



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

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Judgment No. 2020-UNAT-1042

**Bantan Nugroho  
(Respondent/Applicant)**

**v.**

**Secretary-General of the United Nations  
(Appellant/Respondent)**

**JUDGMENT**

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Before:	Judge Martha Halfeld, Presiding Judge Graeme Colgan Judge Kanwaldeep Sandhu
Case No.:	2020-1388
Date:	30 October 2020
Registrar:	Weicheng Lin

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Counsel for Mr. Nugroho: Mr. Robbie Leighton  
Counsel for Secretary-General: Mr. Noam Wiener

**JUDGE MARTHA HALFELD, PRESIDING.**

1. The Secretary-General of the United Nations has appealed against the decision of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), which granted an application filed by Mr. Bantan Nugroho, a former staff member of the United Nations Office of Disarmament Affairs (UNODA), who had served in its Implementation Support Unit (ISU) of the Convention on Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW).

2. By means of the present Judgment, the United Nations Appeals Tribunal (Appeals Tribunal or UNAT) dismisses the appeal and affirms the UNDT decision.

**Facts and procedure**

3. Mr. Nugroho joined CCW in Geneva in July 2002. He was granted a continuing appointment on 30 September 2014. At the time of the termination of his continuing appointment in August 2018, he was the P-4 head of the ISU, CCW.

4. The ISU was established in 2009, following a decision of CCW's High Contracting Parties (HCPs), to provide support to CCW's work by *inter alia* preparing and organizing its regular meetings. It was hosted by the Geneva Branch of the UNODA, and was staffed with two posts encumbered by Mr. Nugroho and a P-3 Political Affairs Officer. Mr. Nugroho's post was funded by extra-budgetary contributions from the HCPs and Observer States, CCW. Administratively, the two ISU staff members were treated as staff members of UNODA managed by the Human Resources Management Services, United Nations Office at Geneva (HRMS/UNOG).

5. CCW experienced financial difficulties in 2016, as some major HCPs had failed to pay their dues for several years, with arrears mounting to more than USD 500,000. Between 12 and 16 December 2016, the HCPs of CCW held the Fifth Review Conference in Geneva to consider *inter alia* efficiency and cost saving measures. The Fifth Review Conference decided to invite the ISU to present a biennial budget to its next annual meeting in 2017 for consideration by the HCPs; and requested that the ISU continue to report on the estimated costs versus the actual costs of the meetings and conferences of the preceding year.

6. Nonetheless, the financial crisis continued in 2017. That led to cancellation of some CCW meetings, service cuts, and staff reduction.

7. On 17 January 2017, the Acting Director, UNODA/Geneva, called a meeting to discuss the implications of the financial crisis on *inter alia* CCW, especially the ISU. Attendees included Mr. Nugroho, the other ISU staff member, the Chief, Financial Resources Management Services (FRMS), UNOG, and the Chief, HRMS/UNOG. The Chief, FRMS, noted that the trust fund for CCW had started 2017 with a deficit of USD 137,000, adding that the current funds level would not allow the continuation of the employment contracts beyond their expiration dates, if the financial situation did not improve. The Chief, HRMS/OHRM, in her turn, stated that funding must be set aside for separation payments, adding that priority placement was for the staff holding a permanent appointment, but there was no obligation to place staff holding a continuing appointment. She encouraged staff to apply to suitable job openings, and their applications would be marked in *Inspira* as from a downsizing entity to facilitate their selection for available positions.

8. On 15 September 2017, Mr. Nugroho was informed that his contract would not be renewed beyond 31 December 2017. Four days later, on 19 September 2017, the Chief, HRMS/UNOG, advised Mr. Nugroho that due to extra-budgetary funding issues his “continuing appointment may be terminated on 31 December 2017”.

9. On 18 October 2017, UNODA/Geneva circulated a temporary job opening (TJO) for a P-4 Political Affairs Officer for a short duration through 31 March 2018 with a possibility of extension. The main responsibilities of the TJO included providing substantive and secretariat services to the Conference on Disarmament (CD) on its deliberations and multilateral negotiations and assisting the Deputy Secretary-General of the CD in his/her work. According to Mr. Nugroho, he had been rostered for that post. 102 candidates applied for the TJO. However, to “ensure fair treatment”, the Director, UNODA/Geneva, decided to adopt a strict competency-based interview model. Mr. Nugroho and four other applicants were interviewed.

10. On 17 November 2017, UNODA/Geneva informed the U.K Permanent Mission about CCW’s financial situation. In the Note Verbale, UNODA/Geneva indicated that “[d]ue to the lack of sufficient funds on the CCW account for 2018 planned activities”, UNODA/Geneva

was not in a position to extend contracts of the two ISU staff members beyond 31 December 2017.

11. Between 22 and 24 November 2017, the HCPs held a CCW meeting in Geneva. Mr. Nugroho served as the Secretary of the meeting. The CCW meeting expressed its deep appreciation for the Report presented by the ISU and its work and requested that the ISU continue to report annually on its activities, including on its estimated costs and actual costs. The CCW meeting recognized that the costs of meetings comprised the costs of the CCW Secretariat's activities to be performed by the ISU. The CCW meeting requested the Chairperson-elect to report, in 2018, any further measures that could be considered to improve the support of the CCW Secretariat to the Convention, recognizing the role of the ISU in performing this function. The CCW meeting adopted an operational budget for 2018 and a preliminary budget for 2019. It also prepared a provisional agenda for its 2018 annual meeting, which included consideration of the Report of the ISU.

12. On 18 December 2017, the Director, UNODA/Geneva, recommended to the High Representative of the ODA a candidate other than Mr. Nugroho for the P-4 TJO. In respect of Mr. Nugroho, she stated that he "[did] not meet the requirement outlined for this job and any involvement [by Mr. Nugroho] would be a liability for [UNODA/Geneva] to [...] effectively support the work of the CD, the Deputy Secretary General [sic] of the CD or perform related tasks in a timely fashion". She added that Mr. Nugroho had failed to demonstrate his "suitability for the role, understanding of the responsibilities outlined of the TJO". Specifically, during the interview, Mr. Nugroho was said to be "unable to demonstrate [his] competencies, display an understanding of the needs of this office, [his] ability and willingness to adapt to a new working environment and expectations, [his] commitment to deliver on deadlines which [were] critical to the position, including outreach efforts and technological awareness". In her view, "Mr. Nugroho demonstrated little to no understanding of any of the responsibilities or expectations outlined". The High Representative approved the recommendation of the Director, UNODA/Geneva.

13. On 29 December 2017, Mr. Nugroho's continuing appointment was extended for a month through 31 January 2018 thanks to the availability of an extra-budgetary funding. But on 18 January 2018, he was informed that his continuing appointment would be terminated on 31 January 2018, in accordance with Staff Regulation 9.3(a)(i) and Staff Rule 9.6(c)(i).

14. On 30 and 31 January 2018, Mr. Nugroho requested management evaluation of the termination decision as well as suspension of said decision. The Management Evaluation Unit (MEU) informed Mr. Nugroho on 1 February 2018 that the contested decision had been suspended pending management evaluation.

15. In the days that ensued, efforts to place Mr. Nugroho outside of the ISU at the P-4 or P-3 level continued both in Geneva and at Headquarters in New York. As noted above, he applied for the P-4 TJO within UNODA/Geneva, but was not selected. Between April and July 2018, a P-4 TJO post and three P-3 posts of Political Affairs Officer within the Department of Political Affairs and 11 P-4 posts of Political Affairs Officer in field missions were identified for Mr. Nugroho, including a P-4 post of Political Affairs Officer with the United Nations Assistance Mission in Somalia (UNSOM) in Mogadishu, Somalia. But he was not selected for any of them, because either some had been filled with rostered candidates, or he did not meet the language requirements or desirable criteria, or he was not considered suitable.

16. On 30 and 31 January 2018, Mr. Nugroho filed a request for management evaluation of the decision to terminate his continuing appointment on 31 January 2018. The termination was subsequently suspended pending management evaluation.

17. On 14 June 2018, Mr. Nugroho filed an application with the UNDT to contest the decision to terminate his continuing appointment.

18. On 2 August 2018, the Chef de Cabinet announced the outcome of the management evaluation. She upheld the termination decision, because it had been taken on the grounds of post abolition and staff reduction, and the Administration had made efforts to secure a position for him, but had been unable to identify a suitable alternative position for him.

19. Mr. Nugroho was separated from service on 6 August 2018.

20. In Judgment No. UNDT/2020/032 dated 27 February 2020, the Dispute Tribunal found that the contested decision was not supported by the facts and was unjustified and unlawful. The UNDT found that the Secretary-General had provided no evidence in support of the claims that the funds would not be sufficient to cover both the meeting costs and the ISU staff costs in 2018, or that the CCW Member States had decided on 25 November 2017 to prioritize the CCW meetings over the payment of staff costs. In its view, the circulation of the

P-4 TJO of Political Affairs Officer for the UNODA/Geneva contradicted and undermined any claim of financial shortfall. The UNDT also found the termination decision to be unlawful, because the Administration had failed to act in compliance with Staff Rules 9.6(c)(i) and 13.1(d) requiring it to make all reasonable efforts to retain the service of Mr. Nugroho's, as the holder of a continuing appointment, against suitable alternative posts, on a non-competitive basis. In the present case, the Administration's efforts in this regard were limited to marking Mr. Nugroho in *Inspira* as from a downsizing entity and encouraging him to apply and inform HRMS/UNOG of any such application, and the main method of retention used by the Administration was through a competitive process without consideration of priority criteria applicable to Mr. Nugroho's case. The cases in point were the P-4 TJO post of Political Affairs Officer with UNODA/Geneva and the same level position with UNSOM. "[N]o consideration was given to [Mr. Nugroho's] lateral transfer to the post and he was not selected."<sup>1</sup>

21. As remedies, the UNDT ordered rescission of the termination decision or two years' net base salary in lieu of rescission. But the UNDT declined to award Mr. Nugroho any moral damages, as the conclusions in the medical certificate that Mr. Nugroho had provided to the UNDT were generic and did not constitute the evidence with the specificity required by the UNAT case law.

## **Submissions**

### **The Secretary-General's Appeal**

22. The Secretary-General requests that the UNAT vacate the impugned UNDT Judgment in its entirety.

23. The Secretary-General submits that the Dispute Tribunal erred by finding that the termination decision was unlawful. The UNDT improperly shifted the burden of proof to the Secretary-General after it had determined that Mr. Nugroho had satisfied his burden with the provision of the 29 November 2017 Final Report by the HCPs. It was uncontested that a shortage of funds existed in 2016 and throughout 2017 resulting in insufficient funds to pay for Mr. Nugroho's post or any other ISU post. The UNDT had no factual basis to determine that the passing of an operational budget and the recompense of backpay by an HCP

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<sup>1</sup> Impugned Judgment, para. 64.

somehow caused CCW's deficits to disappear. The UNDT's conclusion about the circulation of the P-4 TJO within UNODA/Geneva only reflected its misunderstanding of the assessed regular budgetary source (for the P-4 TJO) versus voluntarily funded budgetary source (for Mr. Nugroho's ISU post), and the fact that the Secretary-General was not permitted to use the former to fund the latter.

24. The Secretary-General contends that the UNDT erred in awarding Mr. Nugroho compensation for not being adequately notified of the termination of his contract, because he had received notice of the termination almost seven months before he was actually separated. Any compensation under this head should be subtracted.

25. The Secretary-General maintains that, contrary to the determination by the UNDT, the Administration made thorough and exhaustive efforts to place Mr. Nugroho outside of competitive process, at or below his level, across different entities and geographically diverse duty stations. He was not selected for the P-4 post of Political Affairs Officer either with UNODA/Geneva or UNSOM not because other candidates were more suitable than, or more preferred over, Mr. Nugroho, but because he was found not to be suitable for those positions. Managers at the highest level of the Organization were contacted, and a concentrated search was conducted by OHRM, and Mr. Nugroho's file was considered outside the regular recruitment process on numerous occasions.

### **Mr. Nugroho's Answer**

26. Mr. Nugroho submits that the termination decision was not supported by the facts. Contrary to the Secretary-General's assertion before the UNDT that the termination decision had come from the CCW Chairperson originally, the 25 November 2017 CCW Report showed that CCW had decided to continue and staff the ISU in order to carry out the tasks of consulting on cost saving measures before the 2018 meeting, reporting on its activities annually and presenting a biennial budget to each future CCW meeting. Before the UNDT, the Secretary-General argued that the termination decision had been taken by CCW and implemented by the Administration. Before the UNAT, the Secretary-General now argues that the separation was not a decision by CCW, but UNODA was obliged by the financial situation to separate Mr. Nugroho from service against CCW's wishes. Having failed to persuade the UNDT of one justification, the Secretary-General now seeks to persuade the Appeals Tribunal of another.

27. Mr. Nugroho maintains that the UNDT did not find that payment by one HCP meant that CCW was not in arrears. It did not draw any conclusion about CCW's financial situation; it simply made justifiable comment regarding the Secretary-General's refusal to provide evidence of the actual financial situation of CCW.

28. The alleged confusion on the part of the UNDT about regular budget and voluntary contributions was a concoction that the Secretary-General has made without a basis.

29. The Secretary-General claims, without any factual basis, that the UNDT erred in awarding Mr. Nugroho compensation for failure to give him adequate notice of the termination decision. In the impugned Judgment, the UNDT stated rather the opposite, i.e., the issue of notice was irrelevant because the termination decision was unlawful.

30. Mr. Nugroho states that the UNDT did not err in finding that the Secretary-General had failed to comply with his obligations under Staff Rules 9.6(e) and 13.1(d). But for his legal challenge, Mr. Nugroho would have been separated from service on 31 January 2018. Consequently, the contested decision should be judged by actions prior to that date, and not by those responding to the legal challenge. Additionally, little faith could be placed on the efforts to place a staff member after the decision to separate has been taken and a challenge has been mounted. By then the presentation of such efforts represents a *post facto* attempt to frustrate the challenge.

31. The termination decision remains tainted by the failure to make any effort for priority placement of Mr. Nugroho, including in relation to the P-4 TJO post carrying out similar functions within the same UNODA/Geneva.

### **Considerations**

32. The UNDT found that the decision to terminate Mr. Nugroho's continuing appointment was unlawful for two main reasons, both of which have been appealed against by the Secretary-General. The Appeals Tribunal will assess them in turn.



*The reason underlying the termination of the continuing appointment*

33. In his appeal, the Secretary-General raises the issue of the UNDT having erred when it held that the contested decision was not supported by the facts, and that the advertisement of a temporary job opening demonstrated that budget was available to fund Mr. Nugroho's post. The Secretary-General states that the dire financial situation of CCW over several years is well documented and was the reason why Mr. Nugroho's post had to be abolished and his appointment had to be terminated.

34. According to the Secretary-General, on the one hand, the HCPs which funded Mr. Nugroho's contract were not complying with their financial obligations; on the other hand, funds committed for any other purpose could not be used to finance Mr. Nugroho's appointment.

35. It is undisputed that Mr. Nugroho encumbered one of the two posts at the ISU, which had been created by the HCPs to provide support to the work of CCW, and whose funding did not come from the regular budget, but from voluntary contributions by the HCPs. Because of the financial crisis due to mounting arrears, in September 2017, Mr. Nugroho was advised that his continuing appointment "may be terminated on 31 December 2017".<sup>2</sup>

36. For the Secretary-General, the subsequent operational budget passed by the HCPs and the fact that one single HCP had paid its arrears cannot be construed as replenishment of funds allowing the Organisation to finance Mr. Nugroho's post. In this regard, the Secretary-General claims that CCW's deficit was much broader and could not have been rectified by the payment of one HCP's arrears.

37. In his answer to the appeal, Mr. Nugroho highlights some inconsistencies between the arguments presented by the Secretary-General before the UNDT and those before this Tribunal. There, the line of argument was primarily that CCW had given priority to meetings rather than to staff costs of the ISU (which included Mr. Nugroho's position). Nevertheless, this argument was contradicted by the documents, which showed the opposite, as highlighted by the UNDT. Now, at the appeals level, the Secretary-General has changed his claim by stating, without having disclosed any supporting evidence, that the decision was essentially based on the financial situation of CCW.

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<sup>2</sup> *Ibid.*, para. 6.

38. The Appeals Tribunal finds that the failure to provide evidence of the motive underlying the decision, which was meant to be of budgetary nature, was the first reason underpinning the UNDT's finding that the termination of Mr. Nugroho's appointment was unlawful.<sup>3</sup> Incidentally, the contested administrative decision, dated 18 January 2018, on the termination of continuing appointment, stated the following:

Reference is made to my letter dated 19 September 2017, informing you that the extra-budgetary funding for your position was only available until 31 December 2017 and that your continuing appointment may be terminated on that date. By email dated 29 December 2017, I further informed you that a temporary funding arrangement was found to allow the financing of your contract until 31 January 2018, after which date your contract could be terminated.

39. As established above, the reason given by the Administration to justify the termination of Mr. Nugroho's appointment was of a financial order. The duty to give reasons for a decision, as this Tribunal has long held, is essential for the Tribunals to exercise their judicial review of administrative decisions, assessing whether they were arbitrary, capricious, or unlawful.<sup>4</sup> Although this obligation might not stem from any Staff Regulation or Rule, it derives from the public law principle which confers upon the Tribunals the inherent power to review the validity of such administrative decisions, the functioning of the system of administration of justice and the principle of accountability of managers.<sup>5</sup>

40. It is therefore good practice for the Organisation to provide a general guidance for its managers that a well written statement of reasons, albeit sometimes succinct depending on the circumstance, is fundamental for the correct identification of the matters, concerns and reasoning process of the decision-maker, as well as for the accurate implementation, which will more likely reflect the decision maker's intent. At the same time, this practice provides better grounds of adequate explanation for those adversely affected by these decisions, perhaps even facilitating their acceptance and hence diminishing instances of disputes. What is more, when a justification is given by the Administration for the exercise of its discretion, it must be supported by the facts.<sup>6</sup> In short, there is a threefold purpose

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<sup>3</sup> *Ibid.*, paras. 27-33.

<sup>4</sup> *Collins v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1021, para. 42, citing *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, paras. 35 and 36.

<sup>5</sup> *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para. 36.

<sup>6</sup> *Collins v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1021, footnote 28, citing *Islam v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-115, para. 29.

for providing reasons for decisions, which is intelligibility (enabling both implementation and acceptance), accountability and reviewability.

41. In the present case, according to the UNDT, the CCW financial crisis and the decision to discontinue the ISU contracts had been shared with Mr. Nugroho in September 2017<sup>7</sup> and therefore were indisputable between the parties. However, the 2018 operational budget approved in November 2017 expressly provided for a P-4 post within the ISU for the upcoming twelve months.<sup>8</sup>

42. This particular fact – that a P-4 post within the ISU had been provided for by the 2018 operational budget, despite the financial crisis and the previous decision not to extend ISU contracts beyond 2017 – was not specifically addressed by the Secretary-General in his appeal. The Appeals Tribunal finds that this fact is of crucial significance, not only because it involved the performance of tasks by the ISU, which was composed of only two staff members, including Mr. Nugroho, but also because this operational budget, having come into existence after the initial signaling of the termination, could be interpreted as having contradicted or overridden the circumstances that had formed the basis for the decision to terminate Mr. Nugroho's appointment. Therefore, the January 2018 final contested termination decision or the Secretary-General's arguments in his appeal ought to have addressed this issue.

43. Moreover, it is true that, notwithstanding the indisputable ongoing financial crisis, there is nothing on the records to invalidate the ultimate HCPs' decision to approve the 2018 operational budget, which included a P-4 post in the same unit with similar to identical tasks as those performed by Mr. Nugroho. Incidentally, the breakdown of the operational budget of November 2017 showed that the direct staff costs of one P-4 for twelve months had been envisaged.<sup>9</sup> These provisions coincided with the post and duty station occupied by Mr. Nugroho, as there were two staff members at the ISU at the time and only Mr. Nugroho was a P-4.

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<sup>7</sup> Impugned Judgment, paras. 6 and 34.

<sup>8</sup> *Ibid.*, para. 27.

<sup>9</sup> *Ibid.*

44. The Secretary-General also argues that the new temporary job opening did not contradict the non-availability of funds to finance Mr. Nugroho's post. This is because the temporary post was to be financed by the regular budget, while Mr. Nugroho's was funded by voluntary contributions. However, the Secretary-General's arguments about the general financial crisis and the different origins of funds for the TJO do not address the main reasoning in the UNDT Judgment, which was related to the subsequent operational budget approved by the HCPs.

45. In this regard, the Appeals Tribunal also highlights that the document CCW/MSP/2017/3 regarding the estimated costs for the November 2018 Meeting of the HCPs as decided by the HCPS at their 22-24 November 2017 Meeting envisaged that the cost of the P4 post for twelve months would be shared among the HCPs participating in the conferences or meetings, "since the above-mentioned activities shall have no financial implication for the regular budget of the Organization".<sup>10</sup>

46. Furthermore, the Final Report of the 2017 Meeting of the HCPs to CCW, dated 29 November 2017, shows that the HCPs agreed on a series of "financial measures to improve the financial situation of the Convention" concerning meetings of the HCPs and any subsidiary bodies those meetings may establish, "as well as the funding of the Secretariat in relation to those meetings" for the period of twelve months from 1 January to 31 December 2018.<sup>11</sup> It also expressly references the "costs of the Secretariat's activities, recognizing that these activities are to be performed by the Implementation Support Unit",<sup>12</sup> where Mr. Nugroho used to work.

47. The same document provides for a number of situations concerning contributions for the meetings of the HCPs and measures in the event that contributions fail to meet the operational budget. It also anticipates that "[a]ny credits or debits arising shall be applied to the calculation of contributions for the financial period starting 12 months after the conclusion of the financial period to which the credits or debits pertain".<sup>13</sup> In short, the HCPs' conclusions were in the direction of using their own voluntary budget to finance their meetings and activities.

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<sup>10</sup> CCW/MSP/2017/3, paras. 1, 2, 4 and 5.

<sup>11</sup> Final Report of the HCPs to CCW, Advanced version, 29 November 2017, para. 38(I) and (II).

<sup>12</sup> *Ibid.*, para. 38(III)(b).

<sup>13</sup> *Ibid.*, para. 38(X).

48. All these determinations taken in late November 2017 mean that the January 2018 contested administrative decision should not have been grounded on financial issues that had prevailed in September 2017, or should have addressed the recent operational budget determinations or should even have been backed by additional evidence relating not to the situation before the issuance of the operational budget (which was undisputed), but rather to any additional fact that could have modified the CCW situation after the approval of the said budget. It seems that the January 2018 administrative decision to abolish Mr. Nugroho's post and terminate his permanent/continuing<sup>14</sup> appointment is in direct disagreement with the HCPs' determinations that had been expressed during the November 2017 meeting.

49. In this context, the Appeals Tribunal finds that the Secretary-General's contentions about the different sources of budget to finance Mr. Nugroho's post have no merit. It follows that the UNDT was correct in its finding that the decision to terminate Mr. Nugroho's continuing appointment, as a result of the abolition of his post, was unlawful, since its basis did not exist.

*The obligation of retention*

50. The Secretary-General maintains that the UNDT also erred by holding that the Organisation did not comply with its obligation under Staff Rules 9.6(e) and 13.1(d). In this respect, the Secretary-General claims that, during the more than six months after the contested decision until Mr. Nugroho was separated from service, the Organisation exerted significant efforts to find alternative placement for him, but to no avail due to the lack of suitable skills on the part of Mr. Nugroho.

51. Failure to comply with its obligation of retention, as prescribed by Staff Rules 9.6(e) and 13.1(d), was the second reason why the UNDT considered the termination decision to be unlawful. Specifically, the UNDT found that the Organisation did not fulfill its obligation to assess Mr. Nugroho's suitability to perform the core functions and responsibilities of the available posts in a non-competitive procedure. Rather, it only considered Mr. Nugroho within a competitive process and did not consider him for a lateral transfer when the P-4

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<sup>14</sup> Reference is made to ST/SGB/2018/1 (effective 1 January 2018), especially Rule 13.1, which established that, effective 1 July 2009, all permanent appointments shall be governed by the terms and conditions applicable to continuing appointments. It appears therefore that the rights and entitlements for holders of permanent appointment devolved onto the holders of continuing appointments.

temporary position was eventually advertised for the same level and office where Mr. Nugroho used to work and to perform activities related to the same tasks he used to do.<sup>15</sup> Accordingly, the UNDT observed that:<sup>16</sup>

... The Respondent gave no specific evidence to show that the required criteria under the recalled staff rules were applied or considered, such as [Mr. Nugroho's] contract status, suitability for vacant posts, special skills, length of service, competence and integrity, nationality, etc., with a view to positioning him or offering him a position. There was no evidence of him being placed in a redeployment pool or of any effort to match his special skills, experience, taking into account other material criteria with a view to matching him with any vacant, new, or opening positions. The documentary evidence in this case illustrates that the main method of retention of staff was through a competitive process, without consideration of priority criteria such as contract type or seniority.

52. The efforts to find placement for Mr. Nugroho cited in the UNDT Judgment, and deemed to be insufficient were limited to marking him as affected by downsizing in *Inspira* and encouraging him to apply and to inform HRMS of any applications. According to the UNDT, the Organisation did not adequately attempt to place Mr. Nugroho in positions below his current level or through lateral moves, nor did it provide evidence demonstrating an attempt to find placement for Mr. Nugroho except through competitive process.

53. In his answer to the appeal, Mr. Nugroho points out, *inter alia*, that the efforts made by the Organisation to place him against another suitable post after the contested administrative decision had been taken and had been challenged cannot be regarded as compliance with its legal obligations. This is because the legality of an administrative decision must be assessed at the time it was taken, within its context and the knowledge the decision-maker had at the time of the decision.

54. The Appeals Tribunal agrees that the lawfulness of administrative decisions shall ordinarily be judged on the basis of the factual context at the time when they are taken. Nevertheless, in the present case, in light of the above-mentioned determination that the UNDT did not err in its finding that the decision to terminate Mr. Nugroho's appointment was unlawful because it was not supported by the facts, there is no need for the

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<sup>15</sup> Impugned Judgment, paras. 32 and 64.

<sup>16</sup> *Ibid.*, para. 61.

Appeals Tribunal to deal with the issue of whether or not the UNDT erred in its subsidiary finding concerning the failure by the Administration to comply with its obligation of retention pursuant to Staff Rules 9.6(e) and 13.1(d). This is because if the termination of the appointment was found to be unlawful due to lack of factual support for the abolition of his post, the possible compliance with this latter obligation, which would precisely derive from said abolition, would have no bearing on the outcome of the case. Specifically, the abolition of the post due to financial reasons, a premise upon which this subsequent obligation could have been fulfilled, did not subsist for judicial review.

55. Likewise, while the Secretary-General argues that the UNDT also erred in finding that Mr. Nugroho was not given adequate notice of the termination of his appointment, the Appeals Tribunal finds that this was only a corroborating or subsidiary argument used by the UNDT,<sup>17</sup> which had little or no relevance for the determination of the case.

56. The appeal therefore shall fail.

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<sup>17</sup> *Ibid.*, paras. 33 and 35.

**Judgment**

57. The appeal is dismissed and Judgment No. UNDT/2020/032 is affirmed.

Original and Authoritative Version: English

Dated this 30<sup>th</sup> day of October 2020.

*(Signed)*

Judge Halfeld, Presiding  
Juiz de Fora, Brazil

*(Signed)*

Judge Colgan  
Auckland, New Zealand

*(Signed)*

Judge Sandhu  
Vancouver, Canada

Entered in the Register on this 20<sup>th</sup> day of November 2020 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar