



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

SHADIAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Teresa Posse, UNDP

Thomas Jacob, UNDP

Introduction

1. By application filed on 7 October 2015, the Applicant, a former Assistant Resident Representative (Operations) (NO-C) with the United Nations Development Programme (“UNDP”) Iran Country Office (“Iran CO”), challenges the decision to separate him from service for “purported reason of abolition of post”.

Facts

2. The Applicant joined the United Nations in February 2005 as a Programme Assistant (G-6) with the United Nations High Commissioner for Refugees (“UNHCR”). He worked for UNHCR for seven years and obtained a promotion to the NO-A level as an Assistant Programme Officer.

3. On 1 February 2012, the Applicant was appointed as Assistant Resident Representative—Operations with UNDP at the NO-C level and assumed the role of Operations Manager (“ARR(O) post”).

4. Another Operations Manager post at the lower level of NO-B existed in the Iran CO. This was the Head of Operations for the projects covered by the Global Fund for the fight against HIV-AIDS, Tuberculosis and Malaria Cluster (“GFATM OM post”).

5. Until the arrival of the relevant Deputy Resident Representative to the matters considered in this case, UNDP, Iran (“Deputy Resident Representative”), in August 2012, the Applicant received satisfactory performance appraisals. The Applicant’s performance appraisal for the performance cycles of 2013 and 2014, when he was supervised by the Deputy Resident Representative, were never completed.

6. Throughout the period that the Applicant was supervised by the Deputy Resident Representative he encountered difficulties with the latter’s management style, resulting in a conflictual working relationship.

7. In a meeting held on 5 January 2015, the Applicant was verbally informed by the Resident Representative, UNDP, Iran (“Resident Representative”) and the

Deputy Resident Representative of the plan to abolish the posts of ARR(O) and GFATM OM and establish a new ARR(O) post at the NO-C level, which would merge the functions of the abolished posts. The Applicant was further informed that, in light of these plans, his appointment, which was due to expire on 31 January 2015, would be extended only by a further three months, until 30 April 2015.

8. By email of 23 January 2015, a Human Resources Specialist, Regional Bureau for Asia and the Pacific (“RBAP”), Office of Human Resources (“OHR”) sent the request for classification of the new ARR(O) post prepared by the Deputy Resident Representative to the Organizational Design Unit, Office of Human Resources (“ODU/OHR”) at headquarters, noting that the position had been created as a result of a re-purposing exercise in merging two OM functions.

9. By memorandum of 28 January 2015 to the Deputy Resident Representative, a Human Resource Advisor, ODU/OHR approved the “classification” or “reclassification” of the new ARR(O) post (post number 00098510) at the NO-C level (“new ARR(O) post”), effective 1 February 2015. The memorandum refers to both the reclassification and classification of the new ARR(O) post, without distinction, as more amply discussed below.

10. On 1 March 2015, the Applicant was given written notice that his contract would not be renewed beyond 30 April 2015 for reasons of post abolition.

11. On 5 March 2015, the job description for the new ARR(O) post was advertised.

12. The Applicant applied for the post on 19 March 2015. He was shortlisted for the post, along with the incumbent of the GFATM OM post, and invited to an interview.

13. The Applicant was interviewed for the new ARR(O) post on 21 April 2015 by a panel composed of four members: the Resident Representative, the Head of the United Nations Educational, Scientific and Cultural Organization in Iran, the Head of the World Food Program in Iran, and the Deputy Resident Representative, who participated as a non-voting member. The Applicant was not recommended for

the post. The interview report states that “despite the fact that he had been working in this sort of position for 3 years, the Panel members concluded, from [the Applicant]’s answers to the interview questions that he does not fully meet the requirement for such a senior and demanding post. His competencies do not fully match with the position’s requirement”.

14. On 30 April 2015, the Applicant was informed that since the recruitment process for the new ARR(O) post had not been finalised, his contract would be renewed for a further month.

15. On 6 May 2015, the recruitment process for the new ARR(O) post was sent to the Compliance Review Panel (“CRP”) in the Bangkok Regional Centre for review. On 13 May 2015, the CRP approved the recruitment process.

16. By letter of 17 May 2015 from the Deputy Resident Representative, the Applicant was informed that he had not been selected for the new ARR(O) post. The letter stated that “[w]hile the interview panel did find [his] background and skills to be appropriate and relevant, after careful evaluation in the interview process which covered evaluation of both competencies required for the post as well as the technical knowledge needed, another candidate more closely matched the requirements for this role”.

17. On 22 May 2015, the Applicant requested management evaluation of the abolition of the ARR(O) post and his non-selection for the new ARR(O) post. The Applicant provided further information regarding his request on 25 May and 17 June 2015.

18. By email of 28 May 2015, the Applicant requested suspension of the decision to separate him from service pending management evaluation.

19. By email of 3 June 2015 from a Human Resources Specialist, RBAP, OHR, the Applicant was informed that his contract would be extended until 9 July 2015, pending management review.

20. On 9 July 2015, the Applicant received a response to his request for management evaluation upholding the decisions to abolish the position of ARR(O),

to create a new merged position of the abolished ARR(O) post and the abolished GFATM OM post, and not to select him for the new ARR(O) post.

21. The Applicant was separated from service on 9 July 2015.

Procedural history

22. The Applicant filed his application with the Tribunal on 7 October 2015 and the Respondent submitted his reply on 9 November 2015.

23. By Order No. 15 (GVA/2017) of 19 January 2017, the proceedings were suspended until 19 April 2017 to allow the parties to seek an amicable resolution of their dispute.

24. By Orders Nos. 234 (GVA/2016) of 5 December 2016 and 126 (GVA/2017) of 14 June 2017 and oral orders made during the hearing on the merits, the Tribunal ordered the Respondent to produce additional documents, on its own motion and upon request from the Applicant. The Respondent filed additional documents on 15 December 2016 and 8, 13, 16, 20, 21, 22, 23 and 29 June 2017.

25. The Applicant also filed additional documents on 8, 20, 21 and 23 June 2017.

26. The Tribunal held a hearing on the merits from 19 to 23 and 27 June 2017, during which eight witnesses were heard, in addition to the Applicant.

Parties' submissions

27. The Applicant's principal contentions are:

Receivability

- a. The application is receivable in its entirety as the Applicant could not separately challenge the abolition of his post, the change of his terms of reference or the re-advertisement of his post at an earlier stage. The only administrative decision he could formally challenge was the non-renewal of his appointment, which he did within the applicable deadline;

Merits

- b. The contested decision was motivated by bias on the part of the two decision-makers, who wanted to separate the Applicant from service and ensure that the incumbent of the GFATM OM post would be retained. The UNDP Human Resources colluded with these decision-makers in order to effect the Applicant's separation;
- c. The Organization mischaracterised the process as an abolition of the posts of ARR(O) and GFATM OM and the creation of a new post of ARR(O) whilst, in effect, it only made cosmetic changes to the terms of reference of the post of ARR(O) encumbered by the Applicant; This unlawful process avoided a comparative review of the old and new terms of reference for the post of ARR(O) and deprived the Applicant of the safeguards he was entitled to as incumbent of the ARR(O) post;
- d. The advertisement of the Applicant's post was made in violation of sec. 74 of UNDP Recruitment and Selection Framework as no new functions were added to his terms of reference nor any additional technical competency required;
- e. The recruitment process for the new ARR(O) post was not only tainted by bias but also impaired by several procedural flaws, all designed to avoid scrutiny over the process;
- f. In particular, all the decisions in this selection process, except the marking of the candidates' interviews, were made by the Deputy Resident Representative who had no authority to take such decisions;
- g. The requirement to use an assessment process other than a panel interview, set forth in sec. 68 of the UNDP Recruitment and Selection Framework, have not been complied with, which removed any objective element from the selection process. Furthermore, technical skills were not properly assessed during the interview;

h. Two of the panel members, including the Deputy Resident Representative who exerted influence on the selection process despite his alleged role as a non-voting panel member, were biased as they previously manifested their desire to separate the Applicant;

i. The Organization did not seek to establish a quorum in the local CRP prior to using external ones, as required by secs. 9, 11 and 12 of the Rules and Procedures for the UNDP Compliance Review Panel (“CRP Rules”). This procedural error vitiates the decisions in respect of the classification of the new ARR(O) post and the recruitment process for this post. It is also evidence of bias;

j. Consequently, the Applicant requests the Tribunal to:

i. Rescind the decision to separate him from the Organization;

ii. Award him damages for loss of earnings resulting from that separation; and

iii. Award him moral damages “resulting from the serious blow the decision has had on [his] career development”.

28. The Respondent’s principal contentions are:

Receivability

a. The application is irreceivable as the Applicant knew about the abolition of his post since January 2015 and was formally notified of the same on 1 March 2015. He did not file his request for management evaluation until 22 May 2015, which is after the 60-day mandatory deadline to submit a request for management evaluation;

Merits

b. The decisions to abolish the old ARR(O) and GFATM OM posts and to create a new post merging their functions were lawful as:

- i. they were triggered by a requirement to reduce the Iran CO budget;
 - ii. they constitute a reasonable exercise of the Organization's managerial discretion to restructure its units; and
 - iii. the new ARR(O) post differs significantly from the old one because it combines the functions of the old ARR(O) post and that of the GFATM post, resulting in the addition of the following three key functions: a) to lead the GFATM team, which represents an additional responsibility for over USD10 million per annum, b) to assist in the preparation of legal documents and c) to act as an audit focal point;
- c. The Applicant's candidacy for the new ARR(O) post was given full and fair consideration as:
- i. The RBAP considered that convening an *ad hoc* CRP in the CO might create the appearance of a lack of transparency or a conflict of interest; hence, in line with the CRP Rules, it decided that it was preferable that the recruitment be reviewed by the CRP in Bangkok;
 - ii. The decision to forego a written technical assessment was a reasonable exercise of the Organization's managerial discretion given that the two short-list candidates had been successful incumbents of the two former posts and the Iran CO was operating under time constraints given that the two posts had to be abolished by 30 April 2015; Furthermore, sec. 68 of the UNDP Recruitment and Selection Framework does not require the conduct of a written assessment;
 - iii. The Organization was unable to review the Applicant's performance appraisal as part of the selection process due to the fact that the Applicant submitted his work plan for 2013 and 2014 only on 19 April 2015;
 - iv. The Deputy Resident Representative had delegated authority to take decisions in respect of the selection process;

d. As to remedies, the Applicant had a duty to mitigate his loss so any award of material damages should take into account the income from his new job. Furthermore, the Applicant did not adduce any evidence of moral damages;

e. Consequently, the Respondent requests the Tribunal to reject the application in its entirety.

Consideration

Receivability

29. By his application, the Applicant challenges the decision to separate him from service, notified to him by letter of 17 May 2015. In this process, he impugns prior decisions taken in the process that led to his separation, notably the decision to abolish his post and to create and advertise a new one. At the hearing on the merits, the Respondent challenged the receivability of the application insofar as it concerns these latter decisions, arguing that the Applicant is time-barred to challenge them as he did not file a request for management evaluation within the set deadline.

30. The Appeals Tribunal held in *Lee* 2014-UNAT-481 that while an applicant “cannot challenge the discretionary authority of the Secretary-General to restructure the Organization or to abolish a post, [he/she] may challenge an administrative decision resulting from the restructuring once that decision has been made”. It found that the budgetary proposal by the Secretary-General and the General Assembly’s adoption of it by resolution “[were] merely acts prefatory to or preceding an administrative decision that would ‘produce direct legal consequences’ to [the Applicant’s] employment”.

31. It follows from this jurisprudence that the Applicant could not separately challenge the decisions to abolish his post and to create a new one.

32. That said, this does not mean that the Applicant, while contesting his separation from service, cannot raise arguments touching upon prefatory steps taken in the process leading to such decision and which contributed to it. This position was confirmed in *Hersh* 2014-UNAT-433-Corr.1, where the Respondent argued

that the Dispute Tribunal could not review the decision regarding the reclassification of a post, taken during a process that led to the Applicant's separation, when reviewing the legality of the decision to separate the Applicant. The Appeals Tribunal rejected this argument, finding that "the UNDT's review of the factual situation by necessity involved a consideration beyond the mere fact of termination of Ms. Hersh's contract".

33. The need for the Tribunal to go beyond the examination of the decision not to renew the Applicant's contract is particularly acute in the present case, where the decision to abolish the Applicant's ARR(O) post and to create a new one cannot be dissociated from the ultimate decision not to renew his fixed-term appointment, as discussed below. Adopting the Respondent's narrow position on the receivability of the application would remove an important set of facts from the scope of the judicial review and, in effect, prevent judicial scrutiny over an important part of the process that ultimately led to the Applicant's separation.

34. Furthermore, many of the events leading to the Applicant's separation were simply not known to him, as there was no disclosure of the processes, which only became apparent during these proceedings, as discussed below.

35. The Tribunal finds that whilst it is formally seized of the decision to separate the Applicant from service, it may incidentally review the decisions to abolish his post, to create a new one and not to select the Applicant for the newly created post, which are all essentially part of the same transaction. They are additionally directly relevant to the foundation of issues of bias and procedural flaws, as alleged by the Applicant.

36. Therefore, the Tribunal finds the application receivable in its entirety.

Scope of review

37. The Tribunal has to examine the legality of the decision not to renew the Applicant's fixed-term appointment beyond 9 July 2015, following the alleged abolition of his post and the creation of a new post of ARR(O) for which he was not selected.

38. It is settled law that a fixed-term appointment does not bear any expectancy of renewal (Staff regulation 4.5; *Syed* 2010-UNAT-061; *Appellee* 2013-UNAT-341). A non-renewal decision can be challenged on the grounds that it was arbitrary, procedurally deficient, or the result of prejudice or some other improper motivation (*Morsy* 2013-UNAT-298; *Asaad* 2010-UNAT-021; *Said* 2015-UNAT-500; *Assale* 2015-UNAT-534). The staff member alleging that the decision was based on improper motives carries the burden of proof with respect to these allegations (*Asaad* 2010-UNAT-021; *Jennings* 2011-UNAT-184; *Nwuke* 2015-UNAT-506; *Hepworth* 2015-UNAT-503). In turn, when a particular justification is given for an administrative decision it must be supported by the facts (*Islam* 2011-UNAT-115).

39. In *Obdeijn* 2012-UNAT-201, the Appeals Tribunal further stressed that “a decision not to renew an FTA can be challenged as the Administration has the duty to act fairly, justly and transparently in dealing with its staff members”.

40. As to the restructuring exercise, the Appeals Tribunal held in *Gehr* 2012-UNAT-236 that “it is well settled jurisprudence that an international Organization necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff”. However, the Appeals Tribunal recalled in *Chen* 2011-UNAT-2017 that “whilst the Secretary-General has wide discretion in the reclassification of posts (...) like any discretion, it may not be exercised in an arbitrary, capricious, or illegal manner”.

41. As to selection decisions, the Appeals Tribunal repeatedly held that they must be “reasonable, lawful and procedurally fair”. They are presumed to be regular “if management is able to show that an applicant’s candidature was given a full and fair consideration” (*Rolland*, 2011-UNAT-122). The Appeals Tribunal recently held in *Ngokeng* 2017-UNAT-747 that “[w]hile the Secretary-General bears the overall onus to prove the justifiability of the decision on promotion, once the presumption arises the rebuttal of it should occur only where clear and convincing evidence establishes that an irregularity was highly probable.”

42. Against this background, the Tribunal will now turn to examine:
- a. The Applicant's allegations that the two main decision-makers were biased against him and sought to ensure his separation from the Organization; and
 - b. The alleged irregularities in the process leading to the Applicant's separation, including in the abolition of his ARR(O) post, the creation of a new ARR(O) post and the non-selection of the Applicant for the new ARR(O) post.

Allegations of bias

43. The Applicant claims that the Deputy Resident Representative and the Resident Representative sought to ensure his separation from service in an unlawful fashion and that the UNDP Human Resources team colluded with them to achieve this result. The Applicant alleges that after devising a plan to abolish his post and the GFATM OM post, they ensured that the incumbent of the GFATM OM post would secure the newly created ARR(O) post.

44. The Respondent argues that the Applicant's separation was the result of a rationalisation exercise initiated in the context of the CO Financial Sustainability Plan, which started in late 2014 and led management to identify duplication in the functions of the ARR(O) and GFATM OM posts and, ultimately, to decide in January 2015 to abolish the two posts and create a new ARR(O) post. He argues that the recruitment process for the new ARR(O) post was done in a fair and lawful manner.

Disclosure of key documents

45. At the outset, the Tribunal notes that the case took a different turn on the third day of the hearing, when the Respondent for the time produced an exchange of emails between the Deputy Resident Representative and the UNDP Human Resources team, which reveal the genesis of the decision to separate the Applicant and the process that led to it. These documents were produced upon an Order from

the Tribunal, following the cross-examination of the Deputy Resident Representative, which revealed their existence.

46. The Tribunal deems it appropriate to quote a large portion of the exchanges contained in these documents given their import to the case, to avoid any misinterpretation and to fully expose the role played by the Human Resources team in the process and the approach taken by both the Resident Representative and the Deputy Resident Representative.

47. In a confidential email of 24 September 2014 to a Human Resources Specialist, RBAP, OHR, copied to the Resident Representative, the Deputy Resident Representative unequivocally expressed his desire to separate the Applicant due to alleged performance issues and sought advice on the way to proceed, but not based upon such issues:

1) We have a NoC Operations Manager who is on a FTA position. He (sic.) recruitment was done in Feb 2012 through a competitive process. His current contract—at the end of three years—ends in Feb 2015. We wish to exercise the option of not extending the contract beyond its current tenure. With his FTA at less than 5 years we wish to exercise the option of not extending the contract beyond its current tenure. While we have serious performance issues we do not wish to go that route and simply not extend the contract. Please advise on the practicability of doing this without assigning a reason. In that scenario what is the required mandatory notice period?

The individual has prior experience in UNHCR but I do not have this contractual status but can share if you wish to consider them.

The other reason we wish to take the above step is also to rationalize (and save valuable resources) by integrating this NoC post with a NoB Operations Manager in Health & Development cluster in the GFATM project's Programme Management Unit. The NoB post in the GFATM PUM is fully funded by the Global Fund. The new NoC post will have a new ToR combining the functions of the two above OM posts which in any case have lots of overlaps. This way we can save 50% of the NoC OM post in the CO as the funding will come from GFATM (for 50% of the new OM post). While a one month notice period is the requirement as per HR policy we are intending to give greater notice window say even three months. Please advise if all of the above proposals are fine.

2) We have another NoC who (sic.) functions as Programme Officer and heads one of the four programme clusters in the CO. Out of the

current portfolio of the cluster of 5 projects a minimum of three are going to be reassigned to another cluster for a variety of reasons. This will leave the cluster and the PO managing just two relatively small size projects. At the same time as part of the re-casting of the CO especially in terms of both developing new programme business to address the CO financial sustainability issues as well as establishing a Policy unit to meet the demands of policy advisory services we would like to modify this person's ToR to include these new functions and create the time by moving projects from his current portfolio as explained above.

Is this above scenario feasible to implement? The key factor will be to avoid having to make this a new post requiring to go through a recruitment process and instead be either a lateral move to another new NoC post or a revision of the existing ToR of the post that individual is encumbering.

Your feedback/guidance on the above two issues will be greatly appreciated.

48. By email of 25 September 2014, the Human Resources Specialist, RBAP, OHR, advised the Deputy Resident Representative on the way to proceed as follows:

1) Indeed, it is best not to take the "performance route". The change of functions, although the position will be maintained at the NOC level, may be sufficient justification for the non-renewal of contract –however, this needs to be cleared by LSO [Legal Support Office], which I can facilitate in obtaining based on you (sic.) 3rd paragraph below. Before I proceed, however, please provide me the name and index number of the affected staff to determine whether s/he is a long-serving staff member.

2) As soon as you have a final version of the updated TOR, please have it reviewed by ODU/OHR. Normally, if the changes [to the TORs] are minor, the incumbent can be retained in the position. However, if the changes to the TORs are major, the position may have to be advertised.

49. By email of 26 September 2014, the Human Resources Specialist, RBAP, OHR, summarised a Skype conversation she had with the Deputy Resident Representative earlier that day, further detailing the process to be followed in the two separate instances for which the Deputy Resident Representative sought advice and in order to retain the incumbent of the GFATM OM post (referred to as the "NOB position" in this email):

1) Local staff member, Mr. Shahin Shadian (index# 682921), is NOT a long-serving staff member having joined UNDP upon initial appointment effective [1 February 2012]. As such a non-renewal notification shall be issued to him to notify of non-renewal of his contract beyond February 2015. Although at least 30 days' notification is required, it is best that any affected staff member receives such notification as early as possible so they can start exploring other options including searching for jobs within or outside of UNDP. You will note in the attached template that a reason for the non-extension is required, which I request from you soonest in order to facilitate clearance from LSO.

2) Please submit the revised JDs/TORs of the two NOC positions in due course under a separate covering memo to ODU (memo and JD templates are attached), for their assessment and confirmation that both positions can, indeed, be retained at the NOC level.

3) The justification for advertising one of the NOC positions for recruitment and open competition, while the other NOC (Programme Officer) will not be advertised, is that the former's revised TOR is the result of the merging of both NOC and NOB positions. As a result of such a merger, and the abolishment of the NOB position, this NOC position must be advertised to open for the opportunity for the two affected staff members—among other applicants—to compete and fill this NOC position.

4) Since the NOB position will be abolished, it is also necessary to notify the current incumbent in writing. Although you will be “targeting/headhunting” her to apply for the NOC position that will be advertised, a formal notification has to be issued to her as there are no guarantees that she will, indeed, be selected for the new position. (*Note: A lateral move is not possible as she is at NOB level, while the position is NOC.*) In this connection, please advise the name of the NOB incumbent to determine whether she is a long-serving staff or not to enable issuance of the appropriate letter (i.e., the same procedure has to be followed as in item 1 above).

50. By email of 19 October 2014, the Deputy Resident Representative followed-up with the Human Resources Specialist, RBAP, OHR, to obtain clearance for the non-renewal letter he wanted to send to the Applicant:

In further reference to our ongoing discussions on the multiple issues outlined in your email below—with regard to the issue listed at no. 1—please find attached the draft of the letter (in the template format you provided) with regard to the non-renewal of the FT contract of Mr. Shadian. We have used the template nearly completely.

Please proceed with getting the necessary clearances at the HQ end including LSO so that we could issue the letter at the earliest but no later than the end of this month—October.

51. The draft non-renewal letter, written on behalf of the Resident Representative, stated that the non-renewal of the Applicant’s fixed term appointment was “due to a major revision of the Terms of Reference for this post consequent upon the need to combine the functions of the two Operations Managers—one for the Country Office and the other for the GFATM Health & Development Cluster which is itself a need to reduce management costs”. It further stated that “[i]t [was] not a reflection for [his] performance”.

52. By email of 22 October 2014, the Human Resources Specialist, RBAP, OHR, responded to the Deputy Resident Representative’s request, insisting that clearance for the reclassification of the Applicant’s post be obtained prior to notifying the Applicant of the non-renewal of his appointment:

I would like to recall my earlier advice, as per item 2 of my email of 26 September 2014, i.e., to submit the revised TOR to ODU/OHR for reclassification. Before the non-renewal notification is issued to Mr. Shahin Shadian, it is critical that CO management provides a solid proof (i.e., there are indeed major changes as a result of the merging of the two OM functions even though the level is retained at NOC) to justify the non-renewal of the incumbent’s contract and opening the position for competitive recruitment. Please let us know the status of the submission to ODU/OHR. I am reattaching the templates, for your ease of perusal if this is yet to be processed.

As soon as we have the required confirmation from ODU/OHR, we will submit the draft non-renewal notification to LSO for their further review and clearance.

53. In November 2014, another Human Resources Specialist, RBAP, OHR, took the case over from the previous specialist. By email of 20 November 2014 to the new Human Resources Specialist, RBAP, OHR, in charge of the case, the Deputy Resident Representative sent the “revised ToRs” for the new ARR(O) post to Human Resources and reiterated his request to obtain clearance for sending a non-renewal notification to the Applicant:

Based on Lory’s guidance below we have worked on revising the ToR for the OM post combining the functions of the two OM posts.

The revised new ToR for the OM (Assistant Resident Representative – Operations) post is attached. I am also attaching the existing ToR of the OM post (encumbered by Mr. Shahin Shadian). (...)

For ease of Sara's reference I am also attaching the draft of the non-renewal notification to be issued to Mr. Shadian.

Please confirm whether you would like to review the new ToR and revert to us with inputs or shall we go ahead and submit it to ODU/OHR.

As the FT contract of Mr. Shadian is coming to an end in Feb 2015 and we would like to issue the non-renewal notification as early as possible giving the staff member enough time to apply for other positions your early reply will be greatly appreciated.

54. The Human Resources Specialist, RBAP, OHR, responded as follows in an email of 3 December 2014:

1) I would suggest to move forward with submitting the JD for reclassification to ODU, there is no need for me to review;

2) On the letter my advice is not to add anything besides the usual non-renewal letter. If you could kindly remove the first para[graph] regarding the reason for non-renewal. I am not sure whether your intention is to advertise the post and ask the affected [staff member] to apply, if that is the case, I would ask to separate the two issues and avoid any risk. In fact the cleanest way would be to abolish the post and if the post is changing to establish a new post with the new requirement. If the post is advertised externally, the separated staff member will have an opportunity to apply for the post at that time.

55. By email of 3 December 2014 to the Human Resources Specialist, RBAP, OHR, the Deputy Resident Representative reiterated again his request for clearance of the non-renewal letter to the Applicant, while at the same time referring for the first time to the possibility that the Applicant may apply to the newly created post:

The draft letter was prepared based on the template that Lory had shared with me (attached for your ready reference) after our discussions over a couple of conference calls. This template did have the reason in the first para[graph] and even suggested options. Hence our draft was on the same lines.

Taking your advice on board I am attaching the two versions of the draft letter for you to refer to LSO. One has no reason stated in the first para (ver 1) and the other has the reason as "due to a major revision of the Terms of Reference of the post you are encumbering

consequent to which the post will be abolished.” (ver 2). Our preference will also be to go for a version without any reason. I agree that it keeps it simple.

In response to your other point you have raised our plan is to abolish the current NO-C post and create a new NO-C post with the new ToR (to be approved by ODU) and advertise the same. We will advertise both internally and externally and if we do not find sufficient suitable applicants, then consider external applicants also. This [staff member] whose post is being abolished will definitely have a chance to apply as external candidate.

Could we request you to please ON PRIORITY run both the versions past the LSO and revert to us urgently. As we have only under two months left we are keen to issue the letter ASAP.

I will be sending the new ToR to ODU for classification under copy to you. It would be useful to know to whom it should be addressed. The template that Lory shared has Mark’s name on it. Is that still valid? As an old friend and colleague I can then request Mark for priority attention!

56. By email of 4 December 2014, the Human Resources Specialist, RBAP, OHR responded that “[she would] submit to LSO immediately and revert”.

57. In a further email of 22 December 2014, the Human Resources Specialist, RBAP, OHR summarised the process previously agreed upon during Skype conversations with the Deputy Resident Representative, devised to ensure that the appointments of both incumbents of the abolished posts would be renewed until completion of the recruitment process for the newly created ARR(O) post, thereby allowing them to apply to the said position as internal candidates:

1) (...) The two Operation positions (CO – NOC & GFATM – NOB) to be abolished and a new OM position @ NOC level to be created, reclassified and advertised.

As this will affect the two incumbents (both of whom are non-long serving staff members), management to initiate discussion with both staff members and inform them of the post abolishment plan and both staff members to be given the opportunity to apply for the advertised position:

Shahin Shadian (NOC): Index #682921 EOD 1/2/2012 with contract expiration date of 31/1/2015;

[A.Z.] (NOB): Index # EOD on FTA 1/01/2012 with COB 31/12/14.

Since you have explained the history, we discussed to link the OM strengthening plan to the Financial Sustainability plan which the office has had earlier.

You were then to provide us with the plan including the expected timing of the VA and its completion date, to enable us advise you on the duration of the recommended extension of FTA appointment for both staff members to allow them apply and compete for the position.

As indicated above, since both staff members are non-long serving, there is no need for a search letter, as I originally envisaged in our discussion. It will therefore be a non-renewal letter, which could be combined with the anticipated extension of FTA (I suggested then that it could be three months to accommodate the filling of the newly established OM—NOC position).

2) After our discussion, you were provided with the template of the post creation and classification. Since then you have sent the request to Joel with clarification. I am assuming that the final request to be sent to both OFRM and ODU.

3) Please find attached template of a regular non-renewal letter, which you will need to include the reason for extension on the first para[graph] and send it us back together with you (sic.) plan (which services as a justification for the non-renewal) to enable us share with LSO for clearance and move forward with the action.

58. In an email of 22 December 2014, the Deputy Resident Representative followed-up on a number of issues above, notably in respect of the non-renewal letter to be sent to the Applicant and, for the first time, proposed a draft non-renewal letter for the incumbent of the GFATM post as well:

As regards the draft non-renewal letter in the template—I have already shared with you multiple drafts with different reasons for non-renewal for Mr. Shadian. I will attach the one that relate to abolition of post for reasons of cost saving through integration and redesigning of the two OM posts. I am attaching the one for Mr. Shadian and also a freshly prepared one for [A.Z.].

59. By email of 24 December 2014, the Human Resources Specialist, RBAP, OHR, after consultation with Human Resources Business Partner and the Legal Support Office, authorised the Deputy Resident Representative to implement the plan detailed above (see para. 57 above) and provided him specific instructions on the way to proceed:

Please go ahead and have the discussion with the staff members tomorrow as planned, separately;

The discussion should inform them the detail of the plan as you mentioned on the draft letter;

The discussion should be documented;

The letter should not give too much information as we discussed, since it will be captured through your individual discussions with the [staff members], it should only mention—on the first para “... per your discussion with so and so, on the such and such date, your contract is being extended for a period of three months, from through ... 2015”. The rest should follow as per the usual non-renewal letter except with the new extended date of contract;

The post should be advertised internally, however, should you think that interested internal candidates will only be the two of them, you may want to consider internal to UN System, but you could think this over. It should not be advertised externally.

You will also need to come up with a plan on how you would want to conduct the recruitment process and document the action plan.

(...)

I look forward to receive the draft letters, the plan and the signed classification memo. The formal post creation request will be forwarded directly to Joel.

60. By email of 30 December 2014 to the Human Resources Specialist, RBAP, OHR, the Deputy Resident Representative confirmed that he proceeded as planned, notably that he had informed the incumbent of the GFATM OM post that her contract would be extended until April 2015 and that he would do the same when the Applicant returns from leave on 4 or 5 January 2015, specifying that “this [would provide them] adequate time to conduct a thorough recruitment process as well as sufficient time for the two colleagues to consider other options”.

61. The process then continued with the request for classification of the new ARR(O) post being sent to ODU/OHR by the Human Resources Specialist, RBAP, OHR, as discussed in the “Facts” section above (see paras. 8 to 21 above).

62. These emails disclose an account of events significantly different from the process described by the Respondent in his submissions and in the witness

statements he produced prior to the hearing, and clearly and most convincingly support the Applicant's allegations of bias made in his initial application.

63. The Tribunal is concerned that these documents, which were crucial to the determination of the case and were apparently in the possession of Counsel for the Respondent for some time, were disclosed only at a very late stage of the process, following a request it made during the Deputy Resident Representative's cross-examination. Whilst these documents were not specifically covered by the orders for production of evidence made by the Tribunal prior to the hearing, as their existence was unknown at the time, the Tribunal finds that the Respondent nevertheless failed to fulfil his disclosure obligations in this case. In this respect, the Tribunal recalls its holding in *Valentine* UNDT/2017/004 that in the context where most of the relevant evidence is in the possession of the Administration, "[p]rompt and full disclosure of the relevant documents by the Respondent is key to a fair determination of the case". As held in *Valentine*, the Respondent's disclosure obligations are not limited to produce the evidence relevant to support his own case but includes "any document in his possession that is relevant to the determination of the Applicant's case, as presented in his or her application". This duty of candour that falls on the Respondent is necessary to ensure that staff members have access to justice. Applicants cannot have their cases fairly and properly considered by the Tribunal without the Tribunal being fully informed of all matter touching upon the case. The non-disclosure of documents which are clearly relevant goes to the ability of an applicant to form and present his or her case and to the ability of the Tribunal to ensure that proper processes have been followed and are not tainted by ill motivation. The failure to provide relevant documents is the same as misleading the Tribunal. This is unacceptable conduct, especially in circumstances where the knowledge of the existence of relevant documents is solely within the purview of the Respondent. The duty of candour finds its source in art. 4 of the Code of conduct for legal representatives and litigants in person, adopted as Appendix to General Assembly resolution 71/266 on 23 December 2016, which provides that "legal representatives (...) shall maintain the highest standards of integrity and shall at all times act honestly, candidly, fairly (...) [and] in good faith".

64. The late disclosure of the documents also calls into question the integrity of the Respondent and his Counsel in handling this case, as well as that of a number of witnesses, as discussed below. Most certainly, a long litigation could have been avoided had the documents been disclosed in a timely manner.

Credibility of witnesses

65. During his testimony, the Deputy Resident Representative initially insisted that the sole reason for the Applicant's separation was the abolition of his post, even after having been specifically reminded by the Tribunal that he was under oath. When presented with his email of 24 September 2014 quoted above, he recanted his testimony and admitted that he intended to separate the Applicant prior to his post being abolished and a new one created. His witness statement made no reference to his email of 24 September 2014, although it was the genesis of the whole action leading to the separation of the Applicant. The Deputy Resident Representative admitted that although he was of the view that the Applicant had performance issues, he could not base his non-renewal on that ground as it would require a documentary record and to follow a "lengthy process". However, he insisted that he could decide not to renew the Applicant's appointment without providing any reason as it was a fixed-term appointment which carries no expectancy of renewal. The Deputy Resident Representative also admitted that, in light of para. 2 of his email of 24 September 2014, the rationalisation of the ARR(O) and GFATM posts was a justification put forward not to renew the Applicant's appointment, and not the other way around, contrary to his previous assertion. Despite his stated intent to separate the Applicant, the Deputy Resident Representative maintained that the recruitment process for the new ARR(O) post was conducted in a fair and transparent manner, and that the Applicant had a real chance to be selected for the new ARR(O) post.

66. The Tribunal most unfortunately finds that it is beyond any doubt that the Deputy Resident Representative failed to be truthful in conformity with the oath taken in respect of vital issues for consideration, after having been specifically reminded that he was on oath. The Tribunal can form a clear view that the Deputy Resident Representative presumably thought that he could make a series of false

denials until he was confronted with incontrovertible documentary evidence, which he had every reason to believe had not been disclosed to the Tribunal, as it had not been provided to the Tribunal before the hearing. It is further noted that the witness was generally evasive in his answers and, at times, even refused to answer simple questions. He appeared at all times to be motivated by a desire to obscure the decision-making process and to implicate others, while minimizing his own involvement. This witness was not a witness of truth and no reliance can be placed upon his testimony. Rather, his attitude lends supports to the conclusion that the contested decision was based on ulterior motives.

67. As to the Resident Representative, he also failed to make any reference in his witness statement and his initial oral testimony to the email of 24 September 2014, or any of the other emails to and from Human Resources seeking advice as to how to engineer the separation of the Applicant. However, after having been presented the email of 24 September 2014, he confirmed that he and the Deputy Resident Representative had concerns with the Applicant's performance and that these were a factor taken into account in the decision to separate the Applicant, although he insisted that it was not the main one. He stated that the Applicant's post had to be merged anyway with the GFATM OM post and that the outcome would be the result of a valid process as the Applicant would be allowed to compete for the new post. He tried to convince the Tribunal that the Applicant had a chance to be selected for the new ARR(O) post, despite the expressed concerns about his performance by the decision-makers. The Tribunal finds that the Resident Representative's testimony is inherently incoherent and not credible. Again, it displays an attempt to justify an ill-motivated and improper process.

68. The Human Resources Business Partner, who was copied with all emails quoted above and oversaw the whole process, also gave evidence to support the contested decision. She initially sought in her witness statement and testimony in Court to justify and support the process that led to the contested decision, trying to avoid any reference to the origin of the process. The Human Resources Business Partner declared in her witness statement, which she confirmed under oath at the hearing, that "[i]n early 2015, the UNDP's Country Office in Iran contacted the Office of Human Resources to enquire and request advice about the merging of

2 posts of Operations Managers into a one new post”. When confronted with the 24 September 2014 email and the ones that followed, she was forced to admit that her witness statement was inaccurate, and rather disingenuously sought to argue that this was a typographical error. The witness statement clearly gave the impression that the events under review commenced in “early 2015”, when clearly they commenced in September 2014, which she well knew, but totally failed to disclose. The “contact” before this date disclosed matters evidencing inappropriate conduct by those involved in such.

69. In cross-examination, the Human Resources Business Partner, after she had been made aware that the Tribunal had the correspondence from the commencement of the transactions involved in this matter, declared that she found that the email of 24 September 2014 was “not very ethical” and “worried her a lot”. She further expressed her concerns about the advice provided by the first Human Resource Officer in charge of the case, which caused her to remove her from the case and to assign it to a “more senior staff member” (see para. 53 above). She also said that she escalated the matter to her supervisor and the Regional Bureau for further review of the case and the management procedures in the CO.

70. In this respect, the evidence shows that the Applicant questioned the process that led to his separation in April 2015 and the Resident Representative, in an email of 21 April 2015 addressed to the Human Resources Business Partner and copied to the Regional Bureau, raised the fact that the whole process was undertaken by the CO “in close consultation with and under the overall guidance of OHR”. In an email of the same day to the Assistant Secretary-General and Assistant Administrator and Regional Director, RBAP, the Human Resources Business Partner wrote:

This is further to our meeting on Iran. In every message they point out that it was all done in consultation with OHR, however, OHR provided technical support on letters and classification, but the decisions were made by the CO. I think the office change management process requires a very detailed review by OHR and the Bureau.

This was the only evidence adduced by the Respondent to support the witness statement that she took action for the Applicant’s case to be reviewed.

71. The Tribunal finds that little credibility can be afforded to this witness, whose testimony appears to have been motivated by a desire to justify the contested decision at all cost and to distance herself and her team from it, rather than to assist the Tribunal in finding the truth. The witness' reference in her witness statement to an initial request from the Iran CO being made in January 2015 cannot be seen as a typographical error in light of the significance of the email of 24 September 2014 and the concerns that the witness said she had in this respect. The Tribunal finds that the witness deliberately attempted to avoid revealing the genesis of the contested decision. Contrary to her assertions, the Human Resources Business Partner did not try in any way to put an end to this process that allegedly concerned her and led to the separation of the Applicant. Her communication with her supervisor and the Regional Bureau rather displays an effort to distance herself and her team from the process, most likely to avoid the responsibility for any wrongdoing.

72. The Tribunal was further concerned with the fact that it was eventually disclosed that the four main witnesses for the Respondent had met prior to the hearing to specifically discuss the evidence that they would be giving. The Tribunal, in the circumstances of this case, expresses concern that such would happen. Such conduct diminishes the value of the evidence of each of these witnesses.

73. In view of the foregoing, the Tribunal finds that it cannot give any weight to the testimonies of the Deputy Resident Representative, the Resident Representative and the Human Resource Business Partner as to the asserted reason for the Applicant's separation and the legitimacy of the process that led to it. These are better reflected in the exchange of emails quoted above, which leave no room for interpretation and lead to the inescapable and clear conclusion beyond any doubt that the contested decision was motivated by ulterior motives from the Deputy Resident Representative and the Resident Representative, as discussed below.

Evidence of bias

74. The email exchanges above clearly establish that the primary reason for the contested decision was a desire by the Deputy Resident Representative and the Resident Representative to separate the Applicant from service, due to alleged

performance issues, and not the result of the abolition of his post. Not only did the Deputy Resident Representative explicitly state his real motivation in his email of 24 September 2014, but he also persistently insisted that a non-renewal letter be sent to the Applicant, even before a decision to abolish his post and to create a new one had been approved by the ODU/OHR.

75. The evidence further shows that the Deputy Resident Representative could not initiate a non-renewal based on performance issues as there was no record of underperformance. The Applicant's performance appraisals were not completed for the performance cycles of 2013 and 2014, which correspond to the period when the Deputy Resident Representative was his first reporting officer. The Applicant's previous performance appraisals, completed by his former supervisor, the former Resident Representative, rather indicated a satisfactory performance. Whilst the parties disagree as to who was responsible for the failure to complete the Applicant's performance appraisals for 2013 and 2014, it is undisputed that alleged performance issues could not be used to justify the non-renewal of the Applicant's contract absent any documented record, as recognised by the Deputy Resident Representative himself during his testimony. No evidence of unsatisfactory performance has otherwise been adduced. Rather, the Deputy Resident Representative described the Applicant in his witness statement as "a dedicated and hardworking staff member", who "was an amicable and soft spoken individual who led his team kindly and defended them "to a fault"". The Human Resources Business Partner also confirmed in her testimony that "this was not a performance situation" as there was no evidence of underperformance.

76. The Deputy Resident Representative's desire to separate the Applicant appears to have been triggered by a difficult working relationship between the two, due to the Applicant disagreeing with some managerial practices adopted by the Deputy Resident Representative. Amongst others, it is undisputed that the Applicant expressed his disagreement with the Deputy Resident Representative claiming expenses for the replacement of an official mobile phone that he broke and for claiming expenses in respect of hosting of a reception at his private residence, behaviour that clearly displeased the Deputy Resident Representative.

77. It is also established that the Deputy Resident Representative and the Resident Representative sought to ensure that the incumbent of the GFATM OM post would be selected for the new ARR(O) post. The email of 26 September 2014 from the Human Resources Specialist, RBAP, OHR, in which she assumed that the incumbent of the GFATM OM post would be “headhunted” for the new ARR(O) post and advised that a lateral move was not possible is evidence of an actual bias and predetermination of the selection process on the part of the Deputy Resident Representative and the Resident Representative to ensure her selection. This bias is further evidenced by the fact that unlike the Applicant, it was not envisaged to send the selected candidate a non-renewal letter until 22 December 2014, whilst her contract expired on 31 December 2014. In addition, it appears that her contract was extended until the recruitment process of the new ARR(O) post was completed to avoid her being considered as an external candidate rather than an internal one, as suggested in the email of 22 December 2014 from the Human Resources Specialist, RBAP, OHR. Whilst it is true that the Applicant’s appointment was similarly extended, the difference of treatment between the two candidates, as discussed above, inescapably leads the Tribunal to the clear conclusion that the Applicant’s contract extension was done to create an illusion that he stood a chance to be selected for the new ARR(O) post.

78. The Deputy Resident Representative and the Resident Representative repeatedly claimed that the process leading to the contested decision was legitimate as it was guided all throughout by Human Resources. This argument must be rejected. Not only it is not sufficient that decisions be cleared or guided by Human Resources to be deemed legitimate but, in the instant case, the evidence shows that the Human Resources team was well aware of the illegitimate objective of the Deputy Resident Representative and colluded with him to achieve it, in breach of its legal obligations to ensure that proper processes were followed and not corrupted, and its duty of care towards the Applicant.

79. From the outset, it was the role of the first Human Resources Specialist, RBAP, OHR, in charge of the case to advise the Deputy Resident Representative that a staff member cannot be separated for unsubstantiated reasons and that abolition of post cannot be used as a pretext to separate a staff member. If there

were performance issues, as referred to in the email of 24 September 2014, then there was a clear duty to identify such and to act accordingly and not act so as to subvert the Staff Regulations and Rules and the rights given thereunder to the Applicant as part of his appointment. Rather, the Human Resources Officer supported the idea that a change of functions of the Applicant's post would be a "justification" for his non-renewal, and later advised that the change had to be substantial to trigger advertisement. She was well aware that the Deputy Resident Representative sought to select the incumbent of the GFATM OM post for the new ARR(O) post and gave advice about "headhunting" her instead of seeking to prevent an obvious biased selection process.

80. The second Human Resources Specialist, RBAP, OHR, in charge of the case then continued along the same line, advising in respect of how to justify the rationalisation of the two posts and to ensure that the incumbent of the GFATM OM post would be allowed to compete for the new ARR(O) post as an internal candidate, thereby enhancing her chances to be selected.

81. These illegitimate advices from two Human Resources Specialists were provided under the overall supervision of the Human Resources Business Partner, who was copied on all emails quoted above and did nothing to rectify the situation, despite her concerns expressed to the Tribunal about the legitimacy of the process. By so acting, she supported the attack upon the system's integrity and the contractual rights of the Applicant.

82. In view of the foregoing, the Tribunal finds that the decision to separate the Applicant was not the result of the abolition of his post, as stated in the contested decision, but rather motivated by a desire from the Deputy Resident Representative, supported by the Resident Representative, not to renew his appointment. The stated intent of the Deputy Resident Representative and the Resident Representative to separate the Applicant as early as September 2014 tainted the whole process that followed, which cannot be seen otherwise as designed to ensure the Applicant's separation from service or, at the very least, to ensure that in a rationalisation exercise of two posts, the Applicant would be separated and the incumbent of the GFATM OM post would be retained. They received advice from Human Resources

as to how to ensure that the Applicant's separation could be justified, not using "the performance route", by the abolition of his post and the incumbent of the GFATM OM post could have better chances to be selected for the newly created ARR(O) post.

83. The irregularities in the process of abolition of the ARR(O) and GFATM OM posts and the creation of a new one, which will be discussed in the following section, further demonstrate that the Deputy Resident Representative and the Resident Representative sought to illegitimately manipulate the rules of the Organization to achieve a desired outcome rather than applying them to the situation at hand. They also sought to avoid proper scrutiny over the process, as was clearly evidenced, *inter alia*, by the omission from their witness statements of important facts and the emails exchanges eventually disclosed to the Tribunal.

Procedural irregularities

Decision to abolish the Applicant's position and to create a new ARR(O) post

84. The Applicant alleges that the abolition of his post and the creation of a new ARR(O) post was done *male fide* and in violation of the rules, as:

- a. The Organization mischaracterised the process as an abolition of the ARR(O) and GFATM OM posts and the creation of a new post of ARR(O) whilst, in effect, it proceeded with the reclassification of the ARR(O) post encumbered by the Applicant;
- b. This unlawful process avoided a comparative review of the old and new terms of reference for the post of ARR(O) and deprived the Applicant of the safeguards he was entitled to as incumbent of the ARR(O) post;
- c. The advertisement of the Applicant's post was made in violation of sec. 74 of UNDP Recruitment and Selection Framework as no new functions were added to his terms of reference nor any additional technical competency required; and

d. The post classification was not properly reviewed by ODU and the review process violated the CRP rules as no attempt was made to constitute a local CRP.

85. The Respondent argues that the creation of the new ARR(O) post was justified by the fact that it merged the functions of two posts as a result of a rationalisation exercise. He argues that it would have been “unfair” to simply reclassify the ARR(O) post and abolish the GFATM OM post. He submits that the classification of the new ARR(O) post was properly reviewed by ODU and that its advertisement for a competitive selection process was done in accordance with the rules given that new key functions had been added to the ARR(O) position.

a. Characterisation of the process

86. The Tribunal acknowledges that the Organization has broad discretion in the Organization of its workforce. This discretion is not unfettered and must be exercised in compliance with the rules. Whilst there is no specific rule dealing with the process of abolition and merger of posts, the applicable rules do set out the process for post reclassification and provide protection for the incumbent of a position that is being reclassified. The proper application of the regulations and rules relies upon the *bona fides* of those applying them. There are checks and balances in the system, but again, such rely upon the *bona fides* of those involved in their application to ensure that full disclosure of events is made and that there is no manipulation engaged in by those administering the system.

87. In particular, secs. 73 and 74 of the UNDP Recruitment and Selection Framework provide in respect of post reclassification:

73. The Rank-in-Post policy and the Job Evaluation Guidelines specify the circumstances under which an encumbered post must be reclassified and the subsequent requirements for re-advertisement and the competitive recruitment process to be followed.

74. Under the Rank-in-Post policy, any post reclassified to a higher or lower level must be advertised for competitive selection. If classification does not result in a change of the classified level and a post remains at the same level but the revised job description contains new functions from another technical area requiring a new

set of functional or technical competencies and qualifications, such posts must be also advertised for competitive selection. For further guidance on the business process and procedures for job classification, please refer to the policy on Job Evaluation.

88. In addition, sec. 2.5 of the UNDP Rank-in-Post Policy provides that:

[I]f the post which has been reclassified is occupied by a FTA, CA or PA staff member and is advertised, the incumbent will be invited to apply for the reclassified post, his/her application will receive priority consideration and if he/she is found suitable, he/she may be selected for the post irrespective of his/her ranking in the selection process.

If the incumbent is not selected for the reclassified post, the hiring unit will be required to provide to the CRB/CRP substantiated reasons for not considering him/her suitable for the post, and the procedures related to abolition of post will apply.

89. The question at issue is whether the Applicant was unlawfully deprived of the aforementioned protections as incumbent of the ARR(O) post, under a pretext that the post was abolished instead of being reclassified following the addition of new responsibilities.

90. From the outset it cannot be ignored that the process was motivated by an expressed desire of the CO Senior Management to ensure that the Applicant would be separated from service and that the incumbent of the GFATM OM post would have a chance to compete for the new ARR(O) post, if not to be selected. The series of emails reproduced above show that the process was driven by considerations related to the incumbents of the posts rather than an Organizational perspective, as required by the rules. Indeed, there is no evidence of any examination of the ToRs having been made before a decision was actually taken to abolish the ARR(O) and the GFATM OM posts.

91. The Deputy Resident Representative and the Resident Representative insisted during their testimonies that abolishing the two posts and merging them into a new one was the only available solution to ensure fairness to both incumbents of the abolished posts and that no other option, including a reclassification of the Applicant's post, was ever considered. Their testimonies are in flagrant contradiction with the documentary evidence, which clearly shows that the

intention of the CO Senior Management was initially to integrate the functions of the GFATM OM post into the ARR(O) post and then to re-advertise the ARR(O) post. In an email of 26 October 2014 to the Assistant Secretary-General and Assistant Administrator and Regional Director of RBAP and the Deputy Assistant Administrator and Deputy Regional Director of RBAP concerning his plan for the Iran CO, the Resident Representative clearly stated:

This integration will start with the recalibration of the Operations Managers posts. At present we have 2 Operations Managers (one for the Country Office at NO-C level and one for the GFATM programme at NO-B level). We deem that only one OM is needed especially since the Finance (in both CO and GFATM unit) and Procurement (in the GFATM unit) are led at NO-A levels. In HR, since the GFATM unit handles a very small volume of functions (just 21 Service contracts) we are merging that with the CO HR unit and have secured the GFATM budget to cover one half of a post in CO HR unit. We are thus proceeding to modify the TOR of the CO OM post integrating the functions of both the OM posts and re-advertising the same. Subsequently the GFATM unit OM post will be abolished. This will save the CO nearly US\$ 35,000 per year as nearly half of the cost of the recombined NO-C post will be recovered from the GFATM Staffing budget. Similar re-alignments will take place in coming months, either by attrition or by post abolishment depending on need.

92. This is indeed the assumption upon which the Deputy Resident Representative and the Human Resources Specialist, RBAP, OHR, were initially working on, as evidenced by the emails of 25 and 26 September 2014, 22 October 2014 and 20 November 2014 quoted above, which clearly refer to a “reclassification” of the Applicant’s post following changes to its ToRs.

93. This scenario appears to have only changed in early December 2014, when the Human Resources Specialist, RBAP, OHR, suggested in her email of 3 December 2014 that “the cleanest way would be to abolish the post and if the post is changing to establish a new post with the new requirement”. In light of this exchange of emails there can be no doubt that this advice was not based on a strict application of the rules to the reorganizational process at hand but rather motivated by a desire to achieve a desired outcome in “the cleanest way”.

94. A comparison of the ToRs of the three positions confirms that the ARR(O) post continued to exist, with additional responsibility for leading the GFATM operations, as evidenced by the following.

95. As a starting point, it is noted that the two positions that the Organization allegedly sought to merge, namely the ARR(O) post encumbered by the Applicant and the GFATM OM post, were fundamentally different. The ARR(O) post was a core function in the CO, responsible for leading the office's operations. It had a wide breath of functions, which notably encompassed responsibility over the delivery of projects in the office's portfolio. In this connection, the ToRs of the old ARR(O) post stated under "Operational Context":

Under the guidance of the [Deputy Resident Representative], the ARR (Operations) acts as an advisor to Senior Management on all aspects of CO management and operations. This includes strategic financial and human resources management, efficient procurement and logistical services, ICT and common services consistent with UNDP rules and regulations. The main role is to lead the operations, ensuring smooth functioning of the CO/programmes/projects and UN common services, consistent services delivery and constant evaluation and readjustment of the operations to take into account changes in the operating environment as and when needed. The ARR (Operations) acts as the UNDP Security Focal Point.

The ARR (Operations) leads and guides the CO Operations Team and fosters collaboration within the team, with programme staff and with other UN Agencies and a client-oriented approach. The ARR (Operations) works in close collaboration with programme and project teams in the CO, operations staff in other UN Agencies, UNDP HQs staff and Government officials to successfully deliver operations services.

The ARR(O) post was a core function of UNDP field missions and its ToRs were based on a generic profile. It was at the NO-C level and reported directly to the Deputy Resident Representative.

96. In turn, the GFATM OM post was a project post responsible solely for the operations of UNDP projects on "HIV/TB/Malaria Components", funded by Global Fund to fight AIDS, Tuberculosis and Malaria (GFATM). The ToRs stated under "Operational context":

Under the overall guidance of UNDP Deputy Resident Representative and direct supervision of the Head of GFATM Cluster, the Head of Operations ensures efficient and smooth implementation of operational activities of UNDP projects funded by GFATM in PR, i.e. efficient implementation of financial activities as per UNDP regulations, administration of SRs' human resources and delivery of procurement services. He/she analyzes and interprets the financial rules and regulations and provides solutions to issues related to operations. The Head of Operations promotes a collaborative, client-focused, quality and results oriented approach in the Unit.

The post was at the NO-B level and its incumbent reported to the Programme Specialist/Head of the GFATM Cluster. It had a limited duration, subject to the continuation of the GFATM, through which it was funded. In this connection, it was established during the hearing that some of the GFATM components were closed in 2016 and that the grant was likely to come to an end in early 2018.

97. A comparison of the old and new ToRs for the ARR(O) post shows that the post continued to operate in the same operational context and to fulfil the same functions, with additional responsibility for operations of the GFATM. The description of the operational context of the new ToRs of the new ARR(O) post remained exactly the same, with only the following addition:

The ARR (Operations), in addition to the above tasks, will also specifically lead and guide the GFATM (Global Fund to fight AIDS, Tuberculosis, and Malaria) PMU Operations unit. In this role s/he will ensure consistent and efficient implementation of operational activities of donor funded projects – specifically the Global Fund projects. UNDP is a key partner of the Global Fund to fight AIDS, TB, and Malaria. In Iran, and in its role as Principal Recipient of the Global Fund grants UNDP Iran is responsible for financial and programmatic management of the grants. The responsibilities of ARR (Operations) includes, inter alia, leading smooth, efficient, and timely delivery of operational services of the Global Fund projects and identifying approaches and modalities to achieve projects targets while ensuring consistency with UNDP rules and regulations as well as donor requirements and policies. To ensure effective response and strategic direction of operations of such projects ARR (Operations) will develop a partnership-oriented approach and will closely work with programme units and liaise with the related offices in HQ, donor, and Government partners as and when needed.

The description of functions was modified accordingly, as discussed below.

98. In turn, it is clear that the GFATM post became redundant following the transfer of its responsibilities to the ARR(O) post and ceased to exist.

99. The Tribunal finds that since the Applicant's post continued to exist but its job description was modified, it had to be reclassified pursuant to sec. 74 of the UNDP Recruitment and Selection Framework rather than being abolished. This was indeed the original intent of the CO Senior Management and the only possible approach in the circumstances. In the context of this case, it is evident that the *post facto* decision to abolish the Applicant's post was taken to ensure that the new post would be open to competitive selection. In mischaracterising the process as an abolition of post, those involved ensured that the Applicant would not be given priority consideration for the new ARR(O) post, thereby depriving him of the protection under the rules in a situation of reclassification.

100. As to the alleged objective of fairness for the incumbents of the two abolished posts, the Tribunal stresses that they were not, from the outset, in a similar situation. They had different level of responsibilities, performed different functions, were subject to a different operational context and financed by different sources. Most importantly, they were not at the same level. Instead of achieving fairness, the Deputy Resident Representative and the Resident Representative prejudiced the Applicant and favoured the incumbent of the GFATM OM post, in line with their objective to ensure that the Applicant would be separated and that the incumbent of the GFATM OM post would be considered for the new ARR(O) post.

101. In view of the foregoing, the Tribunal finds that the abolition of the Applicant's post was clearly motivated by ulterior motives and done in violation of sec. 74 of the UNDP Recruitment and Selection Framework.

102. The next question at issue is whether the re-advertisement of the ARR(O) post violated the Applicant's rights as incumbent of the post.

b. Advertisement of the "new" ARR(O) post

103. Pursuant to sec. 74 of the UNDP Recruitment and Selection Framework, a revision of the job description would only lead to re-advertisement of the post if

“the revised job description contains new functions from another technical area requiring a new set of functional or technical competencies and qualifications”.

104. In this connection, the Respondent argues that the new ARR(O) post “differs significantly” from the old ARR(O) post, as three additional key functions were added, namely 1) to lead the GFATM Operations team, which represent an additional responsibility of over USD10 million per annum and involve the management of projects that are far more complex; 2) to assist in the preparation of legal documents; and 3) to act as an audit focal point. These will be examined in turn.

105. As to the responsibility for GFATM operations, the ToRs of the old ARR(O) post show that the Operations Manager already oversaw operations for various projects managed by the CO, such that the addition of responsibility for the GFATM operations created new tasks listed in the ToRs but did not change the post’s core functions. The Respondent’s witnesses insisted that managing GFATM projects was fundamentally different and more complex than other projects as GFATM was under a direct implementation modality (“DIM”), whereas other projects managed by the Iran CO were under a national implementation modality (“NIM”). When asked how this difference affected the role of the operations manager, the only response provided by the Respondent’s witnesses was that it involved increased relationship with government and donors. In this connection, the Applicant rightfully pointed out that ensuring such relationships was already part of his job description, as appears from the description of the operational context of the old ARR(O) post.

106. The Human Resources Business Partner also stated in her testimony that the procurement of medical supplies for GFATM projects was significantly different from normal procurement. She was not able, however, to elaborate on how this alleged specificity affected the functions of the ARR(O). The Tribunal finds that her testimony was motivated by a desire to justify the re-advertisement of the Applicant’s post rather than a thorough and meaningful comparison of the ToRs of the old and new ARR(O) post. There is no specific reference either to this allegedly different type of work in the ToRs.

107. As to the responsibility for “assisting in the preparation of legal documents”, it is listed as a function in the ToRs of the new ARR(O) post whilst it did not appear as such in the old ToRs. However, it appears from the Applicant’s testimony that he already assumed this responsibility, as part of his function to assist the management team and to ensure compliance of operations with UNDP rules and regulations. This was also confirmed by the evidence of a former Operations Manager of the Iran CO. It is further noted that the alleged addition of this function does not come from the integration of the functions of the GFATM post. Rather, the Deputy Resident Representative claimed in his testimony that the preparation of legal documents for the projects was previously done by the programme unit, using templates, whilst the liaison with the Legal Support Office was done by himself. Given that the operations manager is not in charge of preparing documents him or herself, the Deputy Resident Representative was not able to explain what this additional function would entail for the ARR(O) nor to give a credible explanation as to the reason for this sudden alleged increase of responsibility. The Tribunal finds that this was a cosmetic change to the Applicant’s ToRs initiated by the Deputy Resident Representative in an attempt to justify the re-advertisement of the post to achieve the stated result.

108. As to the role of focal point for audits, the Applicant testified that acting in such capacity for CO audits was already part of his duties, although no such audit was conducted during his tenure. He stated that this role would normally fall under the ARR(O) responsibility and that his predecessor indeed acted as focal point when CO audits were conducted. This was confirmed by evidence from a former Operations Manager in the Iran CO in 2006-2007, a former Programme Management Specialist in the Iran CO who was also the Chairperson of the Iran Staff Association Committee from 2013 to 2015, the Human Resources Business Partner and the Resident Representative. However, additional responsibilities appear to have been given to the ARR(O) to lead DIM audits for the Global Fund projects and act as focal point for NIM audits of other projects, which were previously under the responsibility of the incumbent of the GFATM OM post and the Programme Support Unit, respectively. It was also clearly established that the ARR(O) is not responsible for conducting the audits him or herself but only to

collect the relevant documentation and ensure a follow-up. The Tribunal finds that even if additional responsibilities for different types of audits were added to the ARR(O)'s ToRs, these appear to constitute additional tasks, or possibly functions, which remain in the same technical area as the audit functions already under the responsibility of the ARR(O) post.

109. Most significantly, the requirements for the post were not modified. The functional and core competencies and the experience required remained exactly the same. Only the educational requirements were slightly modified, such that the new ToRs require a "Master's Degree or equivalent in Business Administration, Public Administration, Finance, Economics or related field" whereas the former ToRs required the same but stated that a "Bachelor's degree is acceptable only with additional years [2] of work experience". The Human Resources Business Partner explained that the change to the new ToRs was made to ensure compliance with the generic job description. No connection was established between this minor change to the ToRs and the alleged addition of new functions.

110. In view of the foregoing, the Tribunal finds that whilst additional responsibilities in respect of the operations of the GFATM and audits have been added to the ToRs of the new ARR(O) post, these did not constitute new functions from another technical area, as the Operations Manager was already responsible for leading programmes operations and to act as audit focal point. They were merely additional tasks in respect of the same functions. They certainly did not require a new set of functional or technical competencies and qualifications, as evidenced by the fact that there has been no change in the requirements for the post.

111. Therefore, the Tribunal finds that the re-advertisement of the Applicant's post contravened sec. 74 of UNDP Recruitment and Selection Framework.

112. In any event, even if re-advertisement was required, the Applicant should have been given priority consideration for the reclassified position, pursuant to sec. 2.5 of the UNDP Rank-in-Post Policy. He would have been retained in his post upon a mere finding of his suitability, irrespective of his rank in the selection process, and any decision not to select him ought to have been justified to the CRP.

c. Scrutiny over the process

113. This whole process was conducted without any scrutiny from the relevant Human Resources department. No approval was sought for the abolition of the two posts and the creation of a new one. The only procedure undertaken to validate the process was to send a request for classification of the new ARR(O) post to the ODU. In his request of 27 December 2014, the Deputy Resident Representative requested the classification of the new ARR(O) post, which he identified as “a new post”. He attached the budget authorisation, the new proposed Organizational chart and the new ToRs. Significantly, neither the old ToRs of the ARR(O) post nor the old organizational chart were provided. This made it impossible for ODU to properly and convincingly scrutinize the restructuring exercise or to examine whether the change of ToRs for the ARR(O) post required under the relevant rules that the post be re-advertised. In this connection, it is noted that the request form for re-classification, which is used for both classification of new posts and reclassification of existing ones, specifically requires that justification be provided in case of re-classification, and that the previous Organizational chart be provided. By indicating that the process was not a re-classification, the Deputy Resident Representative deliberately avoided providing these documents and submitting them to a comparative review. Classification for the new ARR(O) post was thus granted on the basis of incomplete information, which misrepresented the situation and, therefore, was invalid. The operation of one of the systemic checks was thus subverted.

114. Furthermore, the authority of ODU to authorise the classification has not been established since no attempt was made to constitute a local CRP, which has primary authority to review post classifications and make recommendations to the Resident Representative.

115. In this connection, sec. 1 of the CRP Rules (in force since 1 July 2009) provides that:

In Headquarters at New York, country offices, regional centers and non-New York Headquarter locations where quorum criteria defined below can be met, a Compliance Review Panel (CRP) for UNDP locally recruited staff serving under UNDP Letters of Appointment

is established by the Administrator or the head of office on behalf of the Administrator, under the provisions of Staff Rule 4.15 for the purpose of making recommendations in respect of:

...

d) Review of job classification and reclassification submissions prior to their approval by the Resident Representative (Please see job classification POPP for procedures)

116. Sec. 2 of the Rules for CRP provides for the possibility of making alternative arrangements when the quorum cannot be met:

In non-New York Headquarter offices where the quorum criteria cannot be met, the head of office is required to make alternative arrangements with the CRP in New York for the review of their cases. Country Offices that cannot meet the quorum requirements may utilize the New York CRP. Additionally, when adequate capacity in terms of staffing, logistics, policy awareness and proper delegations of authority have been established in a Regional Centre, their CRP may be utilized in lieu of New York. Regional Centres who meet the criteria and will be designated by the Director OHR as able to perform this function.

117. Secs. 5, 6, 8, 9, 11, 12 and 13 define the composition of the CRP and the quorum to conduct business (emphasis added):

5. A quorum for any CRP to conduct business is *four staff members. Exceptionally, three members may constitute a quorum when the Chair is available and the secretary has confirmed that other members are not available due to leave.* High workloads, even in peak periods, are not a sufficient justification for reducing the quorum to three. Alternates are no longer appointed so the total membership should be broadened to at least eight...

6. Membership should consist of both staff from both the National Officer and General Service categories.

...

8. Composition of any specific CRP should consider recommendations for selections to those posts equal to the level of the lowest graded member of that CRP. In other words, no member will attend meetings or portions of meetings where staff or posts higher than their grade level are being reviewed.

9. *For national officer selections where quorum composition requirements are difficult, the Resident Representative, in consultation with the local staff association, may do the following:*

a) Include eligible staff from other UN agencies at the commensurate grade level

b) Temporarily use internationally recruited staff on FTA or PA.

11. The rule that the ex officio Secretary of the Panel does not vote may be waived to facilitate constituting a quorum.

12. In both HQ and country office locations, *when half or more of the appointed members are on leave (mission travel, Sick Leave, Annual Leave, Home Leave etc.) or are otherwise unable to perform their functions as CRP members, a special emergency quorum of three members may be called provided that there is one voting Chair and two voting members.* In no cases may the ex officio vote or be counted toward a quorum. This arrangement is confirmed by the CRP Secretary and head of office or Director of OHR in NY.

13. *If it is still not possible to meet the quorum requirement then the Resident Representative may take other viable arrangements, in consultation with the local staff association, including working with and through the UNDP Regional Centre CRP (emphasis added).*

118. Sec. 29 of the Rules on CRP provides the following in respect of conflicts of interest:

In order to avoid any conflict of interest or appearance thereof, a member will not participate in the review of recruitment or selection cases *in which he or she has been involved in a way or another* or is the subject of the selection or recruitment case under review or is a spouse or has any family relation (including those beyond mother, father, brother, sister, aunt, uncle niece or nephew) to the considered candidate.

119. In the present case, it is not disputed that there was a CRP at the Iran CO composed of 7 members and 5 alternates. The Respondent alleges that only three of the Iran CO CRP members were at the NO-C level, and that these included the other candidate's supervisor and the Applicant himself, who ought to be excluded given their interest in the process. It is not disputed that the quorum could not be achieved without resorting to alternative arrangements. However, the Applicant takes issue with the fact that no attempt was made to use any alternative

arrangements to constitute a local CRP and that the staff association was not consulted prior to referring the matter to ODU.

120. In this connection, the Respondent's witnesses confirmed that no attempt was made to constitute a quorum using one of the possible alternative arrangements set forth in secs. 5, 9, 11 and 12 of the Rules for the CRP. Amongst others, no attempt was made to include professional staff members or national officers of other UN agencies in Teheran as ad hoc members of the CRP. No consideration was given to the possibility of limiting the quorum to three and to allow the ex officio panel secretary to vote. It was also established that the staff association was not consulted before referring the matter to ODU, in violation of sec. 13.

121. The evidence shows that the decision to send the classification review to ODU was made by the Human Resources team. The Human Resources Business Partner testified that it was decided to send the review to ODU in order to render the process "more transparent". She acknowledged that the rules were not followed but insisted that this decision was nevertheless justified. In this respect, the Tribunal stresses that the rules specifically define the process for seeking classification of a post and these must be followed. The role of the Office of Human Resources is not to decide which process would be more transparent or fair but simply to apply the rules. Compliance with rules, not their avoidance, leads to transparency of process. If the application of the rules is to be taken as merely optional, then there is no rule of law or systemic certainty. In any event, it is not clear how referring to ODU enhanced transparency in the context of the present case where ODU was not provided any information about the background that led to the classification request and was not informed of the existence of the old ARR(O) post. It rather seems to be an additional means to avoid proper scrutiny over the process, in the context where the local CRP would most probably be aware of this background.

122. In view of the foregoing, the Tribunal finds that the decisions to abolish the Applicant's post and to re-advertise it as a new post were clearly unlawful.

Selection process for the new ARR(O) post

123. The Applicant asserts that the selection process for the new ARR(O) post was biased and vitiated by procedural irregularities in that:

- a. All the decisions in this selection process, except the marking of the candidates' interviews, were made by the Deputy Resident Representative who had no authority to take such decisions;
- b. The requirements to use an assessment process other than a panel interview, set forth in sec. 68 of the UNDP Recruitment and Selection Framework, have not been complied with, which removed any objective element from the selection process. Furthermore, technical skills were not properly assessed during the interview;
- c. Two of the panel members, including the Deputy Resident Representative who exerted influence on the selection process despite his alleged role as a non-voting panel member, were biased as they previously manifested their desire to separate the Applicant;
- d. The Organization did not seek to establish a quorum in the local CRP prior to using an external one, as required by secs. 9, 11 and 12 of the CRP Rules.

124. The Respondent submits that the process was conducted in accordance with the applicable rules and that there is no evidence of bias. He argues that the Deputy Resident Representative had delegated authority to conduct recruitment processes, that it was not necessary to conduct a written test and that it was advisable to submit the review of the recruitment process to the regional CRP, in Bangkok. He further asserts that the Deputy Resident Representative did not participate in the candidates' assessment.

125. The evidence shows that the selection process was essentially handled by the Deputy Resident Representative, who, *inter alia*, took the lead in creating the vacancy announcement, short-listing the candidates, deciding to forego a written test, assisting in the preparation of the interview questions and generally handling

all communications with Human Resources. It is not disputed that he acted as *de facto* hiring manager for a large part of the recruitment process, although the final selection decision was formally made by the Resident Representative as hiring manager. The Resident Representative was also kept informed of the steps mentioned above and he chaired the interview panel.

126. At the outset, the Tribunal stresses that given the express desire of the Deputy Resident Representative and the Resident Representative to separate the Applicant and to retain the incumbent of the GFATM OM post, no credibility whatsoever can be given to this recruitment process, which was clearly tainted by bias on the part of the two main actual decision-makers from the very beginning. The process was also vitiated by several procedural irregularities, all of which contributed to avoid an objective assessment of the candidate and proper scrutiny over the process, as discussed below.

a. Authority of the Deputy Resident Representative

127. Firstly, the Deputy Resident Representative did not have authority to take decisions on the methodology for the candidates' assessment. This authority lay with the Resident Representative as hiring manager.

128. Pursuant to art. 122 of the UNDP Selection and Recruitment Framework, “[t]he authority to appoint UNDP staff members under the Staff Rules has been delegated by the Secretary-General to the Administrator of UNDP”. In turn, the Administrator of UNDP further delegated the authority to appoint staff members in Country offices to their Resident Representative, pursuant to art. 124(d) of the UNDP Selection and Recruitment Framework. In line with this provision, the Resident Representative indeed fulfilled the role of hiring manager in the present case.

129. As hiring manager, the Resident Representative was responsible for the recruitment process and could not further delegate his authority. In this respect, art. 11 of the UNDP Selection and Recruitment Framework provides that:

11. Hiring managers are responsible and accountable for their selection proposals and for the manner in which the recruitment and

selection processes have been conducted. When they sign off the submission for the Compliance Review Bodies they certify that the selection process was conducted properly.

130. The UNDP Selection and Recruitment also specifically provides that the hiring manager is responsible for a number of actions, including the establishment of the “strategies, methodologies and techniques to be used for assessing candidates” (art. 67) and the submission of proposed candidate(s) to the relevant compliance review body (art. 97). Although it may be convenient for the hiring manager to delegate part of the recruitment processes, certain actions such as those to establish the recruitment strategy remain under his or her exclusive responsibility.

131. In the present case, the evidence shows that the recruitment strategy was led by the Deputy Resident Representative. Although the Resident Representative was copied to his Deputy’s correspondence with Human Resources, there is no evidence that he took any decision in this respect, notably the decision to limit the assessment to a panel interview, or even that he formally endorsed this decision. The decision to limit the candidates’ assessment to a panel interview and to forego a written test was therefore taken without any authority.

b. Decision to forego a technical assessment

132. Secondly, the Deputy Resident Representative decided to forego the written test, given that both candidates were internal candidates already performing functions similar to that of the new post and that a test would delay the recruitment process, which had to be finalised urgently.

133. In this respect, art. 67 and 68 of the UNDP Recruitment and Selection Framework provide:

67. Prior to commencement of the recruitment and selection process, the hiring manager, in consultation with the HR professional and taking into account corporate diversity requirements, shall decide on the strategies, methodologies and techniques to be used for assessing candidates, based on the requirements of the post, including the relative weight to be assigned to each assessment technique in the overall evaluation of the candidates. The relative weights are critical,

and no single element of the process (e.g. panel interview or technical test) necessarily determines the outcome.

68. In all appointments, the assessment process should not be limited to a panel interview and should include the use of multiple techniques such as technical assessments, writing tests, work samples, language proficiency tests as well as a thorough review of the candidate's performance history. Selection decisions are based on considerations resulting from the different assessment methods, corporate considerations such as gender and diversity as well as the needed mix of skills within the hiring unit. When designing technical or written tests, every effort must be made to ensure hiring units are assessing skills and competencies relevant to the vacancy, as described in the vacancy announcement. In CRB and CRP submissions, hiring units must provide all relevant information pertaining to the grading of technical tests, including outlining criteria for grading and assessment.

134. It follows from art. 67 of the UNDP Recruitment and Selection Framework that the methodology for the assessment of the candidates shall be determined in advance of the selection process, such that it is not dependent upon the candidacies received. In the present case, not only was the assessment methodology decided after the establishment of the shortlist, but the main consideration for selecting the methodology was the identity of the candidates. This is in itself an error, which impaired the objectivity and transparency of the process.

135. As to the requirement to conduct a written test, the Tribunal stresses that the use of the auxiliary verb "should" in sec. 68 of the UNDP Recruitment and Selection Framework is unfortunate and may create confusion, as it can be interpreted either as enacting an obligation or providing an advice or suggestion, unlike the verb "shall" which clearly enacts an obligation or the auxiliary verb "may" which clearly expresses a possible course of action. However, taken as a whole, sec. 68 indicates that the assessment shall comprise more than a panel interview as it provides that "selection decisions are based on different assessment methods". At *minima*, the rule provides a clear guidance to managers as to the need to use more than one assessment technique, such that departure from this requirement would need proper and legitimate justification. It is unfortunate that many of the administrative issuances of the Organization use auxiliary verbs and are not sufficiently directive to make their meaning clear, especially when it can be

expected that for many of those having to use the administrative issuances, English may be a second or third language.

136. In the present case, the assessment was limited to a panel interview. Although this interview included a number of technical questions, these did not constitute another assessment technique as required by art. 68 of the UNDP Recruitment and Selection Framework. The assessment was still subject to the candidates' ability to perform during an interview and subject to the subjective appreciation of the panel members. The need for an additional assessment technique is to remove this element of subjectivity that is proper to interviews and to allow the candidates to demonstrate their competencies through a different type of exercise.

137. Furthermore, the Tribunal finds that the reasons provided to forego the written test were not legitimate. The incumbent of the GFATM OM post had never performed at the NO-C level so her capacity to fulfil the requirements of the ARR(O) post could not be presumed and ought to have been properly tested. Also, it was established that conducting a written test for two candidates would have taken no more than a week or two. Considering that the two candidates had their contracts extended to cover the period necessary for the recruitment process and that the creation of the new post was consequent upon an alleged reorganization and not a sudden emergency, the alleged delay to the recruitment process cannot be considered a legitimate reason to forego the requirement for an additional assessment mechanism and rather appears to be a pretext to avoid an objective assessment of the candidates.

c. Conflict of interest

138. Thirdly, the Deputy Resident Representative participated in the interview process although he declared himself having a conflict of interest due to being the Applicant's supervisor. He stated that he simply wanted to appraise the candidates, as he would be working with one of them in the future. The Deputy Resident Representative claimed that he was a non-voting member of the interview panel, but the evidence shows that he contributed to the assessment process in preparing the questions for the interview, notably the technical ones, asking these questions

to the candidates himself and presenting his opinion to the other panel members on the answers given.

139. In this respect, sec. 86 of the UNDP Recruitment and Selection Framework states that “[i]f a panel member is requested to interview a candidate that they have directly supervised, it is at the discretion of the panel member to determine whether or not he or she should excuse him or herself from the panel should it constitute an actual or perceived conflict of interest”. Sec. 87 further provides that “[a]ny panel member with a conflict of interest pertaining to one or more interviewees should exclude themselves from the interviewing process”. Again, the use of the word “should” in sec. 87 is unfortunate and ought to be read as a “shall” as it would be contrary to the principles governing selection processes set forth in art. 64 of the UNDP Recruitment and Selection Framework, which requires that selection processes be “rigorous, fair, transparent and professional”, that one of those individual involved in the assessment process have a conflict of interest.

140. It follows from sec. 87 that once the Deputy Resident Representative decided that he had a conflict of interest, he had to exclude himself totally from the interview process. His role as a “non-voting member” was not only entirely inappropriate, but it was also not foreseen in the rules. In this respect, the composition of the interview panel is described in sec. 86 of the UNDP Recruitment and Selection Framework, which provides that “[a]ll interview panels will normally include the hiring manager or her/his designated representative from the hiring unit, an HR professional (as a full panel member) or associate (as panel facilitator and rapporteur) and one other professional from outside the hiring unit”.

141. The reason provided by the Deputy Resident Representative to assist at the interview does not withstand scrutiny as it was clearly established that he already knew both of the candidates very well. The circumstances of the case rather lead to the unassailable conclusion that the Deputy Resident Representative attended the interview in order to influence the assessment process.

142. It is further to be noted that the Resident Representative also acted as hiring manager but had an undisclosed conflict of interest as he was part of the whole plan to ensure that the process would lead to the separation of the Applicant. He made

no attempt to prevent the subversion of the processes by declaring the conflict or any of the prior actions to which he was a party. It is noted that, of course, such a declaration would have been inconsistent with achieving the desired result.

d. Scrutiny over the recruitment process

143. Fourthly, the process was reviewed by the regional CRP in Bangkok, without any attempt being made to refer it to the local review panel. As was the case for the review of the new ARR(O) post classification, Human Resources considered that it would be “more transparent” to refer the case to the regional CRP.

144. In this respect, sec. 96 of the UNDP Recruitment and Selection Framework provides that “[n]o offer of FTA can be made without the review of the relevant CRB [compliance review board]/CRP [compliance review panel] as appropriate”. Sec. 97 further provides that “[h]iring managers are responsible for submitting proposed candidates in accordance with the CRBodies TOR and Rules of Procedure”.

145. Pursuant to sec. 1(1) of the CRP Rules, recommendations for “UNDP Fixed Term (FTA) and Permanent Appointments (PA) against locally recruited posts GS1-7 and NOA-D” falls under the mandate of the local CRP. The requirements for referring to another CRP or to the CRB in Headquarters are the same as for classification of posts, which are more amply discussed above (see paras. 116 and 117 above).

146. It is not disputed that no attempt was made to refer the selection process for review by the local CRP, thus rendering the referral to the Bangkok CRP in violation of secs. 96 and 97 of the UNDP Selection and Recruitment Framework, as well as sec. 1 of the CRP Rules. In addition, the Human Resources Business Partner could not explain how referring the matter to the regional CRP in Bangkok would foster transparency, leading the Tribunal to infer that this was a pretext to avoid scrutiny over the process by the local CRP, who was most certainly in a better position to fully appreciate the matter.

147. Finally, the Tribunal notes that in addition to these errors raised by the Applicant, an additional issue of concern is that the CRP stated that some key documents to review the selection process, including the corporate interview report and the candidates' personal history form and qualifications, were not properly signed or were missing. The CPR nevertheless endorsed the recommendation, "provided that all supporting documents be reviewed to ensure complete relevant content and signatures, and made part of the file". No evidence was adduced of a further review by the CRP following any additional documents being provided. Rather, this memorandum is the document submitted by the Respondent in support of his argument that the selection process was properly reviewed by the CRP and must be deemed to comply with the rules.

148. The Tribunal is highly concerned that a compliance review panel, whose role is to scrutinise a recruitment process and ensure compliance with the rules, would endorse a recommendation without reviewing the documents that are not only required by the rules but that it also itself found relevant for its review. The Tribunal is left to wonder just how the panel could endorse the recommendation without reviewing these documents. The memorandum from the CRP shows that no review of the selection process was effectively conducted, and that the panel saw its role as a mere formality. No reliance can be placed on this flawed endorsement.

149. In view of the foregoing, the Tribunal finds that the decision not to select the Applicant for the new ARR(O) post was clearly tainted by bias on the part of the hiring manager, namely the Resident Representative, and the Deputy Resident Representative, both of whom exerted influence on the decision-making process. It was also vitiated by several significant procedural irregularities which, in themselves, render the decision not to select the Applicant for the ARR(O) post unlawful, and further confirm that the decision-makers manipulated the recruitment process to avoid an objective assessment of the candidates and proper scrutiny by the relevant CRP.

150. Having found that the decisions to abolish the Applicant's post, to create a new ARR(O) post and to advertise it without giving any priority consideration to the Applicant, and ultimately not to select the Applicant for the post were all

unlawful, the Tribunal finds that the contested decision to separate the Applicant was equally unlawful.

Remedies

151. Art. 10.5 of the Tribunal Statute, as amended by resolution 69/203 of the General Assembly adopted on 18 December 2014, delineates the Tribunal's powers regarding the award of remedies, providing that:

As part of its judgement, the Dispute Tribunal may only order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

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

Rescission and alternative compensation

152. Having found that the decision to separate the Applicant was unlawful, the Tribunal rescinds it. To provide an effective remedy to the Applicant, whose reintegration would normally flow from the rescission of the decision to separate him, the Tribunal also deems it appropriate to rescind the decision to abolish the Applicant's ARR(O) post, which it also found to be unlawful and was the trigger of the Applicant's separation.

153. Since the contested decision concerns a termination, the Tribunal is required by art. 10.5(a) of its Statute to set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested decision. That being noted, the Tribunal stresses that given the egregious violations of the Applicant's rights, the ill-motivated intent of the decision-makers, the complicity of the Human Resources, the lack of a proper oversight over the whole process and

the numerous irregularities that led to the Applicant's separation, rescinding the decision appears to be the only option for the Organization to avoid support of what is an outrageously unfair process and perpetuate the irregularities that led to the appointment of the incumbent of the new ARR(O) post.

154. Nevertheless, the Tribunal must set an amount of compensation "in lieu of" rescission. It finds that the exceptional and extraordinary circumstances of this case justify the award of compensation exceeding the equivalent of two years' net base salary, set down in art. 10.5(b) of its Statute. It is noted by the Tribunal that this case has disclosed the most extraordinary conduct by senior managers specifically calculated to deny the Applicant rights given to him under the regulations and rules of the Organization. Further, they acted to subvert the checks and balances that normally provide protection to the Applicant from such conduct. Also extraordinary is the initial collusion in the conduct of the senior managers by an officer in Human Resources and the subsequent failure of the Human Resources Business Partner to stop the conduct she admitted and well knew to be unethical and unlawful. There was a significant breach of duty of care owed to the Applicant. The Appeals Tribunal recalled in *Hersh* 2014-UNAT-433 what it had held in *Mmata* (2010-UNAT-092), namely that "art. 10.5(b) of the UNDT Statute does not require a formulaic articulation of aggravating factors; rather it requires evidence of aggravating factors which warrant higher compensation".

155. The Tribunal notes that the Applicant's case is particularly serious, since he had a considerable career with the Organization, in terms of its length, but also in terms of opportunity. As a national officer working in the UNDP Iran CO, his employment secured him an income compared to that of the best paid civil servants in the country, and a possibility of career development. After his termination, the Applicant could not secure another United Nations position. In order to mitigate his damages and ensure a livelihood, the Applicant took up a position with the Norwegian Refugee Council in Iran on 18 October 2015, for which he earns USD2000 per month, which is less than half of the salary he received while working for the United Nations. Two years later, the Applicant still occupies this position and earns the same salary. Despite the Applicant's efforts to mitigate his damages,

his career took a serious blow due to his unlawful separation from the Organization and significantly impacted his standard of living.

156. In light of all of the foregoing, and the seriousness of the breaches of the Applicant's rights as presented above, the Tribunal finds it appropriate to set the amount of compensation under art. 10.5(a) at three years' net base salary. In addition, the Applicant shall receive compensation in the amount equal to the contributions (the staff member's and the Organization's) that would have been paid to the United Nations Joint Staff Pension Fund for a three-year period. Given that this is an amount that the Organization may elect to pay in lieu of rescinding the unlawful decision to separate the Applicant, the Tribunal does not deem appropriate to deduct from the award the amount that the Applicant earned in his new employment, in an attempt to mitigate his damages and to ensure a livelihood.

157. Should the Organization elect to rescind the decision to separate the Applicant, his earnings from 18 October 2015 until the date of the rescission, at USD2000 per month, shall be deducted from the retroactive payment of his salary, as this option would amount to placing the Applicant in the same situation as if his termination never occurred.

158. The Applicant also asks compensation for moral damages. Under art. 10.5 of its Statute, as amended, the rules of evidence with respect to an award of moral damages have been modified, and they can only be granted if evidence to sustain such an award is presented (*Featherstone* 2016-UNAT-683). The evidence as required under art. 10.5, as amended, may be in the form of medical reports or other evidence, but is not so restricted and oral evidence can be sufficient.

159. The Tribunal finds that the Applicant established that he suffered stress and anxiety as a result of the unfair treatment he was subject to in relation to the contested process that led to his separation and the challenges he made to seek redress. The Applicant explained in his witness statement, which was admitted in evidence and unchallenged by the Respondent, that his unlawful termination ruined his life plans six months after he got married. It left him with chest pain, insomnia and stomach ache. He described living with pressure and stress for a period of one

year which was rekindled by having to take part in these proceedings. The Tribunal finds it appropriate to award the sum of USD20,000 as moral damages.

Referral for accountability

160. Pursuant to art. 10.8 of its Statute, “[t]he Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations ... for possible action to enforce accountability”.

161. The Tribunal is of the view that the facts described above (see paras 47 to 62, 74-83, 90-93, 99-100, 113, 121, 126, 137-141 and 146 above) in respect of the ill-motivated decision to separate the Applicant, the collusion of Human Resources to cover this decision by an abolition of post, and the manipulation of the process to achieve the desired outcome and to avoid a lack of objective assessment of the candidates for the allegedly new ARR(O) post, proper scrutiny and the mandated checks and balances raise legitimate concerns as to the professional and ethical behaviour of the individuals involved in this process. Their conduct not only outrageously infringed upon the contractual rights of a staff member but also discredited the Organization as a whole. By manipulating the processes as they did to achieve a desired outcome, the behaviour of those involved may be considered as fraudulent. The staff members involved “displayed a flagrant lack of integrity, in violation of their duty under staff regulation 1.2(b), which specifies that the staff members’ duty of integrity includes “probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status”.

162. The conduct of the Deputy Resident Representative, the Resident Representative and the Human Resources Business Partner before the Court, who all significantly attempted to mislead the Tribunal in order to justify the contested decision at all costs until they were faced with undeniable documentary evidence, to which they were parties, attesting of the real reason for the Applicant’s separation, described in paras 65 to 73 above, also warrant consideration as to the integrity of these senior staff members of the Organization and possible misconduct. The false statements to the Tribunal and the misleading of the Tribunal require to be further examined as to whether they alone may require separate consideration for accountability. It would appear that somebody made a decision

not to disclose all relevant documents, being those ordered to be produced to the Tribunal during the hearing. The motivation for making such a decision is a matter for investigation. By not disclosing the entire information relevant to this matter, significant time and money has been expended. Further, the Respondent was denied the opportunity to correct the egregious conduct of senior managers disclosed in this matter in a timely manner, thus reducing the exposure of the Respondent to damages and the possible payment of compensation.

Conclusion

163. In view of the foregoing, the Tribunal DECIDES:

- a. The decision to abolish the Applicant's post and not to renew his fixed-term appointment are rescinded;
- b. The Respondent is ordered to reinstate the Applicant to the post of Assistant Resident Representative in the Iran Country Office and to pay him his salary retroactively, after deduction of USD2000 per month;
- c. If reinstatement is not possible, the Respondent may elect to pay to the Applicant compensation of three years' net base pay calculated at the rate of his last salary payment at the time of non-renewal, under art. 10.5(a) of the Tribunal's Statute, plus compensation in the amount equal to the contributions (the staff member's and the Organization's) that would have been paid to the United Nations Joint Staff Pension Fund for a three-year period;
- d. The Respondent is ordered to pay to the Applicant the sum of USD20,000 as moral damages; and
- e. The award of 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 award. An additional five per cent shall be applied to the United States of America prime rate 60 days from the date this Judgment becomes executable.

Case No. UNDT/GVA/2015/171

Judgment No. UNDT/2017/087

(Signed)

Judge Rowan Downing

Dated this 17th day of November 2017

Entered in the Register on this 17th day of November 2017

(Signed)

René M. Vargas M., Registrar, Geneva