



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/004  
Judgment  
No.: UNDT/2018/030  
Date: 28 February 2018  
Original: English

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**Before:** Judge Ebrahim-Carstens  
**Registry:** New York  
**Registrar:** Morten Albert Michelsen, Officer-in-Charge

CARDWELL

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
Mariam Munang, OSLA

**Counsel for Respondent:**  
Thomas Jacob, UNDP

## **Introduction**

1. On 12 February 2015, the Applicant, a former Chief, Corporate Online Communications and Multimedia, United Nations Development Programme (“UNDP”) at the P-5 level, filed an application contesting the following decisions: “[a]bolition/reclassification of post, non-selection in retention exercise, removal of job responsibilities, [and] non-renewal”. In a later submission dated 4 August 2017, the Applicant clarified that he only wished to contest his “non-selection in a retention exercise and the non-renewal of his [fixed-term] contract [which] were the final decisions following a series of preparatory steps which [...] were themselves not conducted according to [the] procedure”.

2. As remedies, the Applicant requests the contested decisions be rescinded with retroactive payment of salary to the date of separation or, in the alternative, that he be compensated in the amount of 18 months net-base salary, or net-base salary for such shorter period that he may require for finding appropriate and equally remunerative alternative employment. In addition, the Applicant seeks (a) compensation for moral injury in the amount of three months net-base salary for grave breaches of staff rights and emotional distress; (b) pre-judgment interest upon the foregoing pecuniary damages, with interest at United States prime rate, accruing from the date each salary payment would have been made, compounded semi-annually; and (c) post-judgment interest upon all of the foregoing amounts accruing at United States prime rate from the date of judgment, and United States prime rate plus five percent, including through any period of unsuccessful appeal, compounded semi-annually.

3. The Respondent contends that the Applicant’s appeal against the contested decisions is not receivable as he had failed to request management evaluation of any of these decisions. Also, the Applicant’s attempt to contest his non-renewal was premature.

The Respondent further submits that the Applicant's claims are without merit because they are not supported by evidence.

## Facts

4. In a joint submission dated 20 May 2016, the parties submitted the following agreed facts (emphasis in the original and references to annexes omitted):

1. [The] Applicant joined UNDP on 27 September 2009 when he was appointed to the post of Chief, Corporate Online Communications and Multimedia at the P5 level ("the Applicant's post") in what is now the Online and Digital, Communications Group ["CG"], Bureau of External Relations and Advocacy ["BERA"].

2. Between 2013 and 2014, UNDP underwent a restructuring/realignment process. The features and details of the restructuring/realignment process are set out in the UNDP document "People Realignment Policy and Processes".

3. On 19 May 2014, the UNDP Administrator announced that pursuant to the new Strategic Plan for UNDP, new organograms reflecting the relocation, revision and reduction of a number of posts and grades would be released on 21 May 2014. The announcement stated that "many people[']s jobs are affected, *and we will be embarking on a realignment process aimed at being as fair and transparent as possible to fill the new positions. {...} All organograms will be made available on a dedicated intranet site, and at that time all staff at headquarters and working at regional level centres will receive formal notification that they are within the definition of affected staff. Bureau managers will then work with individual staff members to confirm the status of their existing position*". Staff members who were not matched to a post in the new structure would then participate in job fairs for the remaining posts available. Details of a voluntary separation package were also provided.

4. On 21 May 2014, the UNDP Administrator published the new bureau organograms. The published organograms were described as "represent[ing] the new Headquarters, Regional Hubs, Representation Offices, Global Shared Services Centres and Global Policy Centre configurations [...], [they] are the first step of the realignment process within each bureau and across bureaux. There will continue to be some fine-tuning of the organograms as the realignment proceeds [...]. In particular, the process of functionality aligning [Information and Technology, ("IT")], procurement, [Human Resources, ("HR")], and

finance between all bureau and BOM [Bureau of Management, (“BOM”)] are still ongoing.”

5. With respect to the Applicant’s Online and Digital cluster, CG, BERA an organogram was published reflecting that his post no longer existed and in its place was a P4 post of Team Manager, Online and Digital, CG, BERA (“the P4 post”). A vacancy announcement for the P4 post was subsequently published with an 18 August 2014 application deadline.

6. On 23 May 2014, [name redacted, Mr. MON], Assistant Administrator, BERA, along with [name redacted, Ms. FG], Deputy Director, BERA, met with the Applicant to explain the changes affecting the positions in CG, BERA as reflected in the organogram. The Applicant was informed that the new configuration for CG, BERA would not include a P5 Chief, Online Communication but that a Team Manager at the P4 level who would head Online and Digital, CG, BERA. That same day, the Applicant sent a message indicating that in his view this decision was a mistake.

7. On 13 June 2014 and subsequent to the publishing of the organogram, the Applicant attended a meeting of the communications group, at which the Director, BERA discussed the post of Deputy Director (P5) [(“the Deputy Director P5 post”)], CG, BERA. CG, BERA was composed of six clusters: Media and Advocacy; Online and Digital; Services and Outreach; ExO [unknown abbreviation] Outposted Communications Team; [the Bureau for Policy and Programme Support, (“BPPS”)] Outposted Communications Services; and Regional Hubs Outposted Communications Services.

8. On 17 June 2014, the Applicant attended a meeting for the purpose of discussing the drafting of Job Descriptions (JD) for the posts reflected in the BERA Organogram. Following this meeting, the Applicant drafted the initial JD for the P4, Online and Digital, CG, BERA.

9. On 21 July 2014, the Applicant received an email from a UNDP Associate Administrator, which stated that the Office of Human Resources had “notified staff members who have been confirmed in positions in the new organizational structure” and that those who had not received such a confirmation “have the opportunity to participate in the job fairs”. The Applicant was not the recipient of a notification confirming him in his position.

10. On 22 July 2014, the Assistant Administrator, BERA, requested the classification by the Organization and Design Unit (ODU) of five posts, including the proposed post of Team Manager, Online and Digital, CG, BERA.

11. On 23 July 2014, an external consultant initially scored the post at the P5 level by applying the International Civil Service Commission (ICSC) system.

12. On 24 July 2015, ODU then applied the Global Master Standard which then scored the post at the P4 level.

13. Following some minor modifications to the text, the Team Manager post was formally classified at the P4 level. On 1 August 2014, ODU informed the Assistant Administrator, BERA, that they had finalized the review and classification of the post of Team Manager, Online and Digital, CG, BERA, as P4.

14. On 26 July 2014, the Applicant applied for the Deputy Director P5 post. On 7 September 2014, the Applicant applied for additional posts of DI Senior Advisor, Development Effectiveness in [BPPS] and P5 Global Policy Advisor, Knowledge Management and Innovation, BPPS.

15. By 8 October 2014, the Applicant was informed that he was unsuccessful in the job fairs, including for the P5 post of Deputy Director. An external candidate was selected for the Deputy Director P5 post.

16. On 16 October 2014, the Applicant filed a request for management evaluation (“RME”) challenging the **“1) decision to reclassify; [the Applicant’s] post downwards; 2) decision to separate [the Applicant] on the basis of reclassification of [his] post; 3) decision to remove all of [his managerial responsibilities until year-end, a constructive dismissal; 4) decision to foreclose the possibility of appropriate reassignment through the job fair by: (a) pre-selecting particular posts to go to external candidates, (b) generating an opaque, perpetually morphing and apparently ad hoc process of change management”** [bold added].

17. On 4 November 2014, the Applicant received a letter notifying him that he would be separated at the expiry of his appointment on 31 December 2014.

18. On 13 November 2014, UNDP responded to the Applicant’s [request for management evaluation] and conveyed its decision that there is no legal basis to accede to the Applicant’s request.

19. The Applicant was separated from service on 31 December 2014.

## **Procedural background**

5. On 12 February 2015, the Applicant, represented by counsel from the Office of Staff Legal Assistance (“OSLA”), filed the current application.

6. After the Tribunal (Duty Judge) granted his request for an extension of time by Order No. 32 (NY/2015) dated 18 February 2015, the Respondent filed the reply on 6 April 2015.

7. By Order No. 56 (NY/2015) dated 7 April 2015, the Tribunal instructed the Applicant to file and serve his comments to the Respondent’s reply. The Applicant filed his submission on 8 May 2015.

8. By Order No. 79 (NY/2015) dated 11 May 2015, the Tribunal (Duty Judge) ordered the present case to join the queue of pending cases and be assigned to a Judge in due course.

9. On 12 July 2015, Applicant’s Counsel notified the Dispute Tribunal that the case had been reassigned to a new Counsel from OSLA.

10. On 13 January 2016, the case was assigned to the undersigned Judge.

11. On 5 April 2016, the Tribunal was notified of another change in the Applicant’s OSLA Counsel and informed that the case had been reassigned to the current Counsel of record. In essence, it appears that this matter has been handled by four different legal counsel on behalf of the Applicant.

12. By Order No. 108 (NY/2016) dated 9 May 2016, the Tribunal ordered the parties to file a jointly signed statement providing the following information: a consolidated list of agreed and contested facts in chronological order; a list of agreed legal issues; a list of any further documents which each of the parties requested to produce, or requested the opposing party to produce, and the relevance

thereof; and whether they requested an oral hearing to address the receivability and/or merits of the application.

13. On 20 May 2016, the parties filed a jointly signed statement in response to Order No. 108 (NY/2016) in which the parties provided the list of agreed facts cited above. In the jointly signed statement which was refiled on 10 June 2016, pursuant to Order No. 130 (NY/2016), the Applicant requested disclosure of certain documents from the Respondent, some of which were appended to the statement, but the Respondent opposed production of other requested documentation, setting out reasons therefore. In the ultimate paragraph of the jointly signed statement, the parties indicated that they did not request an oral hearing concluding that “[t]he parties do not request to call on any witnesses and are of the view that this matter can be determined by the Dispute Tribunal based on the papers already before it”. Having agreed that the Tribunal could proceed on the papers already before it, and the Applicant not having made any further request for disclosure or production, the Tribunal proceeded to a determination on the available documents before it.

14. Given the agreed legal issues between the parties (some of which were imprecise and appeared inconsistent with prior submissions) and the several descriptions of the contested decision used by the Applicant’s various Counsel, (including the term “constructive dismissal” which is predicated upon a resignation whilst the Applicant has never resigned), the Tribunal required further clarifications from the parties. By Order No. 143 (NY/2016) dated 15 June 2016, the Tribunal ordered the Applicant to respond to specific questions, *inter alia*, to clarify the separate and distinct administrative decisions that he sought to challenge. Furthermore, the Respondent was instructed to refile the correct document for annex 4 to the reply.

15. On 17 June 2016, the Applicant submitted his response to the Tribunal’s questions as per Order No. 143 (NY/2016), and the Respondent refiled annex 4 to the reply. In this submission it appeared that the Applicant no longer sought to

challenge the decisions concerning “the removal of his job responsibilities” and “abolition/reclassification of his post” as separate administrative decisions, but only challenged those regarding “non-selection in retrenchment exercise” and “non-renewal”.

16. On 27 April 2017, Counsel for the Respondent notified the Tribunal that the case had been reassigned to the current Counsel of record.

17. In order to clarify the scope of the case to properly address the receivability issues and to determine the further conduct of proceedings, by Order No. 137 (NY/2017) dated 20 July 2017, the Tribunal ordered that:

... By 5:00 p.m. on Friday, 4 August 2017, the Applicant is to file a submission in which he confirms that the contested decisions are his “non-selection in retention exercise” and “non-renewal”, setting forth also, (a) the date of the decision, and (b) the decision-maker. If the Applicant seeks to challenge any other administrative decisions, he is to—in a precise and concise manner—also state the exact subject of the relevant decision(s);

... By 5:00 p.m. on Friday, 18 August 2017, the parties are to file their closing statements based on the submissions and documents already on record, which shall include all relevant submissions with regard to the receivability and merits of the case. Unless otherwise instructed, the Tribunal will thereafter proceed to determine the case on the papers before it.

18. On 4 August 2017, in response to Order No. 137 (NY/2017), the Applicant stated that (footnotes omitted):

... The Applicant contests the decisions concerning his non-selection in the retention exercise and the non-renewal of his contract. These were the final decisions following a series of preparatory steps which, the Applicant submits, were themselves not conducted according to procedure.

... The Applicant became aware on 8 October 2014 that he was unsuccessful in the job fairs, including his application for the P5 post of Deputy Director. He does not know who the decision-maker was.

... At the same time, by implication, the Applicant became aware that his contract would not be renewed beyond 31 December 2014. This decision was confirmed in writing in the letter dated 4 November 2014 from [name redacted, Mr. JW], Assistant Administrator and Director, [BOM] of UNDP at the time.

19. On 18 August 2017, the parties filed their closing statements, their respective final submissions are set out below.

### **Applicant's submissions**

20. In the closing statement, the Applicant confirms that he contests the final decisions not to select him for the P-5 post of Deputy Director in the job fair, and the non-renewal of his contract. He states that the other matters he had raised relating to the unlawful reclassification of his post and the irregularity in the selection process, led to these final decisions. The Applicant's contentions may be summarized as follows:

#### *Scope of the case and receivability*

1) The final decisions not to select the Applicant for the P-5 level post of Deputy Director in the job fair and the non-renewal of his contract are contested. Other matters, relating to the unlawful reclassification of his post and the irregularity in the selection process, were also raised in the application, but merely led to the final determination that he was not selected to another job in the job fair and ultimately the non-renewal of his contract;

2) The downgrade of the Applicant's post as a separate administrative decision is not challenged, thus, the issue of receivability does not arise. Rather, the downgrade of his post was one of a series of preparatory steps which ultimately led to his separation, and there was no reviewable administrative decision arising from the downgrade of his post;

3) In the Applicant's request for management evaluation submitted on 16 October 2014, he also challenged his non-selection for the post of P-5 level Deputy Director, thus, this issue is receivable. He had applied to this post as part of the job fair exercise. In the management evaluation request, the Applicant argued that the non-selection for the post of P-5 Deputy Director was the result of bias;

4) The Applicant had reason to believe that the Administration had, as early as 13 June 2014 and before the position was first advertised, already decided to select an external candidate for the post even though internal candidates affected by the restructuring were to be given priority. The Applicant was told by the Director of BERA at a meeting that day that a request had been submitted, and the approval received, to advertise the post externally and that the Director had already identified a candidate from another recruitment to that post. This same decision is being challenged by the Applicant;

5) The Respondent's contention that the Applicant did not request management evaluation of the decision not to renew his appointment is without merit. The Applicant's request for management evaluation raised his concerns regarding the reclassification of his post, but it was not limited to this issue. He stated at the outset that there was effectively an administrative decision to separate him from service. When the Applicant submitted his management evaluation on 16 October 2014, his post had been abolished and he had not been able to secure another position through the job fair. The Applicant concluded that his appointment would not be renewed. In the management evaluation request, the Applicant specifically stated that, "I have been given no formal notice of my termination, although I have seemingly been deprived of my functions";

*Merits*

The preliminary decision to abolish the Applicant's post

6) Whilst the abolishment or reclassification of his P-5 level post as a separate administrative decision is not challenged, issue is taken with this as a preparatory step, conducted in an unlawful manner, which ultimately led to his separation;

7) While the Administration has the power to restructure some or all of its departments or units, including the abolition of posts and the creation of new posts, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members in a restructuring exercise (*Matadi* 2015-UNAT-592). The role of the Dispute Tribunal is to determine whether the abolition and reclassification of the Applicant's P-5 level post was "vitiating by bias or bad faith, that is, if it was taken for an improper purpose" (*Toure* 2016-UNAT-600);

8) The Administration, in bad faith, replaced the Applicant's P-5 level post with another substantially similar one and downgraded it to the P-4 level to prevent him being matched to the new position and force him to compete in the job fair;

9) When the job descriptions of the Applicant's post as Chief and the new post of Team Manager are compared, it is evident that they are substantially similar. Both positions are concerned with online communications, requiring the management of UNDP's multilingual online presence, supervision of a team, and provision of advice to senior management. The Respondent acknowledges that both posts concern online communications but distinguishes the two on the basis that the new post is narrower in focus and has a reduced level of responsibility. The difference is not substantial and, furthermore, as the Applicant also conveyed to

the Director of BERA in his email of 23 May 2014, the span of control for the new Team Manager post is in fact much wider and is unmatched in BERA. The new post of Team Manager supervised eight Professional staff and one General Service staff, which is a much wider supervisory function when compared with another Team Manager for the Services and Outreach Unit which supervises just four Professional staff and one General Service staff. The new Team Manager post, based on its scope should have been classified at the P-5 level. Instead, it was unlawfully downgraded to the P-4 level;

10) The Team Manager post was initially ranked at the P-5 level based on the International Civil Service Commission classification. Thereafter, the Respondent applied a “Global Master Standard” which it claims to have resulted in a lower ranking of P-4 level. However, it is not clear what this Global Master Standard is. There is no reference to a Global Master Standard in any of the documents and, furthermore, it is not known how this purported standard was applied to rank the Team Manager post. The Administration thus failed to act fairly, justly and transparently in classifying the new post;

#### Non-selection

11) All candidates for a job vacancy have the right to have their applications fully and fairly considered, and the Applicant was denied this right when he applied for the Deputy Director P-5 level post;

12) At the meeting that the Applicant attended with the Director of BERA, he was informed that approval for the recruitment of an external candidate for the position had been sought and already been provided. The Director further explained that he expected to eventually select one of the short-listed candidates from another recruitment for the Deputy Director P-5 level post;

13) The Respondent does not dispute the Applicant's assertion that approval to recruit externally had already been provided at the outset. Indeed, the position was initially advertised internally to staff members affected by the structural change and thereafter to all UNDP staff members. It is questioned whether, given the far reach of the UNDP restructuring process which would have affected so many staff members at all levels, it is indeed the case that not a single internal candidate was qualified for the position and recommended for selection. The Applicant was one of few qualified candidates for the position and entitled to be at least fully and fairly considered for the post;

14) The fact that the position was eventually opened to external recruitment and an external candidate was finally selected came as no surprise to the Applicant. This merely confirmed the intention of the Administration which was already conveyed to him when the position was first created. His non-selection for the position was, thus, motivated by bias in favour of the external candidate;

#### Non-renewal

15) Indeed, fixed-term contracts such as the one held by the Applicant have no expectation of renewal. With reference to *Ahmed* 2011-UNAT-153: (a) non-renewal of fixed-term appointments must be based on valid reasons and in compliance with procedural requirements where a decision of non-renewal does not follow the fair procedure or is based on improper grounds, the Tribunal may intervene, and (b) unless the Administration abused its discretion, or was motivated by discriminatory or improper grounds in not extending the appointment, the non-renewal of a staff member's fixed-term appointment is not unlawful;

16) In the letter officially notifying the Applicant of his separation, he was informed that “[a]s you are aware, your post was abolished in the context of the Structural Review exercise and you were not successful in finding a position during the job fair. As a result, I am writing to notify you that your last day of employment with UNDP will be at the expiration of your current appointment on 31 December 2014”;

17) The grounds, thus, given for the non-renewal of the Applicant’s appointment was that his post was abolished and he was unsuccessful in finding a position during the job fair. Neither of these reasons were based on fair procedure. The abolition of his post was motivated by bad faith. With regards to his application to the Deputy Director P-5 level position, he was denied the right to full and fair consideration. As the non-renewal of the Applicant’s appointment was not based on valid grounds, it was therefore unlawful.

### **Respondent’s submissions**

21. The Respondent’s contentions may be summarized as follows:

1) At all stages of the proceedings, the Applicant has not clearly identified the decision(s) he was contesting, who took the contested decisions and when the contested decisions were taken.

2) In his application, dated 12 February 2015, the Applicant identified the contested decision as, “Abolition/reclassification of post, non-selection in retention exercise, removal of job responsibilities, non-renewal”. In response to Order No. 56 (NY/2015), the Applicant submitted that the Applicant’s “ultimate complaint is his separation, which was the consequence of a number of steps taken by UNDP”. In response to Order No. 143 (NY/2016), the Applicant stated that the separate and distinct administrative decisions he was contesting were, “the process by which he was separated

from service on the basis of non-renewal of his appointment. [...] other matters raised in his Application are preparatory decisions leading to the final determination not to renew his appointment. [...] only when he was formally notified of his non-selection, was he in a position to challenge the decision regarding his separation. This notification of non-selection being orally communicated to the Applicant on 8 October 2014”. In addition, the Applicant submitted that he did not maintain the removal of his job responsibilities and the abolition/reclassification of his post as separate and distinct administrative decisions being challenged. In response to Order No. 137 (NY/2017), the Applicant submitted that he was contesting the decision concerning “his non-selection in the retention exercise and the non-renewal of his contract”. The Applicant, however, noted that “[t]hese were the final decisions following a series of preparatory steps [...]”;

3) The decisions that the Applicant attempts to contest are not the decisions put forward by the Applicant in his request for management evaluation. Therefore, in accordance with art. 8.1(c) of the Dispute Tribunal’s Statute, the Applicant’s application is not receivable *ratione materiae*. In the Applicant’s request for management evaluation dated 16 October 2014, he, who at all stages of the proceedings has been represented by Counsel, identified the specific decisions for which he was requesting management evaluation as follows:

- i. “Decision to reclassify [the Applicant’s] post downwards”;
- ii. “[D]ecision to separate [the Applicant] on the basis of the reclassification of [his] post”;
- iii. “[D]ecision to remove all of [the Applicant’s] managerial responsibilities until year-end, a constructive dismissal;

iv. “[D]ecision to foreclose the possibility of appropriate reassignment through the job fair by: ... a) preselecting particular posts to go to external candidates; ... b) generating an opaque perpetually morphing and apparently ad hoc process of change management”;

4) The only consistent claim put forward by the Applicant is that he is contesting a series of steps, namely an administrative process. More importantly, the decisions identified by the Applicant on 4 August 2017 are not the decisions for which he sought management evaluation on 16 October 2014;

5) The jurisprudence of the Dispute Tribunal and the Appeals Tribunal, as reflected in *Monarawila* UNDT/2016/019, states that:

The purpose of management evaluation is to afford the Administration the opportunity to correct any errors in an administrative decision so that judicial review of the decision is not necessary. For this goal to be met it is essential that the staff member clearly identifies the decision that he or she is contesting (*Pirnea* 2013-UNAT-311, para. 42; *Applicant* 2013-UNAT-381, para. 37).

6) Similarly, in *Applicant* UNDT/2012/149, the Dispute Tribunal found that:

[...] [T]o be receivable, an application must properly single out each and every administrative decision that an applicant wishes to contest in a clear and concise manner. [...] [T]he Applicant instead made a range of vague references to different circumstances [...] but failed to clearly define any other contested administrative decisions.

7) Article 8.1(c) of the Dispute Tribunal's Statute provides that an application shall only be receivable if the "applicant has previously submitted the contested decision for management evaluation where required";

8) The first decision contested by the Applicant in his management evaluation request was the "[d]ecision to reclassify [the Applicant's] post downwards". Considering that the Applicant confirmed on 4 August 2017 that he does not maintain this decision as separate and distinct administrative decision and that he is only challenging his non-selection in retention exercise and non-renewal, this issue is now moot. However, the Respondent notes that a decision to reclassify a post is not a preparatory step for another decision. It is in, and of, itself a final decision, one that the Applicant has clearly stated he is no longer contesting;

9) In paras. 10 and 12 of the parties' joint statement dated 20 May 2016, the parties agreed that the reclassification of the Applicant's post was completed on 1 August 2014 after he had drafted the initial job description for the new P-4 level, Online and Digital, CG, BERA, in June 2014. As stated in the response to the management evaluation request the "reclassification merely put [the Applicant] in the position of a number of staff members—and particularly senior professionals in the context of the Structural Change—that of having to participate in the job fair and competitive selection for a post". The request to review this decision on 16 October 2014 was therefore not receivable. There is no evidence that the reclassification of the Applicant's post was arbitrary, capricious, or illegal (*Chen* 2011-UNAT-107);

10) The second decision contested by the Applicant in his management evaluation request was the "decision to separate [the Applicant] on the basis of the reclassification of [his] post". As stated in the response to the management evaluation request, the "reclassification" merely put [the Applicant] in the position of a number of staff members—and

particularly senior professionals in the context of the Structural Change—that of having to participate in the job fair and competitive selection for a post”. Not only was there no decision to separate the Applicant as a result of the reclassification of his post, but no such decision could have been made at the time;

11) If the Applicant is no longer contesting the decision to reclassify his post, he can no longer contest a separation which he asserts was based on a decision which he accepts. More importantly, a plain reading of the second contested decision reflects that at no time in his management evaluation request did the Applicant contest his separation on the basis of, as he now attempts to do in his application, his non-selection during the job fairs, nor did he limit his management evaluation request to the decision to separate him. Further, had the Applicant limited his request to the decision not to renew his appointment, such a request would have been premature as no decision to separate the Applicant had been taken at the time of the management evaluation request;

12) The third decision contested by the Applicant in his management evaluation request was the “decision to remove all of [the Applicant’s] managerial responsibilities until year-end, a constructive dismissal”. In accordance with the Applicant’s own submission, he does not maintain this decision as a separate and distinct administrative decision being challenged. Therefore, this issue is now moot. In any event, the Respondent notes that at no time was such a decision taken, nor does the Applicant put any evidence forward to support this argument;

13) Finally, the last decision contested by the Applicant in his management evaluation request was the “decision to foreclose the possibility of appropriate reassignment through the job fair by: a) preselecting particular posts to go to external candidates; b) generating an opaque perpetually morphing and apparently ad hoc process of change management”. A plain

reading of this contested decision reflects that the Applicant attempts to contest the job fair process and/or decisions that may have preceded and/or been part of that process. Not only was there no decision to foreclose the Applicant's reassignment through the job fair, the Applicant himself does not identify any such decision. More importantly, this decision can in no way be interpreted as the Applicant contesting his "non-selection in retention exercise" or the non-selection to the posts to which he applied;

14) When discussing whether a staff member can appeal a process, the Appeals Tribunal found in *Ishak* 2011-UNAT-152 that a selection process involves a series of steps which lead to the administrative decision and these steps can only be challenged in the context of an appeal against the outcome of the selection process;

15) Throughout his application, the Applicant appears to attempt to contest processes at large by stating that they are comprised of series of preparatory steps. For example, the Applicant submitted that he is contesting the decisions concerning his non-selection in the retention exercise and the non-renewal of his appointment as "[t]hese were final decisions following a series of preparatory steps";

16) Insofar as the Applicant is attempting to state that the selection process was a step within the retention exercise which itself was a step within the decision to separate him, the Applicant errs in his interpretation of the applicable jurisprudence. The Dispute Tribunal in *Garcia Iglesias* UNDT/2015/035 stated that there is only one administrative decision that completes a selection process. Also, a selection procedure ends with the selection of the successful candidate, which results in the non-selection of other candidates. The Applicant cannot cure the absence of a request that individual final administrative decisions be reviewed by rebranding them as "steps" within a larger process, nor can he now contest a decision by linking it to these stand-alone administrative decisions;

Non-selection in retention exercise

17) The decision not to select an applicant for a position is a specific contestable decision. On the other hand, decisions “concerning” a matter lack specificity and, at best, refer to a process. As stated by the Dispute Tribunal in Order No. 137 (NY/2017), the Applicant may not contest a process;

18) In *Nguyen-Kropp and Postica* 2015-UNAT-509, the Appeals Tribunal recalled its prior findings that certain administrative processes, such as in a selection process, are preparatory decisions or one of a series of steps which lead to an administrative decision and that such steps are preliminary in nature and may only be challenged in the context of an appeal against a final decision of the Administration that has direct legal consequences;

19) The Applicant applied to three posts during the job fair: (1) the D-1 level post of Senior Advisor, Development Effectives, BPPS; (2) the P-5 level post of Global Policy Advisor, Knowledge Management & Innovation, BPPS; and (3) the P-5 level post of Deputy Director, Communications, BERA. The Applicant did not apply to his own post which had been downgraded. Each post selection exercise resulted in a specific contestable administrative decision to either select or not select a candidate, including the Applicant;

20) In the parties’ joint statement dated 20 May 2016, they agreed that the Applicant was informed of his non-selection(s) by 8 October 2014. The Applicant received written notifications of his non-selections. In response to Order No. 137 (NY/2017), the Applicant appears to attempt to submit that no actual decision was communicated to him and that he was only made “aware” of his non-selection. Insofar as that was the Applicant’s intent, throughout his submissions, including in the joint statement, it was agreed that, by 8 October 2014, the Applicant had been informed of his non-selection for the respective posts;

21) The jurisprudence of the Dispute Tribunal and the Appeals Tribunal is clear—final selection/non-selection decisions are contestable as they have direct legal consequences on the concerned staff member’s terms of appointment. The Applicant did not contest any specific final selection or non-selection decision for either of the three posts to which he applied;

22) To the contrary, in para. 9 of the Applicant’s application, he confirmed that he was not contesting these decisions by submitting that the first “[t]wo [posts] went to internal candidates and will not be discussed further”. In addition, throughout his submissions, the Applicant submitted that, at the time of his management evaluation request, no selection decision had been taken with respect to the third post, though he noted that his non-selection was communicated to him on 8 October 2014. If the Applicant states that he will not discuss two out of three posts to which he applied, there is no basis for the Respondent to review whether those decisions were or were not proper, nor is there any basis for the Dispute Tribunal to consider those decisions;

23) In response to Order No. 143 (NY/2016), the Applicant submitted that he was contesting “the process by which he was separated” and that it was “only when he was formally notified of his non-selection [that he was] in a position to challenge the decision regarding his separation”. The Applicant was clearly aware that he had been notified of his non-selections, yet he did not contest them in his management evaluation request, nor did he identify them as decisions being contested before the Dispute Tribunal. Instead, the Applicant identified his legal challenge as being “the decision regarding his separation”;

24) The post selection exercise for the P-5 level post complied with “the People Realignment Policy and Processes” and it was not motivated by bias in favor of any candidates. Further, the Applicant does not and did not contest his non-selection for the P-5 post of Deputy Director. Rather,

the Applicant contested a “flawed” process and undefined “decisions concerning his non-selection”. Had the Applicant specifically contested this decision, there would be no merit to this challenge as his non-selection was the result of a proper exercise of discretion;

25) The Applicant asserts that the job fair exercise was a pretense, was opaque and that, on 13 June 2014, the Director, BERA allegedly stated that he expected to place one of the candidates who had been short-listed for the post, “Director, Communications”, in the P-5 level Deputy Director, Communications position. As reflected in the parties’ joint statement, the Applicant’s assertions regarding the 13 June 2014 meeting and the ensuing post selection are contested. At no point during the proceedings has the Applicant provided any evidence in support of his submission. The Applicant failed to identify potential witnesses, provide evidence in support of his allegations or request an oral hearing. The Dispute Tribunal may draw the relevant inference from the Applicant’s clear reluctance to provide evidence in support of his own statements;

26) The job fair process, a procedure that was applied uniformly to all staff members affected by UNDP’s restructuring, was clearly set out in “the People Realignment Policy and Processes” and was not contested by the Applicant. The Applicant has not provided any evidence identifying how this policy was breached, whether as a whole or with respect to the P-5 level Deputy Director post. The Applicant’s assertion that a short-listed candidate was expected to be selected while also stating that the post would need to be advertised externally are two diametrically opposite propositions and do not stand scrutiny;

27) The Director, BERA, was not on the panel that reviewed the applications for the P-5 level post of Deputy Director and did not have a role in recommending a candidate during the desk review. A review panel only considers candidates who apply to the specific post under review

irrespective of the other posts the candidates may have applied to or been short-listed for. The post was advertised twice internally, no suitable candidates were identified by the review panels. Contrary to the Applicant's allegations, it is only a consequence of the panel's independent decision not to recommend an internal candidate during two successive rounds that the post was advertised externally on 9 October 2014;

28) The jurisprudence of the Dispute Tribunal and Appeals Tribunal has regularly upheld that there is always a presumption that official acts have been regularly performed (*Rolland* 2011-UNAT-122). Further, in *Sanwidi* 2010-UNAT-084, the Appeals Tribunal stated that it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him, nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General. As the Dispute Tribunal found in *Chawla* UNDT/2012/108, the burden of establishing bias or the perception of bias which lies on the Applicant in a recruitment process and the burden of proof through clear and convincing evidence;

29) The selection exercise for the P-5 level post of Deputy Director followed at all times the People Realignment Policy and Processes and the Applicant received full and fair consideration in accordance with the United Nations Staff Regulations and Rules. The Respondent also submits that the Applicant provides no evidence that this selection process was tainted by bias or was conducted improperly. The Applicant has not met his burden of proof that his non-selection was improper. The presumption of regularity stands;

Non-renewal of his contract

30) The decision to separate the Applicant was notified to him on 4 November 2014 and could not form part of a request for management evaluation filed on 16 October 2014;

31) It is uncontested that, on 4 November 2014, the Applicant was notified in writing that his last day of employment would be on 31 December 2014. It is also uncontested that in none of his submissions does the Applicant state that he was notified of his separation prior to 4 November 2014. Further, the Respondent notes that contrary to the Applicant's submission on receivability, at no time has the Respondent submitted that a staff member has to wait until he is separated from the Organization to contest the decision to separate him. Rather, and as established by jurisprudence, such an appeal can only follow the notification of the contested decision. In the present instance, this decision was notified to the Applicant on 4 November 2014; two months prior to his separation;

32) In response to Order No. 56 (NY/2015), the Applicant acknowledged that "he had not received any 'formal' notice of his separation of termination at [the time of his request for management evaluation]". The Applicant later went on to submit that the notification of his non-selection in the job fair meant that "there was a clear implied decision to separate him". In his comments on receivability, the Applicant relies on the findings in *Tabari* 2010-UNAT-030 in an attempt to justify being able to contest an implied decision not to renew his appointment. The Applicant's reliance on *Tabari* is misplaced, which provides that not taking a decision is also an administrative decision because it could also be a decision by implication. In *Terragnolo* 2015-UNAT-566, the Appeals Tribunal found that an implied decision stems from the Administration's silence in response to a staff member's complaint

or request, namely the Organization's failure to act can be viewed as an implied decision;

33) At no time in the Applicant's request for management evaluation, nor in his application, does the Applicant state that an implied decision to separate him was taken. Rather, in his application, the Applicant stated that following his non-selection in the job fair, he "knew he would be separated". The Applicant then admits that he "was formally notified" of his non-renewal on 4 November 2014. At no time has the Applicant requested, or attempted to request, management evaluation of the 4 November 2014 decision not to renew his appointment;

34) The mere fact that the Applicant was of the belief that he would not be renewed does not make it so, absent a representation to that effect by the Organization. To the contrary, it would open the floodgates to staff members stating they "knew" an administrative decision was coming, irrespective of whether a decision had already been taken, or much less notified to the staff member;

35) The Applicant may not unilaterally decide that the decisions not to select him constituted an implied notification of the non-renewal of his appointment. The Applicant attempts to circumvent the hurdle of the date on which the notification of his non-renewal was given to him by, as reflected in his response to Order No. 137 (NY/2017), stating that the 4 November 2014 decision was a written confirmation of an earlier implied decision. There is no evidence that the Administration failed to take a decision or that it failed to act on a request from the Applicant regarding the renewal of his appointment thereby producing an implied decision not to renew the Applicant's appointment. In *Rabee* 2013-UNAT-296, the Appeals Tribunal found that "[a]n appellant may not unilaterally determine the date of the administrative decision" for the purpose of challenging it, and "[t]he date

of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine". A timely decision not to renew the Applicant's appointment was taken and notified to the Applicant on 4 November 2014. The Applicant's appeal of his non-renewal was premature and is not properly before the Dispute Tribunal.

### **Consideration**

22. Applications filed by legal counsel should be well articulated, disclosing proper causes of action and identifying the administrative decisions for which review is sought. Similarly, replies must set out any special pleas, and pleas over on the merits, clearly articulating matters which are admitted, denied or not admitted and clearly and concisely stating all material facts relied upon. Submissions should also be concisely and clearly set out, and opposing arguments must clearly identify the corresponding submissions being addressed by both sides. Lack of brevity, clarity and precision delays the disposal of cases.

23. The Tribunal must state at the outset that it found the pleadings and submissions in this case generally unwieldy, imprecise and oftentimes tautologous. The lack of clarity regarding the Applicant's precise claims may well have been the result of the developments following the reclassification (and abolishment) of his post, culminating eventually in his separation; and his having different counsel several times during the proceedings. In his closing statement, the Respondent too addresses matters which the Applicant had already abandoned in his subsequent submissions. It remained for the Tribunal to wade through the submissions to properly identify and distinguish the claims and arguments, with the corresponding submissions. Principally however, the Respondent contends, *inter alia*, that the application is not receivable under art. 8.1(c) of the Dispute Tribunal's Statute and under staff rule 11.2(a).

*Receivability*

24. The Respondent submits that an applicant may only contest final administrative decisions, but in this case the Applicant is challenging the processes leading up to these decisions, rather than the final decisions. Furthermore, that the Applicant is attempting to challenge matters that were not the subject matter of his request for management evaluation, consequently the application is not receivable *ratione materiae*. Regarding the “non-selection in the retention exercise” decision, Counsel for the Respondent in the closing statement also questions whether the Applicant is challenging all three posts to which he applied during the job fair or only the decision not to select him for the P-5 level post of Deputy Director as originally indicated in his Application.

Scope of the case and the definition of the impugned administrative decisions identified by the Applicant

25. It is the Appeals Tribunal’s consistent jurisprudence that an applicant must identify, or define, a specific administrative decision capable of being reviewed (see, for instance, *Planas* 2010-UNAT-049, *Chriclow* 2010-UNAT-035, *Appellant* 2011-UNAT-143 and *Reid* 2014-UNAT-419).

26. The Tribunal notes that, in the Applicant’s response dated 4 August 2017 to Order No. 137 (NY/2017), the contested decisions are finally defined as follows (footnotes and emphasis omitted):

Contested Decisions

... The Applicant contests the decisions concerning his non-selection in the retention exercise and the non-renewal of his contract. These were the final decisions following a series of preparatory steps which, the Applicant submits, were themselves not conducted according to procedure.

... The Applicant became aware on 8 October 2014 that he was unsuccessful in the job fairs, including his application for the P5 post of Deputy Director. He does not know who the decision-maker was.

... At the same time, by implication, the Applicant became aware that his contract would not be renewed beyond 31 December 2014. This decision was confirmed in writing in the letter dated 4 November 2014 from [the] Assistant Administrator and Director, [BOM] of UNDP at the time.

27. The Applicant eventually identified the contested decisions as: (a) his non-selection for the P-5 level post of Deputy Director and (b) the non-renewal of his fixed-term contract. All other decisions, which the Applicant maintains were a series of preparatory steps improperly conducted, referred to in the parties' submissions, are to be assessed as part of the background to the present case. The Respondent's subsequent contentions on their non-receivability as individual decisions in those regards are therefore unnecessary as they have been rendered moot.

Did the Applicant request management evaluation of the identified impugned decisions?

28. The Tribunal notes that before filing an application with the Dispute Tribunal, an applicant must first request management evaluation of the contested administrative decision(s) pursuant to art. 8 of the Dispute Tribunal's Statute and staff rule 11.2(a).

29. In regard to the contested decisions identified by the Applicant—his non-selection for the P-5 level post of Deputy Director and the non-renewal of his fixed-term contract—the Respondent contends that the Applicant failed to request management evaluation thereof in accordance with art. 8.1(c) of the Dispute Tribunal's Statute because the decisions outlined in his request for management evaluation do not correspond with those which he contests in the present case before the Tribunal. The Respondent places reliance on the *dicta* in the matters of

*Monarawila* UNDT/2016/019 and also the Appeals Tribunal in *Pirnea* 2013-UNAT-311, *Applicant* 2013-UNAT-311.

30. It is common cause that in the Applicant's request for management evaluation, his Counsel specified the decisions for management evaluation as follows:

- 1) "Decision to reclassify my post downwards";
- 2) "[D]ecision to separate me on the basis of reclassification of my post";
- 3) "[D]ecision to remove all of my managerial responsibilities until year-end, a constructive dismissal;
- 4) "[D]ecision to foreclose the possibility of appropriate reassignment through the job fair by: ... a) pre-selecting particular posts to go to external candidates"; ... b) generating an opaque, perpetually morphing and apparently ad hoc process of change management".

31. The Applicant submits that his non-selection for the P-5 level post as Deputy Director, did indeed form part of his request for management evaluation dated 16 October 2014 as he had applied for this post as part of the job fair exercise, and also argued in the management evaluation request that his non-selection was the result of bias.

32. The Tribunal notes that, while the non-selection decision is not explicitly mentioned in the Applicant's list of impugned decisions in his management evaluation request, it could be regarded as subsumed under the description of "pre-selecting particular posts to go to external candidates" and the suggestion that the process was not transparent but "opaque". In a "narrative" attached to the management evaluation request, the Applicant further explains in relevant part that (emphasis omitted):

...

ii) The jobs fairs and the Deputy Director recruitment

... On 13 June 2014, a new Deputy Director (P5) post was discussed at a meeting of the communications group, which I attended. At the meeting, the Director of the [BERA] announced that he had requested and received approval to advertise the post externally. He explained that he expected to place one of the short-listed candidates for Director of Communications as the Deputy.

... In late July and September, I was I applied for several posts in the job fairs, including the post of and Deputy Director (P5) (still optimistic that a fair process would prevail). Two rounds of job fairs occurred for the latter post. Part-way through the exercise, on 21 August 2014, the rules were changed, permitting more staff to pick an additional post (presumably opening these posts up to further competition).

... I have not received any information about how the desk review for these posts was conducted. It was opaque.

... I have not been selected for any post.

... On 8 October 2014, UNDP proceeded with external recruitment. I understand that process has not yet been completed. Remarkably, UNDP changed the job description in the external vacancy announcement of the Deputy Director post [reference to annex omitted].

33. In UNDP's response dated 13 November 2014 to the Applicant's request for management evaluation, the following was stated of relevance to the Applicant's non-selection for the P-5 level post as Deputy Director:

... [A]s regards your claim that particular posts were pre-selected for external candidates, none of the positions to which you applied were filled with external candidates. For two posts to which you applied, internal candidates were in fact selected; the other remains to date unfilled. If positions in the job fair were opened to external recruitment, they were not positions to which you applied and therefore did not affect your own chances for selection.

34. In the application to the Dispute Tribunal, Applicant's Counsel described the contested decision as, "non-selection in retention exercise". Under the heading, "Summary of the facts of the case or facts relied upon", it was further elaborated that (emphasis added):

... To attempt to save his job, [the Applicant] applied for three posts, the maximum number of chances originally allotted. *Two went to internal candidates and will not be discussed further.* However, the job fair process for the final position is a matter of serious concern.

... On 13 June 2014, a new Deputy Director (P5) post was discussed at a meeting of the communications group, which [the Applicant] attended. At the meeting, the Director of the [BERA] announced that he had requested and received approval to advertise the post externally. He explained that he expected to place one of the short-listed candidates for Director of Communications as the Deputy [Director]. Numerous witnesses were present.

... In late July and September [2014], [the Applicant] applied for several posts in the job fairs, including the post of Deputy Director (P5) (still optimistic that a fair process would prevail). This post was the Communications post to which UNDP alleges it transferred [the Applicant's] P5 functions.

... Two rounds of job fairs occurred for the Deputy Director post. Part-way through the exercise, on 21 August 2014, the rules were changed, permitting more staff to pick an additional post (presumably opening these posts up to further competition).

... [The Applicant] has not received any information about how the desk review for these posts was conducted. It was opaque.

... [The Applicant] was not selected for the Deputy Director post.

... On 8 October 2014, UNDP proceeded with external recruitment for the Deputy Director post. At the time of filing, [the Applicant] ha[d] no information about that recruitment. Remarkably, upon external advertisement, UNDP changed the job description in the external vacancy announcement of the post [reference to annex omitted].

35. While the presentation of the non-selection decision is inelegantly stated in both the management evaluation request and the application before this Tribunal, Applicant's Counsel did explicitly refer to the decision regarding the P-5 Deputy Director post in the respective narrative sections when describing the Applicant's case. In its response to the management evaluation, UNDP also, at least indirectly, makes reference to the non-selection decision. The Tribunal therefore finds that, in reference also to the Appeals Tribunal's abovementioned decision in *Planas and Applicant* or *Fasanella* 2017-UNAT-765 (see below), the Applicant did request management evaluation of the non-selection decisions and that his claim in this regard is receivable pursuant to art. 8.1(c) of the Dispute Tribunal's Statute and staff rule 11.2(a).

36. As for the decision not to renew the Applicant's fixed-term contract, the Respondent submits that because this decision was notified to the Applicant on 4 November 2014, it could not have formed part of his request for management evaluation, which was filed on 16 October 2014.

37. Counsel for the Applicant argues that the Applicant did request management evaluation of this decision in that, when the Applicant submitted his management evaluation on 16 October 2014, his post had been abolished and he had not been able to secure another position through the job fair. Counsel for the Applicant further submits that, on this basis, the Applicant concluded that his appointment would not be renewed and that, in the management evaluation request, the Applicant therefore also appealed his non-renewal by stating that, "I have been given no formal notice of my termination, although I have seemingly been deprived of my functions".

38. The Tribunal notes that the Applicant does not explicitly refer to any non-renewal decision in the list of decisions set out in the management evaluation request. Implicitly, reaching such conclusion would only be viable based on the reference to the "decision to separate [the Applicant] on the basis of reclassification of [his] post" because such separation could have been the result of

a decision not to renew the Applicant's fixed-term contract. In the "narrative" attached to the management evaluation request, however, no reference is made to the issue of non-renewal of the Applicant's fixed-term contract, although he refers to a loss of his responsibilities, and the foreclosure of any possibility of reassignment in the job fairs, due to "opaque, perpetually morphing and apparently ad hoc process of change management" The reference to a separation decision premised "... on the basis of reclassification of my post" was subsequently withdrawn by the Applicant as a separate administrative decision.

39. In any event, when deciding on the scope of the case, the Tribunal is not limited to the parties' own identification and definition of the contested administrative decision(s) and may, based on the submissions, seek to identify the subject(s) of judicial review by itself. See, for instance, the Appeals Tribunal in *Fasanella*, para. 20, where it stated:

... [...] Thus, the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review. As such, the Dispute Tribunal may consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed. [...]

40. Furthermore, in the case of *Zakaria* 2017-UNAT-764, para. 22, the Appeals Tribunal stated:

... The role of the Dispute Tribunal in characterizing the claims a staff member raises in an application necessarily encompasses the scope of the parties' contentions (footnote omitted):

... The duties of [the Dispute Tribunal] prior to taking a decision include adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task. ...

... Thus, the authority to render a judgment gives the [Dispute Tribunal] an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review.

41. It is clear that the Applicant in his management evaluation request of 16 October 2014 challenged the reclassification of his post, which led to the abolishment of his post, which led to his participation in the job fair, which further led to his non-selection. The result was the non-renewal of his contract, notification of which he received by letter of 4 November 2014. In the management evaluation letter dated 13 November 2014, the UNDP acknowledged that, “On 4 November 2014, you received a letter informing you that as a consequence of the abolition of your post and being unsuccessful in the job fair, you would be separated at the expiry of current appointment on 31 December 2014” following a meeting with the Deputy Director, BERA. By the nature and content of its response, did the management evaluation answer the Applicant’s request on both his non-selection and separation by non-renewal of contract?

42. The nature and contents of a management evaluation response is indicative of what matters were considered in answer to a request for management evaluation (*Lemonnier* 2016-UNAT-679, para. 47). Furthermore, regarding matters arising post management evaluation, the Respondent cannot submit that the Tribunal may not consider matters beyond the scope of an applicant’s request if indeed the administration produces evidence of events subsequent to the management evaluation request on the one hand, and then objects to the applicant offering rebuttal evidence on the other (see *Smith* UNAT-2017-768).

43. According to the parties’ joint statement of facts, the non-renewal decision was notified to the Applicant on 4 November 2014 and before UNDP issued its response to the management evaluation. The question is therefore if UNDP in its response, nevertheless, had interpreted the Applicant’s request to also include an appeal against this decision, or produced evidence of events subsequent to

the management evaluation request pertaining thereto. Although the UNDP referred to the separation letter (which stated that as a consequence of the abolition of post and being unsuccessful in the job fair, he would be separated) in the background facts; it is clearly evident that, under four corresponding headings, UNDP considered strictly only the four matters raised by the Applicant in his request as set out at para. 30 above, and raised no new evidential matters regarding the non-renewal.

44. In UNDP's 13 November 2014 response to the management evaluation the following is stated regarding the Applicant's separation (emphasis in original):

**2. There was no decision to separate you on the basis of a reclassification of your post.**

You seek review of the purported decision, as you characterize it, to separate you on the basis of the "reclassification" of the post you held. However, there was no decision to separate you as a result of the "reclassification". The abolition of your post merely put you in the position of a number of staff members—and particularly senior professionals in the context of the Structural Change—that of having to participate in the job fair and competitive selection for a post. The "reclassification" was in no way a decision to separate you.

As you did not emerge as the successful candidate in the three positions to which you applied, you therefore do not have a post. I note however that you decided not to apply to the new P4 post that contained online and digital functions.

45. Accordingly, UNDP's response to the Applicant's request for management evaluation only focused on the Applicant's characterisation of the purported decision being taken "on the basis of reclassification of [his] post", stating that the abolition of the Applicant's post merely put him in a position of having to participate in the job fair and competitive selection for a post. No mention was made of the non-renewal of Applicant's fixed-term contract. When reading this response, it should therefore have been evident to the Applicant that the 4 November 2014 decision not to renew his fixed-term contract which post-dated his request for management evaluation of 16 October 2014, had not formed part of the management evaluation and that he needed to file a separate request for management evaluation

within 60 days from the date he received notification of this administrative decision. Although the Applicant questioned the processes leading up to his eventual separation by nonrenewal of contract, he never alleged that the Respondent failed to make good faith efforts to place him on a suitable alternative post in the required order of preference pursuant to the Staff Rules and applicable jurisprudence, or that he should have received preferential treatment on a non-competitive basis over temporary or external candidates. As the Applicant failed to request management evaluation of the decision not to renew his contract, his claim in this regard is therefore not receivable under art. 8 of the Dispute Tribunal's Statute and staff rule 11.2(a), as well as the relevant jurisprudence.

*Was the Applicant fully and fairly considered for the Deputy Director post at the P-5 level?*

46. It is well-settled jurisprudence by the Appeals Tribunal that the Dispute Tribunal's judicial review of a selection decision is limited. As, for instance, stated in *Lemonnier* 2017-UNAT-762 (references to footnotes omitted) in paras. 30-32 and 38:

... Initially, the Secretary-General has "broad discretion" in staff selection decisions under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1.12. However, the Secretary-General's "discretion is not unfettered and is subject to judicial review".

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

32. As the Appeals Tribunal has explained, the starting point for judicial review is a presumption that official acts have been regularly performed:

... But this presumption is a rebuttable one. If the management is able to even minimally show that the [staff member's] candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter, the burden of proof shifts to the [staff member] who must show through clear and convincing evidence that [h]e was denied a fair chance of promotion.

[...]

... Whether a non-selected candidate can meet his burden to show that he did not receive full and fair consideration for a job opening depends for the most part on the evidence the Administration reviewed in making the non-selection decision; not evidence outside the administrative record of which the Administration was not aware. And certainly not evidence outside the record relating to the qualifications of the selected candidate. Of course, this does not mean that a staff member cannot present evidence outside the administrative record to show bias or ill motive against him or her or in favour of the selected candidate. That is a different matter. And in fact, Mr. Lemonnier presented such evidence, which the Dispute Tribunal found was “insufficient evidence ... to establish that the contested decision ... was motivated by bias against [him]”.

47. If an applicant contends that selection decision was motivated by bias, the Appeals Tribunal in *Ngokeng* 2017-UNAT-747 provided that (para. 30), “Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the selection or promotion should be upheld”.

48. In the present case, the Applicant submits that his application for the Deputy Director post at the P-5 level did not receive full and fair consideration because the selection of an external candidate for the post was motivated by bias. In support thereof, the Applicant contends that the Director of BERA at a meeting had informed him that approval for recruiting an external candidate had been sought and already been provided, and that the Director had further explained that he expected to

eventually select one of the short-listed candidates from another recruitment for the post. The Applicant argues that the Respondent has not disputed that this approval had already been provided at the outset and that the position was initially advertised internally to staff members affected by the structural change and, thereafter, to all UNDP staff members. The Applicant questions whether, given the far reach of the UNDP restructuring process, it was indeed the case that not a single internal candidate was qualified for the position and recommended for selection, and submits that the Applicant was one of few qualified candidates for the position.

49. The Respondent appears to submit that the Applicant's candidature for Deputy Director post at the P-5 level did receive full and fair consideration because the selection process complied with all relevant legal provisions and was not motivated by bias in favor of any candidates. The Respondent objects to the Applicant's presentation of the facts regarding the meeting with the Director of BERA and notes that, during the proceedings before the Dispute Tribunal, the Applicant did not provide any evidence in support of his submission and/or request a hearing to elicit oral evidence from any possible witnesses. The Respondent contends that the job fair process, a procedure that was applied uniformly to all staff members affected by UNDP's restructuring process, was clearly set out in "the People Realignment Policy and Processes", which has not been contested by the Applicant. The Respondent further submits that the Applicant's assertion that a short-listed candidate was expected to be selected while also stating that the post would need to be advertised externally are two diametrically opposite propositions and do not stand scrutiny. The Respondent adds that the Director of BERA was not on the panel that reviewed the applications for the relevant Deputy Director post and did not have a role in recommending a candidate during the desk review and that the post was advertised twice internally but no suitable candidates were identified by the review panels. The Respondent avers that it was only because

the panel independently decided not to recommend an internal candidate during two successive rounds that the post was advertised externally on 9 October 2014.

50. In his application, the Applicant states that “Numerous witnesses were present” when the Deputy Director BERA announced at a meeting of the communications group, that a short-listed candidate from another recruitment exercise had already been identified to fill the P-5 level post. However, despite the Respondent’s objection to the Applicant’s presentation of these facts, the Applicant failed to call a single witness or to testify himself. The Applicant did not furnish an iota of evidence regarding bias and also did not take the opportunity to call for witnesses or request for disclosure or production of any further documentary evidence on this or any other matters.

51. In line with *Lemonnier*, the Tribunal finds that, based on the list of agreed facts set out in the parties’ joint submission dated 20 May 2016, the Respondent has minimally demonstrated that the Applicant received a full and fair consideration selection process for the Deputy Director post at the P-5 level. It is therefore for the Applicant to show with clear and convincing evidence that the selection process was motivated by bias in favor of an external candidate. As the Respondent has made no concessions in this regard and the Applicant has provided no evidence whatsoever to corroborate this contention, his claim regarding bias in the selection process for the Deputy Director post at the P-5 level must fall.

52. Accordingly, the Applicant’s claim that his candidature for the Deputy Director Position at the P-5 level did not receive full and fair consideration is dismissed.

## Conclusion

53. The application is rejected as:

- 1) The Applicant's appeal against the decision not to renew his fixed-term contract is not receivable *ratione materiae*; and
- 2) The Applicant failed to establish that his candidacy for the Deputy Director post at the P-5 level did not receive full and fair consideration.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 28<sup>th</sup> day of February 2018

Entered in the Register on this 28<sup>th</sup> day of February 2018

*(Signed)*

Morten Albert Michelsen, Registrar, New York, Officer-in-Charge