




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2023-UNAT-1399



**Michel Raymond Marie Rixen
(Respondent/Applicant)**
v.
**Secretary-General
of the World Meteorological Organization
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge Leslie F. Forbang Judge Abdelmohsen Sheha
Case No.:	2023-1777
Date of Decision:	27 October 2023
Date of Publication:	7 December 2023
Registrar:	Juliet E. Johnson

Counsel for Mr. Rixen: Christopher Bollen

Counsel for the Secretary-General: Daniel Trup

JUDGE GRAEME COLGAN, PRESIDING.

1. Michel Rixen, a former staff member of the World Meteorological Organization (WMO), contested a decision to rescind the termination of his appointment. This resulted in his separation from WMO based on the expiration, rather than the premature termination, of his fixed-term appointment (contested decision).
2. The Secretary-General of WMO appeals against Judgment No. UNDT/2022/134 (impugned Judgment) of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) that granted Mr. Rixen's application and rescinded the contested decision.¹ The UNDT concluded that Mr. Rixen was entitled in law to rely on notice of termination of his fixed-term appointment (to which he agreed) before its expiry date and awarded him remedies.
3. For the reasons set out below, we dismiss the Secretary-General's appeal and affirm the impugned Judgment.

Facts and Procedure

4. Mr. Rixen served at WMO as a P-5 Senior Scientific Officer for some 10 years on a series of two-year fixed-term contracts, the last of which was specified to expire on 31 August 2021.² He was engaged in WMO's World Climate Research Program (WCRP).
5. On 3 June 2020 Mr. Rixen was advised that his post was to be abolished in a restructuring exercise with effect on 30 September 2020, that is about 11 months before the end of his fixed-term appointment.³ His post, and that of a similarly-ranked colleague, were to be replaced (and the Organization's activities augmented generally) by three new appointments of lower-graded staff members. He was advised that his tenure was at risk from this abolition of his post. He was encouraged to consider applying for any vacancies and advised that his contract would not be renewed beyond 31 August 2020.
6. On 24 July 2020, the Director of Science and Innovation (D/SI), WMO, requested from the Secretary-General a postponement of the 30 September 2020 post abolition date to allow for delays in the appointment of scientific officers, at P-3 level, whose functions would replace

¹ *Rixen v. Secretary-General of the World Meteorological Organization*, Judgment dated 22 December 2022.

² Impugned Judgment, para. 1.

³ *Ibid.*, para. 2.

Mr. Rixen's role.⁴ On 3 September 2020, the Secretary-General approved the postponement of Mr. Rixen's separation to 31 December 2020.⁵

7. On 13 November 2020, WMO advised Mr. Rixen of what it described as the "good news" of a further impending postponement of his separation and sought his confirmation of this.⁶ On 24 November 2020, he was accordingly notified that his separation date was delayed to 31 March 2021.⁷

8. On 4 February 2021, the D/SI again sought from the Secretary-General an extension to Mr. Rixen's employment contract to 31 May 2021.⁸ His separation was accordingly deferred to that date.⁹

9. Mr. Rixen had agreed to these several changes to his tenure. On 24 March 2021, he was advised that WMO would have work for him until August 2021.¹⁰ That same day, he informed WMO that he was not agreeable to further postponements to his separation date beyond 31 May 2021.¹¹

10. On the following day, 25 March 2021, Mr. Rixen was informed of what was to become the contested decision.¹² He was advised by WMO that, after consideration of the operational needs of WCRP in the coming months, it required him to remain in his post to serve out the duration of his contract and therefore its original decision of 3 June 2020 to terminate his contract had been rescinded.

11. Mr. Rixen contested this decision and, on 14 April 2021, he submitted a Management Evaluation Request (MER).¹³ Under protest, he continued in employment until the expiry date of his fixed-term appointment, 31 August 2021. He fulfilled his work commitments and was paid for these. His MER was not ever decided.

⁴ Inter-office memorandum of 24 July 2020 (Annex 3 to the appeal).

⁵ Impugned Judgment, para. 3.

⁶ 13 November 2020 e-mail to Mr. Rixen (Annex 6 to the appeal).

⁷ 24 November 2020 e-mail to Mr. Rixen (Annex 7 to the appeal).

⁸ Inter-office memorandum of 4 February 2021 (Annex 8 to the appeal).

⁹ Impugned Judgment, para. 3.

¹⁰ 24 March 2021 e-mail to Mr. Rixen (in Annex 10 to the appeal).

¹¹ Impugned Judgment, para. 5.

¹² *Ibid.*, para. 6.

¹³ *Ibid.*, para. 7.

12. On 29 July 2021, Mr. Rixen filed his application with the UNDT.¹⁴ He pointed out that one consequence of the contested decision was that he was not paid a termination indemnity as he would have received had his employment ended as he had been advised and as he had agreed it would, on 31 May 2021. In addition to his claim to a termination indemnity payment, he asserted that the repeated changes to his end-of-employment date by WMO caused him professional harm and adverse medical consequences.

13. It is unnecessary for the issues on this appeal to set out the various interlocutory steps that preceded the UNDT's Judgment delivered on 22 December 2022.

The UNDT's Judgment

14. The UNDT dealt first with the WMO's submission that Mr. Rixen's case was not receivable because its decisions had no adverse impact on the terms of his appointment or his employment contract.¹⁵ On appeal, the Secretary-General challenges the UNDT's conclusion that Mr. Rixen's case was receivable. We will therefore set out the Dispute Tribunal's reasoning for its preliminary conclusion on this point which was decided against the Secretary-General.

15. The UNDT recorded the Secretary-General's justification for the various extensions conveyed to Mr. Rixen on 25 March 2021 as being "the exigencies of the office and the requirements of the ongoing work" in the division in which he was engaged.¹⁶ It recorded the Secretary-General's "careful consideration of the operational needs" of Mr. Rixen's division of WMO. The UNDT referred to Article 2(1) of its Statute requiring challenged administrative decisions to be non-compliant with and to have a direct and adverse impact on the terms of his appointment or his employment contract.

16. For receivability purposes, the UNDT concluded that the repeated cancellations and extensions of Mr. Rixen's departure dates at least arguably breached the Organization's duties of care and due diligence to him.¹⁷ It found that the final decision to abolish his post and terminate his employment before its scheduled expiry date was not, as such, unlawful. However, it held that the contested decision had been taken unilaterally (unlike those previously which had Mr. Rixen's

¹⁴ *Ibid.*, para. 8.

¹⁵ *Ibid.*, paras. 25–40.

¹⁶ *Ibid.*, para. 26.

¹⁷ Impugned Judgment, para. 30.

consent because he held out some hope of ongoing permanence at WMO), in the Organization's own self-interest, and purportedly for its operational needs.

17. It was significant, also, that the employment relationship between a staff member and an international organization is a bi-lateral agreement contemplating a set of rights of, and obligations on, each party.¹⁸ In the case of the United Nations, the UNDT held that the Organization had a duty of care and due diligence towards Mr. Rixen and its other staff. It noted that the Organization took the (lawful) first initiative to abolish his post and to terminate his appointment before the expiry of the fixed term. The UNDT concluded that the Secretary-General then, however, determined, ultimately unilaterally and for what were described as the Organization's own interests, to repeatedly postpone his separation date because of what it claimed were its changing operational needs. It was significant that until the last proposed postponement, Mr. Rixen had agreed to these changes in the hope of attaining greater permanence with the Organization but had then advised it that he would no longer do so for reasons of career planning, of his own work planning with WMO, and because of the adverse effects of these repeated changes on his health and wellbeing.

18. The UNDT went so far as to describe the contested decision as "an abusive exercise of managerial discretion" affecting his terms and conditions of employment.¹⁹ It said that the Organization had taken undue advantage of Mr. Rixen's goodwill, his good faith and his previous cooperation in an exercise which would see his role replaced by several appointments of lower-graded staff. The UNDT concluded that the previous changes which had been agreed to by Mr. Rixen had created a legitimate expectation in him both that his agreement to the changes the Organization intended to make was needed and, in the absence of his required agreement, he would receive a termination indemnity payment in return for his premature separation from the Organization.

19. In these circumstances, the UNDT concluded that the contested decision did impact Mr. Rixen's legal position adversely.²⁰ His application to the UNDT was therefore held to have been receivable.

¹⁸ *Ibid.*, para. 29.

¹⁹ *Ibid.*, para. 37.

²⁰ *Ibid.*, para. 40.

20. Turning to the substantive claims filed by Mr. Rixen, the UNDT began with the presumption of law that, unless and until established by Mr. Rixen to have been otherwise, the Administration's contested decision was lawful, regular and rational.²¹ In particular the UNDT required Mr. Rixen to establish that the Organization's decision had been abusive, arbitrary, discriminatory or irregular.

21. Significant for the UNDT was the Organization's 22 March 2021 announcement in writing to staff generally that one of the replacement staff members would start work on 23 May and spend a week with Mr. Rixen as a handover period; that a second new replacement staff member would start work on 1 August; and that Mr. Rixen would remain with the Organization until the end of May 2021.²² The UNDT found that there was no evidence of justification for change to that position before the announcement to Mr. Rixen 3 days later, on 25 March 2021, of the further extension of his employment to the expiry date in his fixed-term contract despite his declining to agree to this.

22. The explanation proffered by the Secretary-General to the UNDT as the reason for the contested decision was also found by the UNDT to have been inconsistent with its actions.²³ The UNDT noted that while the explanation of staffing shortfalls may have justified the first three extensions proposed by the Organization and which were agreed to by Mr. Rixen, the UNDT could not accept that explanation for the situation between 22 and 25 March.

23. Further, the UNDT concluded that Mr. Rixen had a legitimate expectation of the termination of his appointment on 31 May 2021, as he could have expected WMO to have honoured the promise it made to him and to which he had agreed.²⁴ The UNDT held it was a breach of the duty of good faith owed to Mr. Rixen that this assurance was reneged on by the Organization.

24. The UNDT concluded that there were four separate expressions by the Organization of this assurance given to Mr. Rixen.²⁵ The UNDT held that these were sufficient to create for him a legitimate expectation that his employment would end on 31 May 2021, at least unless more permanent arrangements for his retention could be agreed to. The UNDT held the contested decision to have been unlawful.

²¹ *Ibid.*, paras. 42–43.

²² *Ibid.*, para. 44.

²³ *Ibid.*, paras. 48–52.

²⁴ *Ibid.*, para. 57.

²⁵ *Ibid.*

25. Turning to remedies, the UNDT rescinded the contested decision and re-set the lawful date of separation to 31 May 2021.²⁶ The UNDT declared his entitlement to termination indemnities and separation entitlements. In place of rescission of the contested decision, the UNDT directed the Organization to pay Mr. Rixen compensation of ten months' net salary. Concluding that he had established, by independent evidence, harm to his health resulting from the Organization's unlawful action, the UNDT awarded Mr. Rixen moral damages of USD 5,000. The UNDT ordered that interest be added to the monetary compensation.

26. The UNDT declined, for want of jurisdiction, to award Mr. Rixen compensation for legal fees incurred in this matter and, for lack of evidence, compensation for harm to his professional reputation.²⁷ There is no appeal by Mr. Rixen against these latter remedial decisions that he was declined.

Procedure before the Appeals Tribunal

27. On 18 January 2023, the Secretary-General filed an appeal against the impugned Judgment with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT), to which Mr. Rixen filed an answer on 20 March 2023.

Submissions

The Secretary-General's Appeal

28. The Secretary-General requests that the Appeals Tribunal vacate the impugned Judgment and find that the Administration acted lawfully or, if it determines the contested decision to be unlawful, reduce the award²⁸ and annul the order to pay compensation for moral harm.

29. Arguing that the UNDT erred in fact and in law in finding that Mr. Rixen's submissions were receivable, the Secretary-General criticises the UNDT's determination of the impact on his legal situation. The UNDT failed to identify how his retention in employment had a negative and direct legal consequence on his terms of employment. Implicitly, the UNDT seemed to regard the

²⁶ *Ibid.*, para. 74.

²⁷ *Ibid.*, para. 73.

²⁸ The UNDT did not award a specific amount of termination indemnity. The Secretary-General requests the Appeals Tribunal to reduce the award for a termination indemnity based on Mr. Rixen's period of employment which we take to mean that the Secretary-General requests the Appeals Tribunal to reduce the amount of compensation in lieu of rescission determined by the UNDT on the basis of the amount of the termination indemnity he would have been entitled to.

failure to award a termination indemnity as constituting a potentially adverse element. However, a termination indemnity requires a finding that the staff member's employment was terminated.²⁹ His was never terminated but rather expired as originally agreed it would. Consequently, he had no right to a termination indemnity. The UNDT cannot identify the failure to award a termination indemnity as an adverse element of the contested decision when he remained in employment and, as in *Hamdan*,³⁰ he continued to benefit from the Organization's health insurance and pension scheme.

30. The Secretary-General submits that the UNDT's conclusion that another adverse impact was Mr. Rixen's inability to plan for his professional life, is incorrect. Whilst in employment and thus considered as an internal candidate in recruitment processes he participated in, he retained a distinct advantage over other candidates at that time. In addition, he was free to resign. Furthermore, he obtained another post within one month of leaving WMO. Any impact on the planning of a staff member's professional life in and of itself does not provide the requisite causal link to the terms and conditions of employment.

31. The Secretary-General disagrees with the UNDT's conclusion that the modality of Mr. Rixen's separation created an adverse administrative decision. The abolition of his post, its timing and the resulting extension of appointment were matters subject to the Administration's discretion. The UNDT erred in concluding that the facts of this case resulted in him retaining a right to demand termination.

32. The Secretary-General contends that the UNDT erred in law and in fact in determining that an enforceable legitimate expectation existed and that there was no justification in retaining Mr. Rixen. The UNDT failed to meet its burden to establish a legitimate expectation.³¹ At no stage was he presented with an express written promise that he would be retained.³² Since his post was not abolished, at that stage, the conditions of immediate separation had not been met. Documents

²⁹ Appellant references Article 9.3 of WMO Staff Regulations and *Altayb Garbo v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1051, para. 32.

³⁰ *Abdeulrazig Mohamed Hamdan v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1050, para. 31.

³¹ Appellant references *Hepworth v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-503, para. 41; *Kellie v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-875; and ILOAT Judgment No. 3619 (2016), para. 14.

³² This may or not be an error of expression of the submission. As we note later, Mr. Rixen's case is that he received a written assurance that he would *not* be retained, to which he agreed and on which he relied and changed his employment position.

referred to by the UNDT had been based on an understanding that his post would be abolished at a given date; according to the 3 June 2020 notification, his separation was contingent on the abolition of his post. Implicit in subsequent notifications as well was that the modality of separation was always contingent on the timing. As the abolition was delayed until the end of his fixed-term appointment, this resulted in non-renewal. Furthermore, the separation document, i.e. a memorandum of 17 August 2021, providing information on his entitlements, makes no reference to a termination indemnity.

33. The Secretary-General submits that even if the original notice of abolition constituted a written promise of termination, the UNDT failed to consider that there was insufficient evidence that it was relied upon or that it culminated in injury to Mr. Rixen. He had, in several ways, waived any reliance on the notification of abolition. Even on 24 March 2021, he indicated that he was open to remaining with WMO. The UNDT erred in concluding that he suffered any financial injury. In identifying moral harm, the UNDT failed to consider how the loss of an alleged legitimate expectation led to the ailments sustained by him. The medical report dated 11 August 2021 provides a diagnosis linked instead to overwork and the non-renewal of his contract and does not provide any reference to medical harm linked to the contested decision and alleged loss of a termination indemnity. In addition, the UNDT failed to establish the nexus between the contested decision and the diagnosis. Moreover, neither overwork nor non-renewal was the subject matter of his complaint.

34. The Secretary-General submits that the UNDT failed to properly consider the extent to which WMO was entitled to rescind the prior decision based on a proper assessment of the balance of interests. Reverting to the completion of the employment contract is merely complying with the obligations established between the parties. The UNDT failed to consider the interests of WMO³³ and the actual effects of the contested decision on Mr. Rixen. It is an essential legal principle that the Administration must be free to change direction if required by the exigencies of the service. In this case, it was imperative to onboard and fully orient the newly recruited three P-3 staff members before his departure. The UNDT unlawfully intervened in circumstances in which it failed to consider the inherent authority given to the Secretary-General to retain the services of an existing staff member.

³³ The Appellant cites Article 1.2 of WMO Staff Regulations.

35. The Secretary-General contends that the UNDT erred in law and in fact in awarding compensation. The UNDT's incorrect determination of the amount of compensation in place of rescission essentially leads to Mr. Rixen receiving a termination indemnity for a period where he was actually in employment and received salary and benefitted from associated health and pension contributions, i.e. benefitting from the alleged breach of contract.

Mr. Rixen's Answer

36. Mr. Rixen requests that the Appeals Tribunal dismiss the appeal, affirm the impugned Judgment and award legal costs to him in the amount of CHF 10,000.

37. He submits that he accepted a postponement of his separation to 31 May 2021 and started making personal arrangements but agreed to be available after that date for following up on some of WCRP's ongoing activities. In an e-mail of 17 March 2021, among others, it was re-confirmed that he would be entitled to a termination indemnity.

38. Mr. Rixen argues that the appeal consists, in most part, of arguments unsuccessfully put before the UNDT and fails to address the central consideration, namely that the contested decision was abusive and contradicted WMO's prior conduct. The Secretary-General's interpretation of his conduct is contradicted by the fact that in February 2021, the parties agreed that his separation would occur on 31 May 2021 further to a final postponement. He never accepted a postponement past that date. None of the communications suggest or imply that his separation would be conditional on other factors.

39. He contends that a decision which violates the Administration's duty to act in good faith constitutes a challengeable decision fulfilling the requirements of *Alcañiz*.³⁴ *Garbo* and *Hamdan* are distinguishable from the present case. The Secretary-General's argument that the Administration's conduct did not impact his ability to plan his professional life overlooks that he fell ill and was unable to work starting for some time from 26 March 2020.

40. Mr. Rixen asserts that at no point did he waive any right to challenge the Secretary-General's failure to uphold the Organization's commitments to him. The argument that the Administration's managerial discretion overrides the legitimate expectations of staff members is contradicted by the applicable case law. It is not elaborated in the appeal whether and how the

³⁴ *Lloret Alcañiz et al. v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-840.

case law of the UNDT and the Appeals Tribunal fails to adhere to the principle of the staff member's expectations being subservient to the interests of international organizations, a general principle of international civil service law. Even if the WMO's staffing needs were justified, the contested decision, as an abusive exercise of discretion, was still unlawful.

41. He submits that the Secretary-General has failed to demonstrate that the UNDT erred significantly in its decision on the remedies. The argument that the UNDT's award of compensation instead of rescission would result in Mr. Rixen being compensated twice is erroneous. Had he been separated on 31 May 2021 as planned, he would have had the opportunity to pursue suitable employment and obtain a salary for the subsequent period, in addition to a termination indemnity. As to the moral damages, while the wording of the medical report is imprecise, it cannot be reasonably expected that the medical specialist would exactly identify the contested decision as the primary cause of his mental anguish. The Secretary-General's approach is overly formalistic and, in any event, fails to demonstrate how the UNDT's award is manifestly incorrect. The Secretary-General's reliance on *Coleman*³⁵ as relevant precedent is misleading as it is distinguishable from the present case.

Considerations

42. Having summarised the relevant facts, the UNDT's Judgment and the parties' submissions on appeal, we now turn to address those grounds of appeal advanced by the Secretary-General of WMO.

Receivability of the application

43. We address first that part of the appeal against the UNDT's conclusion of receivability. We understand the Dispute Tribunal's reference to the contested decision affecting Mr. Rixen's "legal situation", while arguably imprecise, referred to the termination date of his employment. This was a term or condition of his employment determined by the legal documents defining that relationship.

44. The Secretary-General contends that, for receivability purposes, Mr. Rixen did not demonstrate how the retention of that original separation date had direct and negative consequences for him. That submission mistakes the nature of the contested decision. As did

³⁵ *Sarah Coleman v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1228, para. 37.

the UNDT, we consider that the nature of the administrative decision challenged by Mr. Rixen was not to retain him in employment until the original date of expiry of his fixed-term contract. Rather, it was the decision to rescind the termination of his contract on 31 May 2021, contrary to the agreement that had been reached that it would conclude on that date. So it was not a matter of Mr. Rixen establishing direct and adverse consequences of having to work for WMO until 31 August 2021, but rather of these being a consequence of his being unable to cease work on 31 May 2021. His case did establish these consequences of the contested decision, thus fulfilling the receivability test.

45. Mr. Rixen's claim filed with the UNDT alleged that he was compelled to change the personal and professional plans he had made in reliance on his agreed termination date (31 May 2021) and that the contested decision caused him to become ill and thereby be on sick leave. It is at least arguable that it is non-compliant with a staff member's terms of employment that an administrative decision by the employer causes the staff member to become ill to the extent of needing to take sick leave. That is not to say that an adverse psychological reaction to an unobjectionable administrative decision will meet the non-compliance test: but where this is the consequence of an unlawful decision, it may constitute a statutory ground to apply to the Dispute Tribunal. An employer has a duty to organize its operations so as not to imperil the health and safety of its staff. We reiterate that as regards this preliminary element of the appeal, these issues need only be alleged credibly for the purposes of the receivability of a staff member's application. Whether they are proven so as to establish liability and remedies is another question subsequently requiring a higher standard of attainment as part of the merits-based assessment of the staff member's claims. We consider that Mr. Rixen met this receivability test.

46. We now address the additional grounds of appeal put forward by the Secretary-General in relation to the UNDT's receivability finding, although they more naturally arise in the merits-based grounds of appeal. The Secretary-General relied on the case of *Hamdan*. However, Mr. Rixen's is not a case of seeking both a termination indemnity and retention of the advantages and benefits of his continued employment until its specified termination date. Mr. Rixen's case is distinguishable from *Hamdan*. As we later conclude, unlike in that earlier case, Mr. Rixen agreed to WMO's proposal to vary that termination date by foreshortening the period of his employment so that he would not have received those ongoing advantages and benefits for the balance of his originally-agreed term. At the time of his refusal to agree to a

further extension of his termination date, he was not seeking, and would not have been entitled to, both a termination indemnity payment for premature separation, and also the remunerative and other benefits of continuing work for an additional three months. Rather, Mr. Rixen was seeking to adhere to an agreed variation to his contract which, in return for foreshortening his period of employment, entitled him to a termination indemnity. That WMO kept him in employment, under protest by him, after his refusal to compromise on their agreement (and from which WMO benefitted), is a consequence of its unlawful action which should not and did not disqualify Mr. Rixen from applying to the UNDT for relief against that unlawfulness.

47. The Secretary-General also relies on the decision in *Garbo*³⁶ to support the argument that Mr. Rixen was not entitled to insist that his employment end by termination rather than by expiry or effluxion of the period of his fixed-term contract. That is not, however, the basis of his case as it was put before and decided by the UNDT and so *Garbo* is also distinguishable from his case. Rather, Mr. Rixen sought to enforce an agreed variation to his contract of employment or would seek to negotiate a further variation to achieve its objective. As we elaborate in this Judgment, we also conclude that the date upon which he was to be separated from service was not a matter entirely of WMO's discretion and authority. We do not accept the additional submission that because separation was to occur as initially agreed on 31 August 2021, any earlier separation could not have been an adverse consequence of an administrative decision.

48. The UNDT was correct that Mr. Rixen had established a direct and negative effect, brought about by the implementation of the contested decision, as a condition for receivability. His case adequately established that condition.

49. We are satisfied that the UNDT correctly received Mr. Rixen's claims for consideration on their merits and reject the non-receivability grounds of appeal.

The appeal on the merits of the impugned Judgment

50. We turn now to the Secretary-General's challenge to the merits of the UNDT's Judgment.

³⁶ *Garbo* Judgment, *op. cit.*

51. The UNDT decided the case on a dual or alternative basis: first, by enforcement of a legitimate expectation; and second, by concluding that WMO's actions were a breach of a duty of care that it owed to Mr. Rixen. We consider that, in addition to these two different ways by which the UNDT arrived at the same result, there is potentially a third cause of action—namely, breach by WMO of an agreed variation to Mr. Rixen's fixed-term agreement (his contract). If so, that too would arrive at the same result. We will, however, deal with the Secretary-General's grounds of appeal which address the decision and reasoning of the UNDT.

Whether the Organization has a necessarily uninhibited power to manage

52. The Secretary-General's case has been broadly advanced as one of the necessity for an international organization, as employer, to determine what is in its best interests and to have a sufficient degree of command and control over staff to achieve this.

53. In reliance, among other supportive statements such as in the recent UNAT Judgment in *Duparc*,³⁷ the Secretary-General says that it is necessary that the Administration have "flexibility in management" for the "dynamic nature of the work environment". Protection of the Organization's interests, it is said, must allow for managerial freedom to make strategic changes at short notice. This principle is said to be both enshrined in the WMO Staff Regulations and is an essential and long-held tenet of international administrative law.

54. Analysis of *Duparc*, however, reveals that the statement that "*flexibility in management is necessary for the dynamic nature of the work environment since it would be impossible to lay down a guideline for every imaginable eventuality*"³⁸ has been taken out of context and expanded both significantly and unjustifiably. Indeed, the immediately following passage in the *Duparc* Judgment emphasises that such discretionary organizational flexibility must be exercised with moderation, lawfully, rationally, correctly in a procedural sense, and proportionately. Such discretionary decisions may not be exercised ignoring the relevant or taking account of the irrelevant. Nor is perversity or absurdity countenanced in such decision-making. Absent these limiting or disqualifying factors, the *Duparc* Judgment recognises the discretion allowed to the Organization to select a course among several that may be open to it to make. Nor should it be doubted that it is not for the Tribunals to substitute

³⁷ *Philippe Duparc, Karim El Gaouzi, Radouan Tualbia & Nicolas Drevon (Duparc et al.) v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1245, para. 43.

³⁸ *Ibid.* (emphasis added).

their decisions on administrative matters for those of the Organization properly taken in the exercise of its discretion.

55. Those statements from *Duparc* reiterate longstanding and carefully balanced jurisprudence, but, as will be seen, they do not support the powers that the Appellant seeks to persuade us to allow it to wield in this case.

56. The Secretary-General also invokes Article 1.2 of WMO Staff Regulations which provides that staff shall be “subject to the authority of the Secretary-General and to assignment (...) to any of the activities or offices of the Organization. (...) The whole time of staff members shall be at the disposal of the Secretary-General.” This does not, however, empower WMO to do what it purported to do in relation to Mr. Rixen. Resignation, which the Secretary-General concedes may allow a staff member to avoid dictatorial control, is not the only constraint on, or escape-hatch from, this claimed Draconian power. WMO’s directions as employer must be lawful and reasonable and exercised lawfully and reasonably in the circumstances prevailing at the time. Nor do we agree that, as the Secretary-General submits, a staff member’s interests are otherwise “subservient to the interests of the Organization”. In an employment relationship for which the United Nations has adopted a combined or fused statutory and contractual model and in which both parties also have express and implied rights and obligations, this notion of subservience is no longer appropriate. Such an unbalanced relationship would be contrary to the employment principles of the International Labour Organization and of the United Nations itself under its founding documents, including the Universal Declaration of Human Rights.

57. The antiquity of the Secretary-General’s argument, and its disconnection from and dissonance with twenty-first century notions of employment democracy, is illustrated by an article by S.M. Schwebel, entitled “The International Character of the Secretariat of the United Nations”, relied on by the Secretary-General in the appeal brief.³⁹ The article discusses a decision rendered in about 1925 by a Commission of Jurists appointed by the Council of the League of Nations, the predecessor to the United Nations. The case involved the dismissal of an official of the Secretariat of the League and resulted in the adoption of the Commission’s

³⁹ Annex 21 to the appeal.

report by the Council. The Secretary-General relies on the following passages from the Schwebel paper:⁴⁰

The Commission took the view that a contract between a person and the Secretary-General ‘must be considered mainly in the light of the principles of public law and administrative legislation. Relations connected with public employment are always governed by the exigencies of the public interest, to which the private and personal interests of the officials must necessarily give way.’ Thus, ‘the administration must always retain discretionary powers, as otherwise it could not ensure the development of these relations with due regard for the recognised public requirements for the satisfaction of which they were constituted’. Officials have their rights, especially economic, but these are ‘subject to the rights of the administration’.

...

‘The same principles [the Commission held] must undoubtedly be applied to the legal relations between the Secretary-General of the League of Nations and the officials of the Secretariat. If the relations connected-with employment in individual States must be subject to the requirements of the public interest, to which they owe their existence, the same must *a fortiori* be true in the case of the League of Nations, which is called upon to satisfy requirements which are much more complicated in that they are international, and which, in consequence, must exercise a still wider discretionary power in respect of the engagement, retention and dismissal of officials.’

58. Returning as we must to the present, almost a century later, our rejection of these principles does not mean that WMO is not entitled to manage its role and work by allocating its human resources as it considers best in the circumstances at any particular time. Nor is it to say that the Tribunals can make those decisions in substitution for the Organization acting in a lawful, reasonable and proportionate manner. But these are very different principles to those illustrated by this antiquated treatise and are not now consonant with the dignity of the individual employee and with the contractual and rules, rights and obligations-based nature of the United Nations’ relationships with its staff members.

General principles of the employment relationship

59. It is, therefore, appropriate to state for ourselves some general legal principles about Mr. Rixen’s employment with WMO and upon which the UNDT’s Judgment and this Judgment are based. Mr. Rixen’s was not a one-sided relationship driven solely or even principally by

⁴⁰ *Ibid.*, page 61.

the Organization's self-perceived and actual needs. As a staff member, Mr. Rixen was entitled to an appropriate degree of personal and career autonomy and not to be held constantly in a temporary state of uncertainty about his professional future. That is not to say that the organizational dynamics of WMO could not be accommodated. But having contracted with Mr. Rixen, if WMO sought to vary those fundamental contractual terms relating to the duration of his employment, it should have obtained his agreement. The employment relationship, with regard to a variation that results in prolonging it, is governed by contract and contractual principles apply, including that such variation is by consent and not unilateral. Indeed, WMO did obtain this consent, albeit impliedly by acquiescence, on several occasions before this was finally denied it by Mr. Rixen for understandable and justifiable reasons. WMO was not entitled to simply override that disagreement to suit its own convenience. This fundamental principle distinguishes a relationship of contract from one of subjugation or servitude. As did the UNDT, we approach the following Secretary-General's submissions on this basis.

A review of the pertinent facts

60. The submissions have required a close consideration of all the relevant written communications between the parties and a realistic assessment of the true meanings of what was written and understood about the proposed termination of Mr. Rixen's employment on 31 May 2021. That scrutiny reveals the following:

- a. On 3 June 2020, Mr. Rixen was advised by WMO that his post would be abolished on 30 September 2020 and that this would put him "at risk of separation" from WMO at that date. He was advised that if he was unable to secure an alternative role within WMO by then, his contract would "not be renewed beyond that date." He did not oppose or contest this and may thereby be considered to have agreed to it, at least inferentially.
- b. On 25 August 2020, Mr. Rixen was advised by WMO that, among other things relating to his forthcoming departure from the Organization on 30 September 2020, he would receive a termination indemnity payment equivalent to nine months of his net salary.
- c. On 3 September 2020, Mr. Rixen was advised by WMO that there was to be a delay to his separation of three months to 31 December 2020. Again, at least

inferentially by his conduct, Mr. Rixen agreed to that requested variation and he did not oppose or contest it.

d. On 24 November 2020, Mr. Rixen was advised by WMO that there was to be a further delay to his separation, this time to 31 March 2021. Again, his conduct in continuing to work for that extended period of early termination of his role signalled, implicitly at least, his acceptance of that further variation to the previously-agreed variation. Similarly, he did not oppose or object to this change.

e. All of the foregoing advices of initial foreshortening and then subsequent extensions to his end-of-employment dates, while made unilaterally by the Organization, had been agreed to by Mr. Rixen by his acquiescence in them.

f. On 22 March 2021, WMO announced in writing to staff generally that one of the replacement staff members would start work on 23 May and spend a week with Mr. Rixen as a handover period; that Mr. Rixen would remain with the Organization until the end of May 2021; and that a second new replacement staff member would start work on 1 August.

g. On 24 March 2021, Mr. Rixen informed WMO in writing that, as he had advised orally two weeks previously, it was unlikely that he would agree to any further variation by extension to his separation date beyond 31 May 2021. He said that this was because he could not plan efficiently either his WMO work, or his career and personal life based on a series of short extensions and that he was planning a new career path after 31 May 2021. Mr. Rixen referred to the written advice that WMO had conveyed to all its staff (including him) that he would be concluding his time at the Organization on 31 May following which he was already making arrangements elsewhere. Mr. Rixen, on advice, declined to agree to any further extensions to his tenure beyond 31 March, having been consulted on, and agreed to, all previous extensions. He nevertheless recorded his wish to be consulted about any further proposed extensions. He also recorded the “significant stress” he had suffered over the previous 15 months from these uncertainties and short extensions and how this had affected his health and wellbeing. With the exception of WMO very promptly offering him “a concrete long-term perspective within the Organization” which he said he would be prepared to discuss, he expressed clearly his disagreement with any further extension beyond 31 March 2021 and his expectation that his separation on this date would occur.

h. On 25 March 2021, WMO advised Mr. Rixen that following a discussion with him on 23 March and contrary to his preferred course of action, the decision to terminate his contract had “been rescinded”.

i. Mr. Rixen continued in his role from 31 March 2021, albeit under protest.

j. On 17 August 2021, WMO advised Mr. Rixen of his forthcoming separation on 31 August 2021, the originally specified date in his latest fixed-term contract. He was paid for and in accordance with his original fixed-term contract and did not receive a termination indemnity.

Alternatives available to Appellant

61. Turning now to the specific merits of the impugned Judgment, the Secretary-General first argues that the UNDT erred, factually and in law, in finding that the contested decision precluded Mr. Rixen from planning for his professional life after WMO. The Appellant draws attention to two factors in support of this ground of appeal; first, that Mr. Rixen applied unsuccessfully for a number of alternative posts within WMO; and, second, that he obtained another professional meteorological role within a short period after leaving WMO.

62. Irrespective of whichever way the case is considered (legitimate expectation, breach of duty of care or breach of contract), the Appellant has not explained how Mr. Rixen’s unsuccessful applications for other WMO posts should disentitle him to relief in the circumstances. He would have been entitled to apply for other posts and may have so applied even had his post not been slated for abolition but his employment was to end in reliance on the expiry of his fixed term. Indeed, Mr. Rixen could be said to have acted responsibly and in an attempt to mitigate his losses potentially claimable against WMO by so applying. He is not to be deprived of his legal entitlements because these applications were unsuccessful. There is nothing in this ground of appeal.

No causation argument

63. Next, the Secretary-General asserts that the UNDT applied an incorrect legal test to this question of the effect of an administrative decision on a staff member’s terms and conditions

of employment. It relies on *Alcañiz*⁴¹ which, if the decision is to be reviewable, requires that there be a causal link between the administrative decision and the terms and conditions of employment. While we agree with the principle and note that the UNDT did so also, on the facts there was such cause and effect between the two. Taking the terms and conditions of Mr. Rixen's employment first, the date of his conclusion of employment was a term of his employment. There was an agreed variation of that date, and the varied date (31 May 2020) on which it would conclude was no less a term of his employment. WMO's decision purporting to rescind its agreement to that varied date affected Mr. Rixen's established career and personal plans made in reliance on that consensually varied termination date. The same reasoning applies to the other causes of action, breach of legitimate expectation or of duty of care. There was a cause and effect relationship between the breach and the harm or loss, thus fulfilling the *Alcañiz* test requirement.

No express promise argument

64. This ground of appeal applies to both the legitimate expectation and contract breach analyses of the relevant events. As to the challenge to the UNDT's conclusion that there was an express promise made to Mr. Rixen that his employment would end on 31 May 2021 so creating in him a legitimate expectation of this, the Secretary-General argues that Mr. Rixen did not establish the existence of an express written promise of a specific course of action.⁴² Nor, the Secretary-General contends, did Mr. Rixen establish his reliance on that promise the breach of which caused him loss or injury.⁴³

65. We disagree. There was an express commitment by WMO in the form of their agreement, evidenced in writing by WMO and publicised generally within the Organization, that Mr. Rixen's tenure would end, ultimately, on 31 May 2021. That constituted both evidence of the breach of the varied contract and, looked at through the alternative legitimate expectation lens, of the necessary expression of the assurance to the staff member. As to reliance thereon by Mr. Rixen, the UNDT accepted his case that he had relied on this assurance and their agreement by making personal and professional career plans accordingly. The Appellant has not established that the UNDT erred in that assessment.

⁴¹ *Alcañiz* Judgment, *op. cit.*

⁴² Appellant refers to *Kellie* (*op. cit.*).

⁴³ Appellant refers to ILOAT Judgment No. 3619 (2016).

No unlawful revocation argument

66. Even then, the Secretary-General submits that Mr. Rixen must demonstrate that its revocation of the decision to terminate Mr. Rixen's employment on 31 May 2021 was unlawful. This ground of appeal addresses the legitimate expectation analysis of the case. The test of expectation legitimacy is said to be whether the decision was taken in the interests of the Organization and did not harm "disproportionately" the staff member's contractual terms and conditions of employment.

67. It must be remembered that in addition to frustrating the plans and arrangements that Mr. Rixen made in his professional career and personal life in reliance on that assurance, its revocation of the parties' agreed variation to his final date of employment also caused him to suffer ill health for which he went on sick leave for a period. Those cumulative and harmful effects on Mr. Rixen were disproportionate to the benefits that WMO achieved by insisting on the continuation of his work against his will for a further three months. This conclusion would apply, if necessary, also to the contract breach and duty of care breach analyses of the case.

No modality of separation argument

68. The Secretary-General concedes that it intended to abolish Mr. Rixen's post and that, absent any delay in or revocation of the abolition, or Mr. Rixen securing an alternative position within the Organization, this would mean separation of the staff member by reason of the abolition of his post. However, the Secretary-General's point is that there was no necessary express promise of what it describes as "the modality" of separation. Again, we disagree. Even if that specificity was a requirement (which we doubt), there was no uncertainty about it. The modality of separation, or the way in law in which his separation would take place, was obvious, even if it had not been expressed. Absent any suggestion of misconduct by the staff member (of which there was none), his cessation of employment before the expiry of his fixed-term contract could only have been the consequence of the abolition of his post as was indeed intended and proposed. As was well-established and known, the abolition of post for a valid operational reason before the expiry of the term for which the staff member had been appointed to it, may have been lawful but would involve a compensatory payment (a termination indemnity). Indeed, this position was confirmed in correspondence from the Organization to Mr. Rixen in relation to one of his earlier agreed variations foreshortening the duration of his employment.

No commitment beyond intention argument

69. We do not accept the apparent argument advanced by the Secretary-General that the documentary and other evidence summarised above established merely an “intention” by the Organization that Mr. Rixen would be separated from service when his post was abolished and if he had not then obtained another within WMO. Such an interpretation of the evidence strains unnaturally the words and phrases used in a continuum of correspondence on the subject. Further, it is also not the Organization’s subsequently professed intention that is the sole, or even the predominant, test of legitimate expectation. Rather, it is what all the relevant communications, assessed cumulatively and objectively, conveyed to the staff member at the relevant times. They were justifiably received by him as advice of his separation from service on specified dates when his post would be abolished. As the correspondence reveals, Mr. Rixen accepted these as such and agreed with all but the final advice of 25 March 2021.

70. Applying this assessment of the evidence to the alternative breach of contract and of duty of care analyses of the case, the submission does not assist the Appellant.

No written promise argument

71. We do not accept the Secretary-General’s submission that Mr. Rixen could not have had a legitimate expectation of his premature termination of his employment because he had no written promise that he would be retained in employment. That is for two reasons. First, his case is that he had an assurance in writing, to which he agreed, that his employment would end prematurely, that is, that he would not be retained by the Organization. Second, we find so because Mr. Rixen’s premature termination of employment was announced not just to him but to all staff in writing and unequivocally. Together with his reliance thereon, this was the fulfilment of the legal criteria for the existence of a legitimate expectation.

72. Again, this submission does not assist the Appellant in establishing that there was no breach of contract or of duty to Mr. Rixen. The written advice is evidence affirming and reinforcing the commission of those breaches.

Conditionality argument

73. Nor do we accept the argument of the Secretary-General that its relevant advice to Mr. Rixen and to other staff about his on-going employment was contingent on the abolition

of his post so that unless and until that abolition was decided and announced, he would not be separated from service prematurely. A consideration of WMO's 3 June 2020 advice to Mr. Rixen, for example, confirms that his intended separation was not so conditional or contingent. Other documentary evidence of these communications also supports our conclusion.

No reliance on termination argument

74. Next, the Secretary-General argues that the UNDT had insufficient evidence to enable it to conclude that any express written promise(s) of premature termination of Mr. Rixen's employment was/were relied on by him to his detriment. The Appellant highlights Mr. Rixen's initial request for management evaluation of the first notification to him of the 3 June 2020 decision to abolish his post. The Secretary-General says that his three subsequent acceptances of delays to this event must negate any detrimental reliance on this advice. The Secretary-General also points to the evidence that Mr. Rixen requested the retention of his WMO electronic office equipment to allow him to continue his work for WMO until 31 August 2021. The Appellant says that only when it became advantageous financially to Mr. Rixen not to stay on until 31 August 2021, did he challenge the WMO's decision of 25 March 2021 to retain him in employment until that date. That is said to have been confirmed by Mr. Rixen's 24 March 2021 advice that he would be prepared to negotiate remaining on in WMO's employment if a more permanent role could be found for him. This evidence is said to have confirmed an intention by the Respondent to waive any reliance on notification of abolition of his post.

75. We do not agree. Mr. Rixen was entitled in law to not accept and to reject, as he did, the Appellant's purported revocation of its earlier decision which had given him a legitimate expectation of a premature cessation of his employment. He was also entitled in law to not accede to the breach by WMO of his (varied) contract unless the Organization was prepared to negotiate again with him. It was not, so that his rejection of its proposed breach remained. The Appellant's purported revocation was also evidence of its breach of its duty of care to Mr. Rixen. As a matter of common sense, his request for retention of his office equipment reflected his need for it, not only to 31 May 2021 but, subsequently, to 31 August 2021 when WMO required him to remain in service to that date. Mr. Rixen did not, expressly or by his conduct, waive his right to insist on the fulfilment of his varied contract to terminate his

employment on 31 May 2021 or otherwise negate the effect of the Appellant's breaches of contract with, and duty to him.

Double dipping argument

76. In addition, the Secretary-General contends that the UNDT erred in concluding that Mr. Rixen suffered financial loss or damage by relying on the promise of early separation. It is noted that he continued to receive all the emoluments of his employment until separated on 31 August 2021. We have labelled this as alleged "double dipping" in the sense of the Appellant's argument that Mr. Rixen wants to retain the financial benefits of his three months' additional employment to 31 August and also receive a termination indemnity. That too is a fallacious submission. The emoluments he received were payment for the period of employment he continued in, albeit under protest, to 31 August 2021. The losses he incurred were separate to, and not compensated for, by his remuneration which was paid to that date.

Summary of conclusions on liability

77. To summarise our conclusions about the alleged errors made by the UNDT in deciding questions of liability in this case, two legal principles favour Mr. Rixen's position. First, he had an enforceable consensual variation to his employment agreement that, in return for agreeing to cease his employment on 31 May 2021, he would receive the benefits of premature termination of a fixed-term contract including payment of a termination indemnity. The Organization was not entitled in law to breach that agreement and the contested decision which did so was unlawful.

78. Second, the Appellant is estopped from acting contrary to its termination date for Mr. Rixen's employment to which he had agreed and in reliance in which he had made arrangements to leave the Organization and to seek to advance his career elsewhere. That was the legitimate expectation that he had of how and when his employment would end and in reliance of which he had made personal and professional arrangements. It would be inequitable to permit the Secretary-General to both breach that agreement and to impose unilaterally a further extension to that agreed arrangement in these circumstances. The personal consequences to Mr. Rixen of the Appellant's actions constituted a breach of its duty of care in its treatment of him—a duty not to harm him as the UNDT was satisfied WMO did.

79. The Organization changed three times the end dates of Mr. Rixen's employment to suit its own convenience and arrangements. It did not seek to enquire from him about, or to take account of, the necessary balancing factors affecting him. While the Appellant obtained his agreement to the initial series of changes to these dates, it sought to trade unfairly on the staff member's goodwill by then making yet another change, without seeking or obtaining his consent as it had done previously and indeed having just been advised by him that he would not consent to further changes. It sought to exercise a power, not only unilaterally but in the face of an express disagreement from Mr. Rixen, for its own ends and without consideration of the staff member's needs or circumstances. Mr. Rixen was treated in cavalier fashion in his last months with the Organization for which he had worked for a long period and for which he had made accommodations to suit its needs at the expense of his own career. It does not go too far to say, as the UNDT did, that WMO over-reached and abused its power in respect of Mr. Rixen.

Challenge to remedies—termination indemnity

80. Turning to the Secretary-General's challenge to the remedies granted by the UNDT, we reject the submission that Mr. Rixen did not establish by evidence that his medical condition resulted from his non-receipt of a termination indemnity payment. That monetary loss was a consequence of his contractual right to premature separation from the Organization and of his entitlement to rely upon his legitimate expectation that this termination would occur. The UNDT was satisfied that his medical condition was another, separate and consequential loss as a result of the same breach, but it was right to tie that loss to the breach of WMO's obligation and not, as the Secretary-General seems to contend, to the loss of the monetary payment.

Challenge to remedies—moral damages

81. The UNDT is said to have erred by failing to establish particularly that the health deterioration suffered by Mr. Rixen and identified by the medical specialist whose report was relied on, was linked to overwork and the non-renewal of his contract. The Appellant submits that any medical consequences were not due to the rescission of the decision not to terminate his post and to hold him to the original expiry date of his fixed-term contract and/or the associated loss of a termination indemnity. As referred to by the UNAT in *Coleman*,⁴⁴ there

⁴⁴ *Coleman Judgment, op. cit.*

must be a proven *nexus* or cause-and-effect relationship between the unlawful administrative decision, and the harm or loss suffered.

82. We are not satisfied that the UNDT erred in this respect. It will be remembered that Mr. Rixen had begun planning and arranging his post-WMO professional and personal life in early March 2021 when he advised the Organization orally that he would not agree to a further extension of his employment. He went on sick leave shortly after receiving WMO's advice that its decision made earlier in the year had been rescinded. This timing of events tends to confirm that the losses suffered by Mr. Rixen were related to his treatment by the Organization rather than by his subjective response to his non-receipt of a termination indemnity.

Other remedies

83. The Secretary-General asserts that Mr. Rixen, even if he is entitled to the remedies granted to him by the UNDT, should not receive its contributions to his pension fund or its contributions to his medical insurance premiums. It says that if his employment had been terminated on 31 May 2021 as he asserts and as has been upheld, he would not have received these elements of his remuneration thereafter as he did. However, that ignores the fact that Mr. Rixen was employed at WMO for the following three months and that these were elements of his remuneration that he earned for that period. Their payment to him was, in that sense, one of the consequences of WMO's breach of its obligation in law to honour their agreement that his employment would end on 31 May 2021. No deduction of them from the award is warranted.

84. We dismiss Mr. Rixen's claim for costs of CHF 10,000. To be awarded costs, a party to an appeal must establish that the other party against whom costs are sought has manifestly abused the appellate process. While the appeal has been dismissed, the Secretary-General's conduct does not at all meet this statutory requirement.

Summary of considerations

85. For the foregoing reasons, we are not satisfied that the UNDT committed any errors of fact or law in its Judgment and find that there are no viable grounds to appeal against it.

86. There being no appeal or cross-appeal by Mr. Rixen against the remedies granted to him, these remain as determined by the UNDT.

Judgment

87. The Secretary-General's appeal is dismissed, and Judgment No. UNDT/2022/134 is hereby affirmed.

Original and Authoritative Version: English

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

(Signed)

Judge Colgan, Presiding

(Signed)

Judge Forbang

(Signed)

Judge Sheha

Judgment published and entered into the Register on this 7th day of December 2023 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar