s holding that staff members are entitled to be retained without having to apply for vacant job opening(s) since such a step represents the beginning of any competitive selection process based on the staff members’ relative competence, integrity, length in service and where required, nationality and gender.

71. In the Termination Letter of 2022, Mr. Fusco was informed of his assigned Human Resources Business Partner, who would “assist [him] and keep [him] informed of the posts for which [he was] applying and being reviewed”.

⁴⁴ Impugned Judgment, para. 77.

⁴⁵ Answer brief, para. 20.

⁴⁶ *Timothy* Judgment, *op. cit.*, para. 46.

72. In our view, it was always open to Mr. Fusco to receive employment assistance, provided he took the first move.

73. Additionally, we note that Mr. Fusco participated in the 2021, 2022 and 2023 editions of SSRRE. According to SSRRE's general introduction, this structured process aims to bring fresh perspectives to different offices and functions, ensure the right skills are deployed where most needed, and prepare senior leaders for higher responsibilities. Senior staff members in this process are assisted in identifying vacancies, profiles matching and consultation. Regarding his failure to secure an assignment during these SSRREs, as noted earlier, his candidature for the available posts remained subject to a suitability assessment.

74. Therefore, Mr. Fusco's challenge against the absence of assistance from the Administration is groundless. The UNDT erred in finding that UNICEF had committed a material irregularity by failing to provide sufficient assistance.

75. In these circumstances, we disagree with the UNDT's finding of a failure by the Administration to apply appropriate priority consideration. We cannot find that the separation decision is unlawful.

Compensation

76. As no irregularity vitiated the lawfulness of the contested decisions, there are no grounds for awarding compensation. As we stated in *Bastet*, compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair.⁴⁷

77. Therefore, the UNDT erred in awarding in-lieu compensation, and Mr. Fusco's request for compensation should be rejected.

⁴⁷ *Bastet v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-511, para. 59 (internal citations omitted).

Judgment

78. The Secretary-General's appeal is granted, and Judgment No. UNDT/2024/071 is hereby reversed.

Original and Authoritative Version: English

Dated this 27th day of June 2025 in New York, United States.

(Signed)

Judge Gao, Presiding

(Signed)

Judge Forbang

(Signed)

Judge Sandhu

Judgment published and entered into the Register on this 14th day of August 2025 in New York, United States.

(Signed)

Juliet E. Johnson,
Registrar