



**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

RIDHA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**  
Omar Yousef Shehabi, OSLA

**Counsel for the Respondent:**  
Angela Arroyo, UNDP

## **Introduction**

1. On 8 May 2019, the Applicant, a former Programme Analyst, at the National Officer-B (“NO-B”) level, working with the United Nations Development Programme (“UNDP”) in Iraq, filed an application before the United Nations Dispute Tribunal contesting a decision not to renew his fixed-term appointment (“FTA”) beyond 31 December 2018.<sup>1</sup>

2. The Respondent filed a reply on 4 June 2019 in which it is argued that the application is not receivable in part, because the Applicant had not contested the decision abolishing his post in his request for management evaluation; his claims in respect to that decision were thus outside the Tribunal’s jurisdiction *ratione materiae*. As concerns the decision not to renew the Applicant’s appointment, the Respondent’s position is that it was lawful.

3. From 26-28 October 2020, the Tribunal held a hearing on the merits of the case. On 25 November 2020, the Respondent filed an additional brief providing reasons for the abolition decision. On 7 December 2020, the Applicant also filed a brief, incorporating into his argument the hearing testimony and documentary evidence produced subsequent to the application.<sup>2</sup> Both parties filed their closing briefs on 26 March 2021.

## **RECEIVABILITY**

### *Respondent’s submissions*

4. The Respondent submits that in his management evaluation request, the Applicant limited his request to challenging the decision not to renew his FTA. Whereas in the present case, the Applicant seeks to expand his claims beyond the scope of the claims submitted for management evaluation by contesting the decision to abolish his post, on the ground that he was not provided with justifications for the

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<sup>1</sup> Application, section II.

<sup>2</sup> Applicant’s brief filed pursuant to Order No. 234 (NBI/2020), filed on 7 December 2020.

abolition of his post. The non-renewal and abolition decisions are two distinct administrative decisions, and to form part of an application to this Tribunal, each needed to be first contested through a request for management evaluation.

*Applicant's submissions*

5. The Applicant avers that it is settled law that abolition of a post may not be challenged separately from the non-renewal decision. The Applicant seeks to rely on the UNAT Judgment in *Lee*,<sup>3</sup> where it was held that “although Ms. Lee cannot challenge the discretionary authority of the Secretary-General to restructure the Organization or to abolish her post, she may challenge an administrative decision resulting from the restructuring once that decision has been made”. The Applicant is challenging the process leading up to the non-renewal of his appointment. It is, therefore, relevant to assess the legality of the abolition of his post as a preliminary matter.

**Considerations**

6. Article 2.1(a) of the UNDT Statute provides that:

The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual...(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

7. In the present application, the Applicant describes the contested decision as “the decision not to renew his FTA beyond 31 December 2018”; so defined the decision falls squarely within the jurisdiction defined by the UNDT Statute. The Applicant raises arguments related to the abolition of his post as grounds for contesting the impugned decision. Specifically, he derives illegality of the non-extension decision from the fact that he was not provided with justification for the abolition of his post.

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<sup>3</sup> *Lee* 2014-UNAT-48, para. 51.

8. The Tribunal recalls that the Appeals Tribunal has consistently held that the key characteristic of an administrative decision subject to judicial review is that the decision must produce direct legal consequences affecting a staff member's terms and conditions of appointment.<sup>4</sup> Preparatory decisions are not appealable, as they do not deploy, *per se*, direct legal consequences. Rather, they represent one of the various steps of a composite decision-making process. As such, they may not be contested in themselves but only in the context of the challenge of a final decision.<sup>5</sup> In accordance with the jurisprudence initiated by *Lee*, abolition of post is considered to be a prefatory act which is not a reviewable decision in itself. A decision resulting from the post abolition is, however, an administrative decision subject to judicial review.<sup>6</sup>

9. By applying the above to the present case, the Tribunal finds that the Applicant could not have effectively challenged the decision to abolish his post in itself, but only as a predicate for the non-renewal of his FTA. He was therefore, correct to limit his claim to "non-renewal of his FTA" in his request for a management evaluation. This is the same decision that the Applicant seeks to contest before the Tribunal. The application, therefore, is receivable.

## **FACTS**

### *Background*

10. The Applicant joined the UNDP Country Office ("CO") in Baghdad, Iraq, on 16 November 2014, where he remained until the expiry of his appointment on 31 December 2018.<sup>7</sup> He held the post of Programme Analyst, NO-B level, which was one of two positions in the Programme Unit tasked with general support for the sectors of Democratic Governance and Energy and Environment.<sup>8</sup> The Terms of Reference ("TOR") of the Applicant's position provided that the Applicant was generally responsible for "*implementation of programme strategies*" and "*effective management*

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<sup>4</sup> *Nouinou* 2019-UNAT-902, para. 35.

<sup>5</sup> *Ishak* 2011-UNAT-152, *Elasoud* 2011-UNAT-173, *Gehr* 2013-UNAT-313.

<sup>6</sup> *Lee* 2014-UNAT-481, para. 48.

<sup>7</sup> Application, section I and section VII para 1.

<sup>8</sup> Reply, annex 9.

*of the CO programme*”.<sup>9</sup> The TOR did not include any thematic specialization, but rather reflected that the Applicant would work in all areas of the Programme.<sup>10</sup> The lack of thematic specialization of the position was the result of the Programme Unit’s structure at the time of the Applicant’s recruitment by UNDP Iraq, that is, when the CO had a general Programme Unit, without any separate or substantively distinct thematic pillars.

11. During the period 2017-2018, the UNDP Iraq CO underwent a structural alignment process. The restructuring was in response to developments dating back to the 2014 declaration of the caliphate by the Islamic State of Iraq and the Levant (“ISIL”) which had placed Iraq in a crisis and forced UNDP to relocate to Amman. In 2015-2016, as Iraq authorities began retaking control of the cities and towns that had been captured by ISIL, UNDP returned to Baghdad and started establishing projects to help stabilize those areas. It was considered that this stabilization phase required a new, responsive structure and a new staff force, capable of managing big projects.<sup>11</sup>

12. Accordingly, due to operational changes in the UNDP Iraq CO, including a rapidly evolving security, humanitarian and development landscape in Iraq, a Management Consulting Team (“MCT”), which provides internal management consultancy was engaged to review the UNDP institutional structure.<sup>12</sup> In April 2017, a letter of understanding (“LOU”) between the MCT and the Iraq CO was concluded setting forth the objectives, scope, approach, expected deliverables, timing, and the organization of the restructuring exercise.<sup>13</sup>

13. The MCT conducted its review between April and May 2017 and issued its report titled “UNDP Iraq Draft Transformation Plan in May 2017.”<sup>14</sup> The MCT outlined

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ms. Lisa Lange and Mr. Vahktang Svandize testimonies, 26 October 2020; Mr. Tabet testimony and Mr. Gerardo Noto, 27 October 2020; Mr. Tahir Shraideh testimony, 28 October 2020; Joint Trial Bundle, page, 40, para. 6.

<sup>12</sup> Ms. Lisa Lange, testimony 26 October 2020 (she clarified that MCT is a team which provides internal management consulting to UNDP).

<sup>13</sup> Joint Trial Bundle, page 50.

<sup>14</sup> Reply, annex 4.

its findings as to the entire Office and made recommendations for the changes to its structure needed to address identified issues.<sup>15</sup> While pointing out to structural needs, MCT did not engage in deciding abolition of individual posts;<sup>16</sup> rather, proposals in the draft Transformation Plan were to “*be further elaborated upon and finalized by the Country Office senior management before it is submitted to the Directors of RBAS [Regional Bureau for Arab States] for clearance*”.<sup>17</sup> On the practical level, in the period of finalization of the Transformation Plan, MCT and UNDP Iraq CO worked in parallel on the alignment of the structure in terms of human resources.<sup>18</sup> Undisputedly, the UNDP Iraq CO senior management were not required to accept all MCT recommendations, as it is illustrated by a subsequent rejection of the proposal to establish the head of one of the newly-created pillars as an international post.

14. With respect to the Programme Unit in which the Applicant’s position was located, the Draft Transformation Plan concluded that the Unit was “*understaffed, poorly organized and dysfunctional with an ad-hoc division of labor*.” The Draft Transformation Plan further concluded that “[s]taff is unclear about the terms of reference” of the Unit.<sup>19</sup> It, therefore, proposed that the Programme Unit be “*reorganized based on a portfolio that balances, safeguards and boosts on-going stabilisation with a forward-looking portfolio that will allow UNDP a lead role in post-stabilisation activities*.” It further recommended that “[t]hree new Programme Pillars...be established that build on and expand the existing project portfolio: 1) *Economic diversification*, 2) *Governance and Reconciliation* and 3) *Environment and Energy*.” On the staffing issue, the Transformation Plan proposed that Pillars 1 and 2 be headed by a senior national officer whereas Pillar 3 be headed by an international officer for the foreseeable future, with the aim to hand over to a national senior officer once the programme was operational. The proposal also indicated that each pillar

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<sup>15</sup> Ibid.

<sup>16</sup> Ms. Lisa Lange, testimony 26 October 2020.

<sup>17</sup> Reply, annex 3, page 4.

<sup>18</sup> Ms. Lisa Lange, testimony 26 October 2020, audio recording at 2:00:32.

<sup>19</sup> Reply, annex 4, page 4.

would have a small support team “for example, a NO-A and 1-2 GS staff.”<sup>20</sup>

*Facts surrounding the impugned decision*

15. Subsequent to the issuance of the Draft Transformation Plan, the UNDP Iraq CO senior management considered the recommendations made by MCT and presented to the Regional Bureau for Arab States (“RBAS”) a document titled “The UNDP Iraq Country Office Transition Process, Next Steps”, commonly called “Final Transition Plan”.<sup>21</sup> RBAS approved the transition process on 5 December 2018, including a new organigram.<sup>22</sup>

16. In particular, to the Programme Unit, in which the Applicant’s position was located, the Final Transition Plan as approved by the UNDP senior management, was restructured to include three programme pillars, namely: Economic team-to be headed by a National Officer-D level (“NO-D”); Governance and Environment teams - each to be headed by a National Officer-C level (“NO-C”). A G-6 level programme associate was to support each programme team.<sup>23</sup>

17. The three programme thematic areas were to replace the previous structure in which the Applicant’s position was located, which was a general programme unit. As a result, positions that held general programme functions – which were the two Programme Analyst, NO-B positions, one held by the Applicant (position 00096761) and the other encumbered by another staff member (position 00094690) – were not part of the new three pillar structure and were to be eliminated.<sup>24</sup>

18. During the same period 2017-2018, when the transformation was being decided, the UNDP Iraq CO experienced frequent changes in leadership: the Country Director, Mr. Mounir Tabet, left Iraq in March 2018<sup>25</sup> and Mr. Gerardo Noto, became the acting Country Director until 10 December 2018. Thereafter, Mr. Noto became

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<sup>20</sup> Reply, annex 4, p. 9, para. 4.

<sup>21</sup> Reply, annex 7, p. 5.

<sup>22</sup> Ibid, p. 1.

<sup>23</sup> Ibid, p. 6, point. b.

<sup>24</sup> Application, annex 2, Reply, annex 7, p.6, point. b

<sup>25</sup> Mr. Tabet testimony, 27 October 2020.

acting Resident Representative until March 2019, when he also left Iraq and went to Libya.<sup>26</sup> During the period 2017-2018, Mr. Thair Shraideh served as acting Country Director Operations. He also left Iraq in June 2018.<sup>27</sup> Mr. Svanidze joined in mid-August 2018 as Deputy Country Director (“DCD”), Operations.<sup>28</sup>

19. Mr. Tabet testified that he was not involved in deciding or implementing the establishment or abolition of posts.<sup>29</sup> Mr. Noto testified that all the decisions concerning the establishment and abolition of posts pursuant to the restructuring exercise, including the position, then encumbered by the Applicant, had already been made by the time he arrived in March 2018.<sup>30</sup> Likewise, Mr. Svanidze testified that when he arrived, he was involved in the implementation of the decisions, which had been taken much earlier before he joined the office.<sup>31</sup> He further testified that even his position was created as a result of the MCT recommendations and the overall restructuring: Prior to his joining, there was only one position of DCD in charge of programmes and operations; in the restructuring, that position was split to create the positions of DCD Programs and DCD Operations.<sup>32</sup> Finally, Mr. Shraideh testified that he is aware that the position that the Applicant encumbered had been one of those to be abolished; he, however, was not sure who among the UNDP officials had analysed the reasons for abolition or taken the decision for abolition.<sup>33</sup>

20. According to the Respondent, Ms. Cameron, indicated by Ms. Lange as the person who worked on the human resources aspect of the Final Transition Plan, had retired from the Organization and was not reachable.

21. In summing up, it proved impossible to identify with certainty who was conceptually responsible for the final transition plan in terms of human resources

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<sup>26</sup> Mr. Noto testimony, 27 October 2020.

<sup>27</sup> Mr. Shraideh testimony, 28 October 2020.

<sup>28</sup> Applicant’s brief filed on 7 December 2020, para. 13; Mr. Svanidze testimony, 26 October 2020.

<sup>29</sup> Mr. Tabet testimony, 27 October 2020, audio recording at 1:58:52.

<sup>30</sup> Mr. Noto testimony, 27 October 2020, audio recording at 15:12.

<sup>31</sup> Mr. Svanidze testimony, 26 October 2020, audio recording at 1:26:38.

<sup>32</sup> Ibid.

<sup>33</sup> Mr. Shraideh testimony, 28 October 2020, audio recording at 27:04.

decisions, i.e., creation or abolition of posts. The parties undertook to retrieve contemporaneous documents on these specifics, but these efforts did not bring results.<sup>34</sup>

22. In February 2018, a staff retreat was held in Erbil, Iraq. There, the UNDP Iraq CO management presented the revised office structure which indicated the positions that were to be affected by the restructuring process.<sup>35</sup> Mr. Shraideh, who gave that presentation, confirmed that during the drafting of the MCT report various versions of the new structure (organigrams) had been produced, however, the one presented at the Erbil retreat, showing the impacted positions, was the final one.<sup>36</sup> He confirmed that the final version of the Organigram was the one which reflected, through a yellow circle and red arrows, that the general Programme Unit was being reorganized into three thematic pillars, each of which with either an NO-C or NO-D position heading the team and a G-6, and which indicated the impacted positions.<sup>37</sup> He confirmed that the organigram indicated the Applicant's position as one impacted by the restructuring (positions marked in light pink colour).<sup>38</sup>

23. The Applicant states that he missed the retreat due to family reasons<sup>39</sup> whereas the witnesses could not confirm or deny his absence. Mr. Noto, in his email dated 18 December 2018, indicated that during the same period, the UNDP Iraq Country Director "at the time", met individually with the incumbents of the positions impacted by the restructuring and informed them of the abolition of their posts.<sup>40</sup> Mr. Shraideh, the acting Country Director Operations, testified that he personally met with the Applicant, albeit it might have been spontaneously, without a scheduled appointment, and explained the rationale for abolishing the Applicant's post, and even encouraged the Applicant to apply for new open positions if he possessed the required

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<sup>34</sup> Applicant's brief filed on 7 December 2020, para. 9.

<sup>35</sup> Mr. Shraideh testimony, 28 October 2020; Application, annex 2.

<sup>36</sup> Ibid.

<sup>37</sup> According to the parties' joint trial bundle, there were various versions of the Organigram (see for example pages 31, 184 and 200 of the Trial Bundle). The one with a yellow circle is p. 184 of the bundle.

<sup>38</sup> Trial bundle, p. 184.

<sup>39</sup> Trial bundle p.11

<sup>40</sup> Application, annex 5, p. 2, para. 3

qualifications.<sup>41</sup> The Applicant denies having held any discussions with the management.<sup>42</sup>

24. By the letter dated 22 October 2018, the Applicant was informed by Mr. Noto, acting Country Director, that, as part of the UNDP Iraq CO restructuring and realignment process, the position that the Applicant encumbered would be abolished effective 1 January 2019. By the same letter, the Applicant was also informed that his appointment would not be extended beyond 31 December 2018.<sup>43</sup>

25. On 15 December 2018, by an email addressed to the UNDP Iraq Country Director, the Applicant acknowledged receipt of the letter regarding the abolition of his position and the resultant non-renewal of his FTA. By the same email, the Applicant sought clarification of the specific reasons leading to the abolition of his post and requested for a copy of the MCT restructuring final report.<sup>44</sup> In a parallel email the Applicant sought for reasons why he had not been considered for two positions of Governance and Reconciliation Programme (NOC 00126826) and Environment and Energy Programme (NOC 00126825) for which he had applied.<sup>45</sup>

26. On 18 December 2018, the Country Director responded to the Applicant's emails and among other, stated that in order to implement the restructuring as per the MCT recommendations, a thorough analysis and needs assessment had been done by the office management taking into consideration the cost, the available resources, the new skills and resources needed. Hence, the decision on abolishing positions and or creating new ones was part of the UNDP Iraq CO restructuring and realignment of the new office structure. With regard to the programme positions, the Country Director stated that only shortlisted candidates are contacted and informed on the next steps. In addition, the recruitment process for one of the positions was still in progress.<sup>46</sup>

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<sup>41</sup> Mr. Shraideh testimony, 28 October 2020.

<sup>42</sup> Applicant's brief of 7 December 2020, para. 16.

<sup>43</sup> Application, annex 3.

<sup>44</sup> Application, annex 4.

<sup>45</sup> Application, annex 5, page 2.

<sup>46</sup> Ibid.

27. On 20 December 2018, the Applicant replied seeking more clarifications, especially with regard to the logic, wisdom and effectiveness behind the abolishment of some positions and creating more others, and whether abolition of the NO-B posts was intended to increase effectiveness or a result of ineffectiveness due to the lack of skills; he specifically questioned parallel retention of a NO-B position in Ebril.<sup>47</sup>

28. On 4 January 2019, the Applicant requested management evaluation of the contested decision and he received the response on 8 February 2019.<sup>48</sup>

## **Submissions**

### *Applicant's submissions*

29. The Applicant relies on *Obdeijn* 2012-UNAT-201, *Robinson* 2020-UNAT-1040 and *Hine-Wai Kapiti Loose* 2020-UNAT-1043 to argue the administration's obligation to provide reasons. The Applicant submits that for staff members to be in a position to identify the concrete aspects of non-compliance with the terms of appointment, the Administration must communicate the specific and detailed reasons for its decisions. In his case, UNDP initially refused to share any information regarding the circumstances of abolition of his post, let alone sharing the relevant parts of the MCT report on the restructuring process. The reasons eventually offered by the Respondent are faulty because they do not address the fundamental considerations underlying the contested decision, namely: the identity of the decision-maker, and the considerations which that decision maker weighed in reaching the decision to abolish the Applicant's post; they only offer information on how the MCT restructuring exercise generally proceeded and the restructured Programme Unit. In its reply, UNDP hid behind the process, offering by way of substance only what Mr. Noto, then-Iraq Country Director *a.i.*, wrote to the Applicant immediately after the decision: that the Iraq country office had "conducted a thorough analysis and needs assessment...taking into consideration the cost, the available resources, [and] the new skills and resources

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<sup>47</sup> Ibid.

<sup>48</sup> Application, annexes 6 and 7.

needed”.<sup>49</sup> But Mr. Noto testified that he had no involvement in that ‘assessment’ and cannot identify who was involved.<sup>50</sup> Even after the hearing, the Respondent cannot piece together those reasons, let alone show that they were conveyed to the Applicant.

30. The Applicant points out that several questions remained unanswered: what ‘new skills and resources’ were assessed to be needed? Who determined that those skills and resources did not match the profile of the post which the Applicant encumbered? Why was there no comparative review, considering that an NO-B programme analyst post, i.e., Applicant’s grade and position remained part of the revised structure?

31. The Applicant submits that the Tribunal can and should draw negative inferences where the Administration gives faulty or belated reasons for its decision. Relying on *Fernandez Arocena* 2018-UNDT-033, the Applicant claims that negative inferences are also appropriate where the Administration is unable to re-create the record of the decision, thereby impeding the presentation of the Applicant’s case and the Tribunal’s examination of the decision. On the basis of these negative inferences, the Tribunal may and should conclude that the Respondent has failed to discharge its burden of proving that its decision to abolish the Applicant’s post, and the ensuing non-renewal of his contract, were neither arbitrary nor tainted by improper motives; and thus, that the post abolition/non-renewal decision was unlawful. As remedies, the Applicant requests: (a) compensation for the violation of his rights to be informed of the reasons for his separation, including justifications for the abolition of his post; (b) rescission of the non-renewal decision; and (c) compensation for the harm suffered as a result of the non-renewal of his appointment.

#### *Respondent’s submissions*

32. The Respondent no longer seems to maintain, as he did in the management evaluation and the reply, that there had been dedicated individual meetings held with

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<sup>49</sup> Applicant’s brief, filed on 7 December 2020, para. 25.

<sup>50</sup> Mr. Noto testimony, 27 October 2020.

the Applicant by the UNDP Iraq CO leadership to explain the reasons for the abolition of his post. He, nevertheless, maintains that the Administration had provided the Applicant with sufficient reasons for it, this being the Country Office restructuring and realignment of the office structure with the MCT recommendations. The Respondent's main contention appears to lie in invoking the presumption of regularity of the abolition decision, which the Applicant failed to rebut. Complaining about being ordered to state "against his will" the material reasons specific to the abolition Applicant's post, the Respondent eventually expressed them as set out below.

33. Given that the new structure had both eliminated the function of general programme positions, in favor of only specialized programme posts, and included positions at the NO-D/NO-C and G-6, the Applicant's general Programme Analyst NO-B level position did not have a place in the new structure and was accordingly abolished. The other general Programme Analyst NO-B position (position 00094690) was also abolished. The decision itself to structure the Programme Unit with three thematic pillars, each with one NO-C level position and G-6 level position, was reasonable.

34. The three-pillar structure was fit to address the problems identified by the MCT because it provided a clear division of labor within the designated themes and organization, which would allow for greater clarity and efficiency in the programme development and implementation in UNDP Iraq. Further, it was reasonable for UNDP to consider that the creation of NO-D or NO-C level positions, which would be specialized in each thematic area, to lead each pillar would further the goal of greater clarity and efficiency in programme development and implementation because NO-D and NO-C level positions are at a senior level and can take on the responsibilities of organizing, directing and coordinating the work of each thematic pillar. It was also reasonable for UNDP to conclude that each thematic pillar would have only two positions – the NO-C and the G-6 – and not additional NO-B level positions, as the expertise and management of the pillar would be provided entirely by the NO-C and the support for the pillar would be entirely handled by the G-6 level position, making any additional NO-B level position redundant and not cost efficient.

35. Although the two NO-B level Programme Analyst positions were abolished, between the three thematic Programme pillars and the Programme Support Unit, the new UNDP Iraq structure included additional positions at the NO-C level – going from zero NO-D positions under the old structure to one NO-D; and from four NO-C level positions to six at the NO-C level.<sup>51</sup> As a result, the abolition of the NO-B level positions may not have resulted in an overall reduction in the UNDP Iraq budget, since new higher level positions were created. Still it was considered a more cost-effective way to allot the budget because the higher-level positions provided the expertise and management skills required to address the issues highlighted by the MCT review.

36. Further, regarding the rationale for UNDP Iraq creating a Programme Analyst NO-B level position in the Erbil duty station (“Erbil NO-B”), while abolishing the Applicant’s Programme Analyst, NO-B level position in Baghdad, the Respondent explains that the Erbil NO-B, while containing the same general title as the Applicant’s former position, is a completely different position, in a different duty station and with different functions, than the position formerly held by the Applicant. Based on an MCT recommendation and as adopted by the Final Transition Process Plan, a decision was taken to have a senior international staff member at the P-5 level to head the Erbil Office.<sup>52</sup> As the P-5 level position would manage the office, an NO-B level position was considered the appropriate level of expertise to provide support to the head of office in implementing programmes in the Kurdistan region. Further, as the P-5 was an international professional position who may not have had knowledge of the local region, it was determined that qualifications for the Erbil NO-B position must include local knowledge and expertise in the Kurdistan region. The intended responsibilities of the Erbil NO-B position are in contrast to the Applicant’s previous position, which as described in his TOR, was for provision of general “*implementation of programme strategies*” and “*effective management of the CO programme*” for UNDP Iraq and did

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<sup>51</sup> Application, annex 2.

<sup>52</sup> Reply, annex 7, p. 6.

not include any specialized knowledge of the Kurdistan Region or functions related to implementation of programmes in that region.<sup>53</sup>

37. The Respondent further advises that the Erbil NO-B, which was created in the revised UNDP Iraq structure, has not to date been advertised for competitive selection or filled, as the Erbil Sub-Office has not yet determined whether that position is necessary. If advertised, it will be open for the Applicant to apply.

### ***Considerations***

#### ***Scope and standard of review***

38. Pursuant to staff regulation 4.5(c), a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service. The Administration is, nevertheless, required to provide a reason for such a non-renewal upon the affected staff member's request or the Tribunal's order, and, as held by the Appeals Tribunal, "when a justification is given by the Administration for the exercise of its discretion it must be supported by the facts."<sup>54</sup> In *Islam*, the Appeals Tribunal affirmed, specifically, that abolishment of a post as a result of reorganization constitutes a valid reason for not renewing the contract of concerned staff member.<sup>55</sup> To the extent, however, the Respondent appears to propose that invoking a reorganization/restructuring exercise suffices as a reason for a non-extension decision and, therefore, no further inquiry would be merited, this Tribunal disagrees.

39. The Tribunal, first, considers that the presumption of regularity relied upon by the Respondent, serves to reasonably limit the scope of judicial review but not to shield the administration from an examination of their actions where validity of administrative action turns on rationale. In other words, presumption of regularity may well extend over the administrative organ's subject matter competence, adherence to procedure and absence of improper motive. It does not extend over substantive validity of a decision,

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<sup>53</sup> Reply, annex 9.

<sup>54</sup> *Islam* 2011-UNAT-115, paras. 29-32, *Obdeijn* 2012-UNAT-201 paras. 33-39; *Pirnea* 2013-UNAT-311 paras. 33-34; *Ahmed* 2011-UNAT-153, para. 45.

<sup>55</sup> *Islam*, *op.cit.*

especially where a decision is lacking reasoning, or the reasoning offered is *prima facie* inadequate. Jurisprudence on point confirms that the Tribunals undertook inquiry into the merits of abolition of posts, and that the depth of the review turned on the coherence of reasons provided for it.<sup>56</sup>

40. It is a well settled 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.<sup>57</sup> In such decisions, the Administration has broad discretion to reorganize its operations and departments to adapt to economic vagaries and challenges.<sup>58</sup> The Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However, even in a restructuring exercise, like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with staff members.<sup>59</sup>

41. It follows that, albeit in restructuring the Respondent exercises a wide discretion, this discretion is not unfettered and is subject to review pursuant to the general *Sanwidi* test<sup>60</sup>, i.e., if an exercise of discretion is legal, rational, procedurally correct and proportional. The postulates expressed specifically in the context of abolition of post: “genuine” restructuring, fairness and justness, taken together, largely overlap with the *Sanwidi* test. The postulate of transparency concerns the process in which the decision is taken, as well as its result, that is, a reasoned decision. The reasoning must necessarily address the rationale.

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<sup>56</sup> Messinger 2011-UNAT-123; Toure 2016-UNAT-660; Zamel 2015-UNAT-602; De Aguirre 2016-UNAT-705; Abu Ata et al 2020-UNAT-1016; Liu 2016-UNAT-659; Smith 2017-UNAT-768; Salem 2018-UNAT-855; Collins 2020-UNAT-1021.

<sup>57</sup> Gehr 2012-UNAT-236, citing to ILOAT Judgment No. 2967, quoting ILOAT Judgment Nos. 2510 and 2856.

<sup>58</sup> Afeworki 2019-UNAT-903.

<sup>59</sup> Hersh 2014-UNAT-433, Bali 2014-UNAT-450, Matadi et al. 2015- UNAT-592; Loeber 2018-UNAT-844.

<sup>60</sup> *Sanwidi* 2010-UNAT-084.

42. In the event the Respondent still harbours doubts, in addition to the jurisprudence cited above, the Tribunal directs him to the recent Appeals Tribunal judgment in *Respondent* 2021-UNAT-1097, where it is stated:

When a tribunal is called upon to judicially review an administrative decision on the ground of irrationality, it is required to examine whether the decision is rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the Administration, or the reasons given for it by the Administration. That task of judicial review depends on the furnishing of adequate and coherent reasons for the decision. The giving of reasons is one of the fundamentals of good administration. It encourages rational and structured decision-making and minimizes arbitrariness and bias.

The requirement for coherent reasons compels the decision-maker to properly consider the relevant statutory provisions, the grounds for taking the decision, the purpose of the decision, all the relevant considerations and the policy to be implemented. Coherent reasons also encourage open administration and contribute to a sense of fairness. Reasons also critically provide the basis for judicial review of the decision. By requiring coherent reasons supported by the evidence one ensures that there is a rational connection between the premises and the conclusion. The decision-maker must be able to show that he or she has considered all the serious objections to the decision and has answers that plausibly meet those objections, which justify discarding them. The reasons have to show that the decision-maker did not take account of irrelevant considerations or add undue weight to a specific consideration.<sup>61</sup>

43. The Tribunal finds that reasons given to the Applicant in Mr. Noto's letter of 18 December 2018, were cursory and not specific enough, as the letter only invoked the process and its conclusion, without addressing at all the rationale for the abolition of the Applicant's post. It is only upon the evidence heard by the Tribunal and the Respondent's 25 November 2020 submission that the Tribunal may relate to the claim that the impugned decision may have been based on improper motives or arbitrary. This review will be done in the following paragraphs. The Tribunal notes that the Applicant still did not impugn the decision on any specific score other than insufficiency of reasons. It recalls that a staff member bears the burden of showing that

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<sup>61</sup> *Applicant* 2021-UNAT-1097, para. 45.

a decision was tainted by improper motives.<sup>62</sup> Finally, where it comes to the question of rationality/lack of arbitrariness, given that the decision belongs in the sphere of wide discretion, as long as the administration demonstrates *prima facie* rationality, the onus shifts to the applicant to show that the decision is irrational/arbitrary.

***Whether the decision was based on improper motives or arbitrary***

44. The postulate of fairness and justness – and also legality and rationality - relates to the requirement that the restructuration be genuine, that is, aimed at structural and not personal changes that would be improperly directed at any specific staff member. This said, improper motive is rarely articulated expressly; rather, it needs to be inferred from the surrounding circumstances.

45. Obviously, the restructuring exercise in question was genuine in that it encompassed the whole Country Office in a complex process and the Applicant was not singled out for retrenchment.<sup>63</sup>

46. To the extent the Applicant suggests inferring improper motives from the fact that the Respondent did not instantly provide reasoning specific to his questions and could not retrieve all documents accompanying the restructuring of UNDP Iraq, the Tribunal recalls that the Applicant's request of 20 December 2018 not only fell in the period of traditional holidays but also hectic changes in the leadership (para. 18 *supra*). The formal dispute ensued shortly thereafter, where the Respondent's agents chose to argue that reasons had been given, rather than (re)stating them in a matter of fact manner. While this tactic has caused loss of time and resources, the Tribunal sees no basis to attribute a sinister motive to the abolition as such. Lack of access to the documents and details sought by the Applicant during these proceedings are also plausibly explained by the passage of time and redundancy resulting from the approval

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<sup>62</sup> *Liu* 2016-UNAT-659; *Assale* 2015-UNAT-534.

<sup>63</sup> See *Smith*, *ibid.*, *Toure*, *ibid.*, as opposed to *Zamel*, *ibid.*, Applicant, *ibid.*, *Rehman* UNDT/2018/031.

of the restructuring on the RBAS level. In conclusion, improper motives were not made out.

47. As to the rationale for the Applicant's post, the Tribunal stresses that the undisputed fact of rapidly evolving security, humanitarian and development landscape in which the UNDP Iraq CO found itself; the fact of hiring a specialized team to design the restructuring; its conclusion that the Unit was "*understaffed, poorly organized and dysfunctional with an ad-hoc division of labor*" and that "[s]taff is unclear about the terms of reference"; and eventually the fact that the project was approved on a high level - all lend credence to the need for transformation, albeit may not *per se* suffice as a reason for abolition of a specific post.<sup>64</sup> In the latter respect, however, the Tribunal is satisfied with the reasons stated by the Respondent in his Additional brief on reasons for abolition decision of 25 November 2020 (summarized at para. 34-36 *supra*). The decision to abolish both general programmatic NO-B posts and in their stead to introduce new functionalities on different level does not disclose irrationality or arbitrariness, let alone a manifest one. That the Applicant seems to suggest that the specialized tasks could have been carried out by the team in its unchanged shape, does not invalidate this conclusion.

48. The Tribunal is satisfied with the Respondent's explanation regarding the NO-B post in Ebril. As for the claim that that there should have been a comparative review, it is important to note that a comparative review process is carried out where the existing number of staff members performing the same function at the same level exceeds the number of authorized posts for those specific functions in the proposed budget or structure. As the post in Ebril was created pursuant to the Transformation Plan with a different functionality, there was no basis for conducting a comparative review.

### ***Whether the administration acted fairly and transparently***

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<sup>64</sup> See *Toure*, *ibid*, para. 34 (*Although not necessary for our holding, we note that this restructuring was effectively approved by the COM in March 2013 and, ultimately, by the General Assembly by way of its approval of the RPTC 2014-2015 biennium...*)

49. Whereas there is no claim of violation of any formal procedure in the present case, a large part of the Applicant's grievance is based on the fact that he had not been offered explanations that he had requested, and that the Respondent provided fallacious information about individual meetings allegedly held on the issue. On this point, the Tribunal recalls its finding in para. 45 *supra*, on the loss of institutional memory. The Tribunal, however, also recalls that the UNDP had created for the Applicant a contemporaneous opportunity to seek explanations.

50. The first concrete opportunity was readily during the staff retreat, which the Applicant chose not to attend. This was almost a year in advance of the expiration of the Applicant's appointment. There is, furthermore, no indication that subsequent to the retreat the Applicant actively sought explanations that he wanted, albeit, clearly, he must have been aware of the abolition of his post – not only because that this kind of news travels fast but also as evidenced by the fact that he applied for other positions. The Tribunal further accepts the testimony of Mr. Shraideh that he had spoken with the Applicant on the subject, even if only in a chance meeting. On the whole, there is no reason to believe that the UNDP Iraq CO had refused communication throughout the period from February to December 2018. Rather, it appears that the Applicant chose to question the abolition of his post only after it had become apparent that his applications for other posts had not been successful.

51. The Tribunal moreover recalls that UNDP gave the Applicant individual notice of non-extension of 10 weeks in advance of the expiration of his appointment.

52. On the whole, the Tribunal finds that the UNDP had acted fairly and transparently.

### ***Conclusion***

53. Absent illegality, irrationality and unfairness in the impugned decision, there is no basis to rescind it and the question of compensation does not arise.

**JUDGMENT**

54. The application is dismissed.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 24<sup>th</sup> day of May 2021

Entered in the Register on this 24<sup>th</sup> day of May 2021

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi