6. On 15 August 2005, the applicant enquired by email with the Office of Human Resources of UNDP whether "UNDP, given [his] contractual status as a 100 series staff member, would give him three months to look for a post, if by the 31st December 2005 there was no post available for [him] and/or OIOS was not seeking to extend [his] position". The reply, sent to the applicant next day, stated:

> The three months search period is an entitlement extended to long serving staff members, i.e. beyond 5 years of service on 100 Series appointment. In reviewing your records, it [was] revealed that your appointment on 100 series with UNDP/BRSP [Bureau for Resources and Strategic Partnerships] began on 29 January 2002 [sic]. As you do not fall under the long-serving category the three months search period will not be applicable to you.

7. A note for the file, dated 22 August 2005 and prepared by two UNDP human resources officers, shows that on 22 August 2005 the officers met with the applicant "to ensure that [he] understands the nature of his loan and that his contract will not be renewed by BRSP beyond 31 December 2005, unless he is able to identify suitable placement either with UNDP or elsewhere in the UN system". The note stated:

> [The applicant] said that he had a clear understanding of the non-renewal of his contract through his discussion with the Director of BRSP. He also said that the only thing he needed clarification was why he is not able to get a three months search period as 100 Series staff member. In addition to the e-mail of 16 August 2005, we again explained to him that he is not a long serving staff member in view of the fact that his appointment on 100 Series with BRSP began only on 29 January 2002 [sic]. The three months search period is applicable to staff member who have served beyond five years on a 100 Series and that it is not applicable to him as he has not met the five years of service. He was further informed that he will separate from the organization, unless he actively searched and finds a suitable assignment within and outside the "Quarry Exercise" prior to the expiry of his appointment on 31 December 2005.
>
> [The applicant] was also informed that he will receive a letter from OHR informing of the above condition and requires his signature as an indication of his understanding. He said that it is clear to him now and has no problem in signifying his understanding.

> loan of staff among the organizations applying the United Nations common system of salaries and allowances.
>
> [The applicant's] return rights at the end of his loan will be based on the terms of agreement between him and UNDP.

10. Following this communication, the applicant assumed his temporary appointment with OIOS. With UNDP's agreement, the applicant's appointment with OIOS was extended several times—on 28 December 2005, 24 March 2006, and 8

> 2. Resign from UNDP and accept a 3-month (delete assignment from) temporary appointment with UN/OIOS on "11-month contract" terms.
>
> This to clarify my position—in the face of traveling next week, when his current contract expires.

16. However, in an email sent by OIOS to the applicant on 28 September 2006, he was informed by the Executive Office of OIOS of the expiration of his reimbursable loan from UNDP. The email stated:

> [Y]our reimbursable loan to OIOS will not be extended and no request for temporary appointment is forthcoming. Therefore, we will notify UNDP . . . tomorrow of your annual leave balance as of 30 September 2006, the expiration date of the current arrangement.

17. The applicant's contract expired on 30 September 2006.

18. On 26 October 2006, the applicant filed a request for administrative review of the decision by OIOS not to offer him a contract extension of between 3 and 11 months. The review was completed on 1 December 2006. Dissatisfied with the outcome, on 3 January 2007 the applicant filed an incomplete statement of appeal with the Joint Appeals Board (JAB), which was followed by a complete statement of appeal filed on 1 February 2007.

19. Following UNDP's unsuccessful challenge to the receivability of the application, UNDP filed a reply to the appeal on 30 June 2008.

20. On 8 April 2009, the JAB majority issued its report, declining to make a recommendation in this case in favor of the applicant. On 6 May 2009, the applicant was informed of Secretary-General's decision concurring with the findings and conclusions of the majority of the JAB that the applicant's rights as a staff member were not violated.

21. On 28 July 2009, the applicant filed an application with the Dispute Tribunal. The respondent was subsequently informed by the Registry of the Tribunal that his reply was due 31 August 2009. On 31 August 2009, the Registry received two

separate submissions from UNDP and the Administrative Law Unit of the United Nations Secretariat, both on behalf of the Secretary-General.

22. The Tribunal held a directions hearing on 23 October 2009 to identify the issues in this case and give directions to the parties as to the further conduct of the matter. At the hearing, the Tribunal was advised by the applicant that he is currently working as a consultant for UNDP. Following the directions hearing, the proceedings were suspended to allow the parties to pursue mediation. On 10 December 2009, counsel for the respondent informed the Registry that the "efforts at informally settling this case were proving unsuccessful" and requested the Tribunal to proceed with this case on the merits on the basis of written submissions.

23. On 22 December 2009, the Tribunal or [5pensO9 9TT0 1 Tf2[0.1484 Tw4.435 0s to the parndeddp

exercised without regard to due process and fundamental fairness, nor should they be influenced by extraneous or prejudicial factors.

e. In this case, the respondent has the burden of proof in showing that the applicant's rights were observed. Specifically, the respondent must show that the applicant, as a long-serving staff member, was considered for available posts and that the applicant was not found suitable for any of them prior to separation.

f. UNDP should have allowed the applicant to utilise his accumulated annual leave of 52.5 days to search for another assignment. The applicant would have reached five years of continuous service if UNDP had not ended his employment without allowing him to avail himself of more than 50 days of unused annual leave. Instead, the applicant found himself unemployed "with two days notice".

g. He should have been considered as a long-service staff member with more than five years of service, which, under UNDP rules, means that he would be entitled to certain benefits and protections not available to staff with less than five years of service. The applicant received a Certificate of Service from UNDP in 2006 upon completion of five years of service, confirming that he served for at least five years.

26. Although in his written submission to the Tribunal of 28 July 2009 the applicant stated that "[t]here was considerable initial confusion over the legal status of the Applicant while with OIOS", at the directions hearing held on 23 October 2009

Respondent's submissions

28. The Tribunal received two separate submissions in this case from two counsel for the respondent. The submissions received from the Administrative Law Unit (ALU) of the United Nations Secretariat are summarized below:

a. The applicant was informed that his temporary appointment with OIOS was due to expire in May 2006, which was several months prior to the expiration of his contract on 30 September 2006.

b. OIOS made no promise to the applicant to extend his assignment with OIOS beyond its expiration date. There was no agreement that the applicant's contract would be extended further and no offer of appointment. Therefore, the applicant had no basis to expect that the Secretariat would retain him beyond the time limits of the loan agreement with UNDP.

c. The applicant was clearly on loan from UNDP to OIOS and there is no basis to claim that he was or should have been on secondment.

d. There is no evidence on record to show that the applicant's due process rights were violated. The applicant has failed to demonstrate how the Organization acted unfairly towards him. Both OIOS and UNDP informed the applicant of the terms and conditions of the final reimbursable loan arrangement well in advance of its expiration date.

e. The award of the applicant's costs is not warranted in this case.

29. The submission received from UNDP can be summarized as follows:

a. The applicant was fully informed of the terms of the reimbursable loan agreement both prior to and during his work with OIOS.

b. The applicant was given more than a reasonable period in which to apply for jobs but failed to do so despite the clear advice received from the

respondent. Throughout the period of his reimbursable loan, the applicant had access to the respondent's internal vacancy listings and could apply for posts as an internal candidate. However, the applicant applied for only one position prior to the expiration of his contract on 30 September 2006.

c. The applicant is not a long-serving staff member because he does not have five years of continuous service with the respondent on a 100-series fixed-term contract. The provisions of UNDP's Due Process Guidelines for Displaced Staff Members apply only to long-serving staff, defined as staff serving continuously on fixed-term appointments for a minimum of five years. Because the applicant was granted a 100 series fixed-term appointment on 1 March 2003, and separated on 30 September 2006, his continuous

f. The applicant fell short by one year and five months of the five-year mark (which would have entitled him to certain protections available to long-serving staff members).

g. There was no duty on the part of UNDP to allow a staff member to use accrued annual leave for the sole purpose of remaining a staff member. The respondent lawfully commuted the applicant's annual leave to cash, in accordance with staff rule 109.8. Further, in the event that the respondent had exceptionally acceded to the applicant's request, the applicant would still have fallen short of the five years' continuous service, contrary to his claims. In any event, by decision of 13 October 2006, the respondent exceptionally decided to allow the applicant to be considered as an internal candidate when applying for suitable vacancies from his separation through 31 December 2006; this period totalled 90 days, which was a far more generous offer than the 50 days of annual leave.

h. The post occupied by the applicant was not moved to Geneva. The post remained in New York, and was unencumbered for some time as there was no need for any of the services associated with the post. In 2009, the post was re-classified to a P-5 post and advertised through a competitive process.

i. The applicant's plea for costs must fail as the applicant has not demonstrated any manifest abuse of the proceedings by the respondent.

Contested administrative decision

30. First, the Tribunal examined whether UNDP or the United Nations Secretariat were required, as a matter of law, to employ the applicant beyond 30 September 2006. Staff rule 104.12(b)(ii), applicable at the time, provided that fixed-term appointments did not carry any expectancy of renewal or of conversion to any other type of appointment. The applicant asserted in his pleadings that the Inter-Organization Agreement provided that staff members on loan retain their contractual rights with the releasing organization.

31. The Tribunal examined the applicable staff regulations, rules, and administrative issuances, as well as UNDP's inter-agency mobility policy and the

33. The Inter-Organization Agreement further states:

> **III. Contractual Relationships between the staff member and the Organizations**
>
> . . .
>
> **Loan**
>
> 10. (a) When a staff member is loaned, he will be under the administrative supervision of the receiving organization, but will have no contractual relationship with it, continuing to be subject to the staff regulations and rules of, and retaining his contractual rights with, the releasing organization.
>
> . . .
>
> **IV. Entitlements of the Staff Member**
>
> **A. Service Credit**
>
> 12. . . . In the case of a loaned staff member, service in the receiving organization will be counted as service in the releasing organization.
>
> . . .
>
> **C. Annual Leave**
>
> 14. . . .
>
> (c) So far as possible, the receiving organization will enable a seconded staff or loaned staff member to take, before his return to the releasing organization, all the annual leave which he accumulates during his service with it.
>
> . . .
>
> (d) When a staff member returns to the releasing organization, he will carry with him his accrued leave credit at the date of his return.

34. As the applicant correctly pointed out in his submission, the Inter-Organization Agreement provides that the applicant retained his contractual rights with the releasing organization, in this case UNDP, while on loan to OIOS. However, these contractual rights were limited to the duration of the contract with UNDP—i.e., until 30 September 2006. The applicant has failed to demonstrate that he had grounds for a legitimate expectation that his contract would be renewed. Further, the Inter-Organization Agreement, quoted above, does not support the applicant's contentions.

The Tribunal was not provided with any evidence that could be interpreted as containing an express or implied promise by the respondent, or constituting any agreement between the parties, that a lien on his post would be maintained by UNDP. In fact, the records show that at the time of the events in question, the applicant was advised that no lien would be maintained on his post and therefore he should have had no misgivings about it.

42. Although the applicant alleges that "there is no indication he was given any special consideration as a staff member with a general lien and in need of placement", he fails to show that there was—or should have been—a lien of any type on his post.

43. In its contemporaneous communications with the applicant, UNDP maintained that, firstly, the applicant's return rights would be based on the terms of agreement between him and UNDP, and, secondly, that the applicant's contract would not be renewed. There is no evidence, nor was it submitted by the applicant, that he contested UNDP's position at the time of these communications or that he actively tried to reach an agreement with UNDP to modify its position on the issue of extension as expressed therein. Therefore, I understand that, at the time of the events, it was understood by both parties that the applicant's contract would not be renewed beyond 30 September 2006, and that, should he wish to remain in the Organization's employ, he must apply for other positions.

44. In the present case the applicant has failed to demonstrate that UNDP or the United Nations Secretariat violated any regulations, rules, or administrative issuances. The applicant was fully aware of the approaching expiration of his contract and should have taken steps to apply for positions in the United Nations system. The applicant was informed of the need to apply for positions in the United Nations on several occasions, including in August 2005 and May 2006. As the Tribunal stated in *Luvai* (UNDT/2009/074), "it is a well-established principle that equity aids the vigilant". It appears from the submissions of the parties that the applicant applied only for one post while on loan with OIOS. The applicant was interviewed with respect to that vacancy in June 2006, but was not selected.

45. The applicant contends that OIOS and UNDP owed a duty of care to him under staff regulation 4.4, because it provides preference to those already in the service of the Organization. Staff regulation 4.4 provides—

> Subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations.

46. I cannot agree with the applicant's interpretation of staff regulation 4.4. As discussed by the Tribunal in *Sefraoui* (UNDT/2009/095), staff regulation 4.4 provides that, generally, "no *a priori* favour is to be accorded to either the external or the internal candidate". This staff regulation does not confer any absolute (as distinct from qualified) preference in favour of members already in service in filling vacancies, and certainly does not create an obligation on the part of the Administration to extend or renew the contracts of staff members on fixed-term appointments.

Allegations of unfair treatment and prejudice and the burden of proof

47. The applicant alleges unfair treatment by the respondent and states that the decision not to extend his appointment was influenced by extraneous or prejudicial factors. Both parties made extensive submissions on the issue of burden of proof. The applicant maintains that the respondent has the burden of proof in showing that the applicant's rights were observed. The respondent asserts that the burden of proof in showing that the Administration acted improperly rests on the applicant. The Tribunal has issued several judgments addressing the issue of the burden of proof.

48. In *Luvai*, the Tribunal held that where allegations of impropriety are raised, the burden of proof is on the one making the allegations. In *Bye* (UNDT/2009/083), the Tribunal, relying on the jurisprudence of the United Nations Administrative Tribunal, made a similar finding, stating that "anyone alleging harassment, prejudice, discrimination or any other extraneous factor of improper motivation of a particular

decision, has the *onus probandi* of such an assertion. . . . This is in fact in line with a well-known maxim of law that the party who alleges a fact bears in principle the burden of proving its veracity".

49. In *Nogueira* (UNDT/2009/088), the Tribunal held that

> [t]he burden of proof is of course on the Applicant to establish that the discretion [of the Secretary-General in matters of appointment and non-renewal] has been exercised injudiciously. Once the Applicant has stated his case, it remains open to the Respondent to rebut the Applicant's contentions or to state their own case. The Tribunal must then consider the evidence in its entirety and determine if he who avers has made out a case on a balance of probabilities.

50. Most recently, in *Sefraoui*, the Tribunal held that, although the pronouncements in *Bye* and in the judgments of the Administrative Tribunal with respect to the burden of proof provide some rules of practical reasoning, they do not completely satisfy the Tribunal's needs in cases that come before it. The Tribunal concluded that by placing the burden of proof on either party it would necessarily assume that the administrative decision is *a priori* wrong or right. *Sefraoui* suggests matters could be determined by the Tribunal more prudently by moving away from the burden of proof terminology and instead, by focusing on the preponderance of evidence—

> 26. A rule that the staff member bears the onus of proving the impugned decision is wrong is simply another way of saying that there is a presumption, which can be rebutted, that administrative decisions are right. It is easy to see why this rule should apply in resolving civil litigation in general, but it is far from obvious why this should be so in the very restricted litigation conducted in the Tribunal, where all plaintiffs are staff members, there is only one defendant, the sole issue is the correctness of an administrative decision that affects a staff member's employment and, furthermore, either party can require the persons involved in making the decision to be identified and called to give evidence.
>
> . . .
>
> 28. It seems to me that, as a matter of fundamental principle, neither the staff member nor the Secretary-General should be in a favoured position. As a practical result of the rule of equality before the law,

Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment".

54. I find that, although not required by the staff rules, the Organization provided the applicant with ample and adequate notice of the expiration of his contract. On 9 May 2006, the Director of the Office of Human Resources of UNDP sent an email to the applicant, stating that UNDP was not in a position to agree to any further loan agreement with OIOS beyond 30 September 2006 and that "[i]f the UN [Secretariat] is keen in extending your reimbursable loan, I strongly suggest for you to negotiate a new offer". This communication to the applicant is unambiguous and makes it clear that his contract would not be extended. This was followed by a memorandum from UNDP to OIOS, dated 8 August 2006, copied to the applicant, stating that "UNDP can no longer accommodate a further extension".

55. On 28 September 2006, OIOS confirmed to the applicant that his loan to OIOS would not get extended. The applicant asserts that this meant that he received