





expectations, (b) lack of funding from OICT is not a valid reason to terminate an UNOPS appointment, (c) having been assured that there was no financial crisis, the Administration is estopped from invoking a financial crisis, (d) discrimination, (e) if there was a financial crisis, this was a self-inflicted crisis due to negligence or corruption and (f)

... DISPUTED FACTS

... The Respondent submitted in the Reply that the contested decision (i.e. the non-renewal of the Applicant's fixed-term appointment) was lawful because it was due to the following:

(i) OICT obtains support services from UNOPS, and OICT takes payments to UNOPS for these services. (As noted [in the agreed facts], the parties agree that the Applicant was assigned by UNOPS to OICT under a [United Nations]-UNOPS Financial

The Applicant disputes the above because:

a)



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and recorded promises” regarding OICT not being “in a financial crisis, so there is no risk of losing jobs for anyone”, “there is no risk of job cuts because we don’t have budgetary issues in that front”, “we want to get out of these three months [contracts] and the way to get out of these three months contract is to fund the FA with UNOPS in such a way they get into one year”, “these are things we are discussing with UNOPS ... some of you will be asked to be transferred from UNOPS to [the United Nations International Computing Centre], some will stay in UNOPS”.

h. Contrary to the “express promises, on 29 July 2022, the Applicant was notified of the UNOPS’ decision to ‘abolish’ his post ... that he will be ‘separated from service ... Further... your appointment will not be renewed...’”. The “abolishment of the post is allegedly based on the ‘reduction of OICT support requirements and funding’”.

i. A fixed-term appointment, such as the Applicant’s, carries no expectancy of renewal, “unless there is a legitimate expectation of a renewal or improper motives existed in the decision not to renew the appointment, which taints the decision with illegality” (referring to *Houenou* 2021-UNAT-1091, para. 25). The Appeals Tribunal has held that, “‘legitimate expectations ... that his or her fixed-term contract may be renewed or extended...’ (referring to *Frechon* 2011-UNAT-132, para. 44) are given, for example, when ‘the Administration has made an ‘express promise ... that gives a staff member an expectancy that his or her appointment will be extended (referring to *Ahmed* Judgment No. 2011-UNAT-153, para. 47)’”.

j. BM, as the ASG of CITO, in “an open, public, and recorded (and not-disputed) Town Hall meeting held on [10] March 2022 expressly and concretely stated that ‘there is no risk of losing jobs for anyone’, that ‘message here is that there is no risk of job cuts,’ and that ‘... we want to ... to fund the FA with UNOPS in such a way they get into one year’”. This “sole but crystal-clear statement, which is not contested by the Respondent, would suffice ... to determine the illegality of the decision not to renew the Applicant’s appointment”.









v. Similarly, BM, confirmed that, “Yes, we—we reduced—the agreement with the UNOPS, the financial 20 agreement. That impacted a number of UNOPS resources...”.

w. The “decision to abolish his contract is discriminatory, and has directly violated” staff rule 9.6(e).

x. Despite the Respondent alleging that “the decision to abolish the Applicant’s position, together with that of more than 30 additional UNOPS staff members, [was] based on a ‘reduction of funding’”, it is “not clear why, among more than 4000 UNOPS employees, the Respondent has chosen to abolish only the positions of these 30 persons”. The “criteria established by [staff rule 9.6 were] not followed”.

y. When asked, what were “the criteria utilized by UNOPS to select those 30 staff of around 4,000 around the world”, NG replied that,

The criteria for those 30 were that they were under specific projects with a specific project partner, when the project  
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So essentially to make those targets, I had to look at the activities within my division that would either be reduced or stopped; that was the only way that we could actually meet those targets. So essentially, the criteria that I used to come to those particular decisions were based on, let's say, what the core activities of the division would be. And the core activities are around the provision—

ee. BM “expressly assured that there was not a financial crisis, and no budgetary issues”. Even if such a crisis existed, it “was not born out of objective or external and unexpected events and irresistible forces, such as a global cash crisis, a war, the sudden reduction of monetary contributions from member states, or the like”. “OICT may be undergoing a financial crisis, but this crisis is not originated from the ‘necessities of service requir[ing] abolition of the post;’ on the contrary, the OICT crisis is self-inflicted”.

ff. BM “was, or should have been, aware of what was the OICT financial situation, since this is one of the main responsibilities of an [Assistant-Secretary-General], and even more since he has been expressly warned by the Financial Controller since February 2021, and this fact is not disputed by the Respondent”. BM, however, “chose to take no action for over a year and a half, he decided to ignore the crisis, to the point he expressly stated that there was no crisis, not budgem , sel 1 nth

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afterwards re-hire 20 new additional staff”. If “a big shortfall” had occurred NG responded that “the deficit that would have been caused would have had to be covered by the operational reserve that UNOPS keeps. Like every other [United Nations] agency, the operational reserve of UNOPS was sufficient”.

oo. As related to OICT, AM confirmed that,

Sir, the two programmes that were under my management are still continued with some slight adjustments. Would you confirm that those programmes are still benefiting from additional extra-funding from those partners that I brought in the—in the picture during my four years in the United Nations?

...

There was new partnerships which you'd generated. You were able to increase the funding from certain partners, certain partners then reduced their funding, et cetera. So it's like an ongoing situation. But, yes, I mean, we had partners that contribute[d].

*Respondent's submissions*

13. The Respondent's submissions may be summarised as follows:

a. The evidence “clearly shows that there was a genuine, large scale restructuring due to severe budget cuts, and this resulted in more than thirty (30) UNOPS personnel being separated from service”. Accordingly, the Respondent has with a minimal showing substantiated the lawfulness of the contested decision and the presumption of regularity stands satisfied.

b. The abolition of the Applicant's post was “part of a genuine large-scale organizational restructuring due to a budget crisis at ... OICT, which in turn resulted in a reduction in the amount of services that OICT obtained from UNOPS (and pays UNOPS for), which in turn resulted in the abolition of the UNOPS positions (including the post that the Applicant was encumbering) that were established (in the past) to provide the services that

were (now) no longer needed, which in [turn] resulted in the ending of the contracts of the persons encumbering those positions (including the non-renewal of the Applicant's fixed-term appointment)".

c. At the hearing, BM and AM stated that "there was a reduction in the OICT budget, and when deciding what activities to continue and what activities to reduce (so that OICT budget does not exceed its reduced budget), OICT's priority was providing core ICT services to ensure that the [United Nations] Secretariat remains operational, e.g. e-mail, cybersecurity, laptop computers, data centres, servers, networks, and communications (such as the Microsoft Teams platform)". The Applicant stated that "I was not in charge of any maintenance of any information system in the United Nations". The explanations of BM and AM "are not only reasonable, but cogent" as "[n]othing in their explanations is unlawful: they were making decisions in the [United Nations'] best interests in light of the reduced OICT budget".

d. The "OICT decision in turn resulted in UNOPS concluding that the UNOPS post that the Applicant was encumbering (which had been created earlier specifically to provide the services that OICT now no longer sought) was redundant, and had to be abolished". The Applicant testified that "[a]s far as I am aware, the position that I was holding within the UNOPS/OICT financial agreement has been abolished, and since the 1st of September



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1. Since “the Applicant was not at the meeting, the Applicant could not have been promised anything”. Even “if the Applicant’s absence is disregarded: the statements at the 10 March 2022 meeting were superseded by what [BM] stated in a subsequent town hall of 9 June 2022, including “...my dream that I shared with you in—I think it was April or earlier in the year—was shattered by the budget deficit situation that we face in 2022, so therefore some measures need to be taken”.

m. As the Appeals Tribunal has “confirmed that changed (financial) circumstances (subsequent to the act that a staff member claims created an expectancy of renewal) mean that there can be no expectancy of renewal (*Houenou* 2021-UNAT-1091 (see [especially]. para 31)), the Applicant’s argument must be dismissed. Even if *Houenou* is “disregarded: a statement of an official of another [United Nations] entity (in this case, the [United Nations] Secretariat [footnote omitted]) cannot create legal obligations on the part of UNOPS”. The Dispute Tribunal has also “dismissed two applications filed by two UNOPS staff members seeking to rely on the same statements: *Delgado* UNDT/2023/094 (see paras. 30-36) and *Fernandez* UNDT/2023/106 (see paras. 30-36)”.

## **Consideration**

### *Preliminary*

14. In *Nastase* 2023-UNAT-1367, the Appeals Tribunal underscored the law and the scope of judicial review in cases, like the present one, regarding abolition of post and non-renewal of a fixed-term appointment, which are two related but separate administrative decisions. The decision of separation from service, is, on the other hand, solely a consequence of the appointment not being renewed and therefore not an independently reviewable decision. Therefore, the contested decisions for review in this application are the decision to abolish the Applicant’s post leading to the second decision not to renew his fixed term appointment (hereinafter referred to as the contested decisions).

*The issue*

15. The issue for the Tribunal's consideration is whether the abolishment of the Applicant's post and subsequent separation from service, due to non-renewal of his appointment was unlawful, unreasonable, unfair or discriminatory.

16. The Tribunal addresses the issue based on the relevant legal framework and an analysis of the parties' pleadings, relevant evidence given at trial and relevant closing submissions.

17. The relevant legal framework governing the grounds of challenge, namely (a) legitimate expectations, (b) lack of funding, (c) estoppel, (d) discrimination and (e) payment of salaries and compensation, is outlined below, after which the law and jurisprudence on the following general principles is presented, (f) the role of the Dispute Tribunal in judicial review, (g) presumption of regularity, and (h) non-renewal of fixed-term appointment.

*Legal framework*

18. The starting point is to understand the law governing organizational restructuring due to operational requirements. The law is settled that the Administration has broad discretion to reorganize its operations and departments to meet changing needs and economic realities (see, *Timothy* 2018-UNAT-847, para. 25 and *Russo-Got* 2021-UNAT-1090, para. 29).

19. This position is also couched in the following manner (see, *Hossain* 2023-UNAT-1359, para. 51, citing *Nouinou* 2019-UNAT-902, para. 34):

[A]n international organization necessarily has the 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. The Appeals 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.





23. UNAT has also found that, based on the circumstances of a case, an express promise of contract renewal made to a staff member is not an absolute necessity for a legitimate expectation to be created (see, *Loose* 2020-UNAT-1043).

(b) Lack of funding

24. The Appeals Tribunal found in *Nastase* that lack of funding would be an operational requirement necessitating an organizational restructuring (similarly, see, the Appeals Tribunal in *Nouinou, Abdeljalil* 2019-UNAT-960, *Abu Ouda et al.* 2020-UNAT-1018, and *Bantan Nugroho* 2020-UNAT-1042).

(c) Estoppel

25. A staff member may plead the doctrine of estoppel where the Administration is alleged to have made a representation which a staff member reasonably relied upon to his/her detriment. Since this is an equitable remedy, a party relying on it must come to the Tribunal with clean hands (see, *Kortes* 2019-UNAT-925, para. 38).

(d) Discrimination

26. Where discrimination is alleged, the onus is on the staff member to substantiate the allegation with evidence. Mere speculation is not enough (see, *Kisia* 2020-UNAT-1049, para. 38, *Najjar* 2021-UNAT-1084, para. 34, and *Azzouni*

(f) Role of the Dispute Tribunal in judicial review

28. The role of this Tribunal in reviewing the administrative decision is enunciated in *Sanwidi* 2010-UNAT-084, para. 42, holding that:

... In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

(g) Presumption of regularity

29. When exercising its role, the Tribunal understands that there is always a presumption that official acts have been regularly performed. If the Administration is able to minimally show that the staff member was given full and fair consideration, the burden shifts to the staff member to show that he or she was subject to an act of unlawfulness, unreasonableness or unfairness. The staff member must rebut the presumption of regularity through clear and convincing evidence. (See, for instance, the Appeals Tribunal in *Nastase*, para. 25, *Rolland* 2011-UNAT-122, para. 26, and *Lemonnier* 2017-UNAT-762, para. 32).

(h) Non-renewal of fixed-term appointments

30. Regarding a review of a case concerning non-renewal of a fixed-term appointment, the law is clear under staff regulation 4.5(c) and staff rule 4.13(c), providing that a fixed-term appointment does not carry any expectancy of renewal. This legal position was expressly put to the Applicant in his letter of appointment, stating that:





was responsible for delivery of project activities toward specifically agreed project targets. A project was always time-bound, with a specific start and end date.

38. He informed the Tribunal that:

Over the past few years, OICT had repeatedly communicated to UNOPS that they were experiencing difficulties in securing the budget necessary to maintain the scope of support requirements through UNOPS and other partners. This had already led, in part, to “rationalization” exercises in 2019-2021 when OICT had to prioritize services and activities and the means to implement them and then requested a reduced scope of support from UNOPS as a consequence, leading to non-continuation of various project streams, the abolishment of the associated UNOPS posts that were no longer required and funded, and the non-renewal of contracts of incumbents of such affected project positions.

...

[...] OICT/Operational Support Division’s decision was explained to be due to reduced availability of standard support account and missions’ budgets and to OICT’s preference to prioritize the use of such funding on OICT core operational activities rather than (non-

40. The Respondent concluded that lack of funding from OICT impacted UNOPS appointments on projects because “OICT’s budget was reduced in 2022, and that if OICT did not make any changes, it would overspend its reduced budget by US\$3-4 million. To avoid a budget deficit situation, [BM] instructed his team to make reductions. These reductions meant cutting down on services procured from UNOPS and other vendors.

Having been assured that there was no financial crisis, the Administration is estopped from invoking a financial crisis

41. The Respondent denied that any representation was made to the Applicant that he relied upon to his detriment. In this judgment, the Respondent through BM showed that if any statements were made, they were not made by UNOPS and further, that the Applicant did not provide evidence that he relied upon

44. The Applicant alleges that UNOPS and not OICT was obliged to pay his salaries, compensation and indemnities. Therefore, the financial crisis in OICT should not have resulted in not renewing his fixed-term appointment with UNOPS.

The Respondent clarified through JW that:

If you are under a UNOPS contract and—the money is drying up, and—then non-renewal is within [my—our] authority. We have no authority to continue the contract. UNOPS has no legal basis for a staffing table. In other words, we don't have other funds thae209-[(Page )] TJET@0.00000887





53. It is also noted that AM asserted that his decision to discontinue the Applicant's scope of work was necessitated by the operational requirements of OICT. He did not target an individual but considered posts that were not required. His decision was not influenced by any external factor. The Applicant did not offer any satisfactory evidence to the contrary. The assumption that he may have been targeted due to the investigations around him was speculative.

54. Furthermore, in examination-in-chief, his witness, BM, as reproduced by the Applicant "emphasized" that, "Yes, we—we reduced—the agreement with the UNOPS, the financial agreement. That impacted a number of UNOPS resources...". This assertion is consistent with the Respondent's case that the reason for the impugned administrative decision was valid. The Tribunal finds that this reduction was the catalyst of the restructuring in UNOPS leading to the abolition of the Applicant's unique post whose services were no longer procured by OICT.

55. The Applicant thought there was a link between the contested decisions and the disciplinary process. He said:

... I mean, to explain or to justify that—those facts are completely linked. But it's only my opinion and I leave it to the Tribunal to make its own—its own opinion about that.

56. In light of the jurisprudence on the role of this Tribunal in judicial review as quoted above, it should be added that the Tribunal does not operate on an opinion because an opinion is subjective. The Tribunal is guided by only relevant facts and not opinions.

Violation of staff regulation 9.3 and staff rule 9.6(e)

57. The Applicant further argued that the decision to abolish his post violated staff regulation 9.3 and staff rule 9.6(e). This is not correct. A separation after the expiry of a fixed-term appointment is not a termination under the staff rules and regulations. Staff regulation 9.3 and staff rule 9.6(e) apply only to termination of contracts and not separation due to effluxion of time. For instance, a termination occurs where a fixed-term appointment is discontinued before its expiry date due to operational requirements of the Administration. In this case, the fixed-term

appointment had

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post was selected for abolition is not in and of itself enough to prove discrimination. It is well-established that a staff member alleging discrimination bears the burden of proving the ground and circumstances of discrimination. It is therefore not enough to merely make an allegation of discrimination without substantiating it ( see above, for instance, *Kisia, Najjar, and Azzouni*).

66. It is on record that on 29 June 2022, the Applicant had a meeting with the Senior Portfolio Manager and the Senior Programme Manager at which he was informed of the impending decision to abolish his post due to support requirements of OICT and funding. This fact was not contradicted.

Disciplinary

69. In *Bah* 2024-UNAT-1437, para. 59, the Appeals Tribunal has reiteratehhh