



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

Judgment No. 2021-UNAT-1097

Respondent
(Respondent/Applicant and Appellant on Cross-Appeal)
v.
Secretary-General of the United Nations
(Appellant/Respondent and Respondent on Cross-Appeal)

JUDGMENT

Before: Judge John Raymond Murphy, Presiding
Judge Martha Halfeld
Judge Kanwaldeep Sandhu

Case No.: 2020-1402

Date: 19 March 2021

Registrar: Weicheng Lin

Counsel for Respondent: Self-represented

Counsel for Secretary General: Noam Wiener

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. A former staff member (the Respondent) filed an application with the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) contesting the decision of the Administration not to renew his fixed term appointment (FTA) beyond 28 February 2018.¹
2. By Judgment No. UNDT/2020/051 (the Impugned Judgment), the Dispute Tribunal granted the application in part, rescinding the administrative decision and ordering the Organization to pay the Respondent damages equal to the salary he would have earned had his appointment been extended until 30 June 2018.
3. The Secretary-General filed an appeal on 8 June 2020, and the Respondent filed an answer and cross-appeal on 8 August 2020. For reasons set out below, the appeal and cross-appeal are rejected.

Facts and Procedure

4. The Respondent commenced employment with the United Nations Development Programme (UNDP) country office in the United Arab Emirates (UAE) as a Programme Analyst on 1 April 2014.
5. In 2017, there were discussions between the UNDP and the UAE about the closure of the UAE country office.
6. On 21 November 2017, a Human Resources (HR) Assistant in the UAE e-mailed a HR Specialist in the Regional Bureau seeking advice as to how to separate the Respondent in a most efficient and cost-effective way. The HR Assistant wrote:

This decision is mainly based on unavailability of funding to extend the staff's contract beyond 31 December 2017. The management decided not to extend this staff's contract in particular as the main goals assigned to him including provision of support to economic development in the Northern Emirates were never met. In addition, the government doesn't wish to finance projects in the Northern Emirates any longer. Consequently, no budget/financial contribution was allocated from the government to this purpose and the [country office] is currently facing a deficit.

¹ The staff member's motion for confidentiality was granted by the United Nations Appeals Tribunal on 15 March 2021. To preserve his anonymity, the staff member will be referred to as "Respondent" in this Judgment.

7. On 10 December 2017, the Resident Representative and Resident Coordinator (RR/RC) in the UAE e-mailed the HR Assistant, asking that the abolishment of the Respondent's post be initiated. The RR/RC wrote:

This decision is based on the pertinence of the position in the current country office context. The main goals assigned to the position include support to economic development in the Northern Emirates. These goals were not met, and additionally, the Government has expressed it has no funding availability for projects in the Northern Emirates for the medium-term. No financial contribution was allocated from the Government for this purpose, and we even have yet to receive the full amount of our office's annual [Government Contributions to Local Office Costs] contribution. As we stand now, the [country office] is facing a deficit in its funding for the institutional budget.

8. Subsequently, the HR Assistant advised the HR Specialist in the Regional Bureau that the RR/RC decided to abolish the Respondent's post effective 1 March 2018 and thus to extend his appointment until 28 February 2018.

9. On 22 December 2017, the RR/RC informed all staff members in the UAE country office at a general meeting that due to uncertainties about the future of the country office, their appointments would be extended only for six months until June 2018.

10. On 7 January 2018, the RR/RC met the Respondent and informed him that his appointment would be extended for two months only.

11. On 8 January 2018, the Respondent via e-mail questioned the decision to abolish his post. The next day, on 9 January 2018, the Respondent was advised that, due to budgetary limitations, his FTA would be extended till 28 February 2018, at which time his appointment would expire. After sick leave entitlements were provided, he left service at the end of April 2018.

12. On 27 February 2018, the UAE government formally confirmed to UNDP that the UAE's country programme with UNDP would not be renewed, and that UNDP would wrap up existing activities and close the country office by June 2018. The UAE wished to work with UNDP to define a successor relationship.

13. On 28 February 2018, the Respondent submitted a request for management evaluation of the decision not to renew his appointment. The Respondent submitted that while all the posts in the UAE country office were funded in a similar fashion, his post was singled out and as such not renewing his post was arbitrary and discriminatory. He added the proffered reasons for the contested decision were not supported by the facts. He also argued that the Administration failed to make efforts to find alternative placement for him as required under Staff Rule 9.6(e).

14. On 7 March 2018, the HR Specialist in the Regional Bureau e-mailed the HR Assistant in the UAE seeking more information regarding the non-renewal of the Respondent's appointment and enquired: (i) whether the funding source for the Respondent's post was different from other posts, and (ii) if there was any documentation showing that the Respondent was working at the Northern Emirates project and that the government was no longer funding such project. In response, the HR Assistant provided the following explanation from the RR/RC:

The source of funding was the same as for other [fixed-term] positions in the office but his [terms of reference] was relevant for the [Country Programme Document ("CPD")] outcome on Northern Emirates. It was not a specific project, thus no documentation on project funding. However, we had a growing deficit and the government disinterest in continuing the outcome under current and also future CPDs made my decision to abolish the post. The decision has been proven right in the sense that the government has stated that there will be no new CPD and that the current [country office] activities should be discontinued as of end of June.

15. On 12 April 2018, the Administration responded to the Respondent's request for management evaluation and upheld the contested decision, on the grounds that it had to cut costs and decided to abolish the Respondent's post and not renew his appointment. It explained:

In order to cut costs, the RR/RC had to consider which position was most disposable. As mentioned, you were the second most junior staff member in the [country office], and of the four members of the programme staff, two staff members had significantly longer Fixed-Term Appointments. The most junior staff member was the G5. You were working on an *ad hoc* basis on Partnerships, a function that was not limited to your role, but which all programme staff performed. Most crucially perhaps, the abolition of your post would achieve significant cost savings needed to close the deficit. For these reasons, the RR/RC decided to not renew your contract beyond 28 February 2018.

16. The country office in the UAE closed on 30 June 2018 and was succeeded by the Office of the United Nations Resident Coordinator. A few staff members were retained beyond 30 June 2018 to provide support to the Resident Coordinator's office in the UAE.

17. On 11 July 2018, the Respondent filed an application with the UNDT contesting the Secretary General's decision not to renew his appointment beyond 28 February 2018.

The UNDT Judgment

18. The UNDT rejected the Secretary-General's contention that the application was not receivable on the grounds that the Respondent had not submitted the contested decision for management evaluation. Before the Management Evaluation Unit (MEU), the Respondent had identified the contested decision as the as termination/abolition of his post but in the application sought review of the decision not to extend/renew his FTA. The UNDT held that the evidence showed that the Respondent before the MEU in substance challenged the non-renewal of his appointment. There is no appeal against this finding.

19. The Dispute Tribunal dismissed the Respondent's claim that the Administration had failed to afford him assistance under Staff Rule 9.6(e). The rule is not applicable when staff members are separated at the expiration of a FTA. There is no cross-appeal against this finding.

20. The Dispute Tribunal found the contested decision to be unlawful because the provided reasons for not renewing the appointment were not properly based on the facts, and the Administration did not act fairly, justly and transparently in dealing with the Respondent. Accepting that the country office faced "budget limitations," the UNDT held that the Respondent had been unfairly singled out with an extension up to 28 February 2018 whereas all the other staff members were extended until June 2018.

21. The UNDT held that there was irrational inconsistency in the reasons for the decision and the evidence upon which it was based. The RR/RC's reason for non-renewal was that "[t]he main goals assigned to the position include support to economic development in the Northern Emirates" but "[t]hese goals were not met, and additionally, the Government has expressed it has no funding availability for projects in the Northern Emirates for the medium-term". However, after the management evaluation request, it became clear that the source of funding for the Respondent's post was the same as other positions in the country

office. The Country Programme Document did not link this project to any particular staff funding. Moreover, there was no specific documentation showing that the Respondent was in fact working on the Northern Emirates project. The Administration failed to show that the Respondent's main roles were in the Northern Emirates Project and that the project was discontinued. This was not a specific project with a dedicated project funding.

22. Likewise, there was no discussion between the RR/RC and the UAE in July 2017 regarding the reduction of any particular funding or staff post as this discussion occurred in the context of deciding the scope of the subsequent Country Programme Document. Later engagements confirmed the closure of the country office but that was long after the contested decision was made. The upcoming closure still did not explain why the Respondent was singled out.

23. The justification provided by the UAE country office, i.e. the Respondent's role in the Northern Emirates project was discontinued and no longer funded, differed from the reason in the response to the management evaluation request. The MEU stated that the reason for the non-renewal was that the Respondent was the second most junior staff member and that he was working on an *ad hoc* basis on Partnerships. The UNDT queried why the most junior staff member at the G-5 level was not selected instead, which would have provided an adequate cost saving, and after December 2017, all programme staff were performing roles in Partnerships.

24. The UNDT concluded:²

As the Appeals Tribunal held in *Sanwidi*, the Tribunal's role is not to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. However, the decision must be legal and rational and not absurd or perverse, and the Administration has the duty to act fairly, justly and transparently in dealing with staff members. Also, the reasons provided for the contested decision must be supported by the facts. However, as described above, various justifications given by the Administration suffered from inconsistencies and inaccuracies and not fully supported by the facts.

25. The UNDT ruled however that the Respondent had failed to show that the decision was ill-motivated. The Respondent claimed that he was targeted for separation after his close relationship with the RR/RC turned sour and submitted a photo showing the RR/RC and him

² Impugned Judgment, para. 43.

at a restaurant and a handwritten note allegedly from the RR/RC thanking the Respondent for making his birthday a memorable one. The UNDT found this documentation insufficient to prove an ulterior purpose. It concluded:³

Accordingly, the Tribunal finds that the provided reasons for not renewing the Applicant's fixed-term appointment were not properly based on facts and the Administration did not act fairly, justly and transparently in dealing with the Applicant. However, the Tribunal finds that the Applicant failed to show that the decision was ill-motivated as alleged.

26. The Dispute Tribunal accordingly rescinded and set aside the irrational decision. In light of the fact that the Respondent's appointment was extended until 29 April 2018 to cover certified sick leave and that the appointments of the rest of the staff members were extended until 30 June 2018, the UNDT set in lieu compensation in the amount of two months' net-base salary. The UNDT dismissed the Respondent's claim for compensation for moral damages for mental trauma and harm to his reputation. The relevant medical report indicated that the Respondent developed severe depression and other symptoms but did not establish an adequate causal link between his symptoms and the irrational basis for his separation from service.

Submissions

The Secretary-General's Appeal

27. The Secretary-General contended that the UNDT erred in law and exceeded its competence by seeking to replace the Administration's discretion with its own and holding that the contested decision should have been applied to a General Service (G-5) level staff member who was recruited to the service of the Organization after the Respondent. The UNDT exceeded its authority when it questioned the RR/RC's decision to shorten the renewal of the appointment of a Professional Service staff member rather than the appointment of a General Service staff member. It was within the Administration's discretion to decide that it wished to retain the General Service staff over a Professional staff at the National Officer level. It is not for the UNDT to determine how the Administration wishes to save money. The fact that another decision was possible does not show that the decision taken was unlawful.

³ Impugned Judgment, para. 46.

28. The Secretary-General contended further that the UNDT erred in law and fact when it concluded that the various justifications given by the Administration were not fully supported by the facts. On the contrary, the Secretary-General postulated that the record contained no evidence that would rebut the presumption of regularity.

29. The Respondent had been in the service of the Organization for a shorter period of time than comparable colleagues, the Administration provided sufficient evidence justifying its decision. The UNDT also erred in its calculation of the amount of savings that might have been achieved by not renewing the contract of the General Service staff member as opposed to the Respondent and thus erred when it found that there was no budgetary rationale to the RR/RC's decision to apply the contested decision to the Respondent and not to the General Service staff member. Consequently, the UNDT further erred when it held that reasons submitted by the Secretary-General for making the contested decision were not supported by the evidence on record.

30. Therefore, the United Nations Appeals Tribunal (Appeals Tribunal) should vacate the Impugned Judgment and hold that the RR/RC was acting within his authority when he chose to address the UAE country office's deficit by extending the appointment of one of the staff members by a shorter period than the other staff members, as he was choosing among the various options that were open to him.

The Respondent's Answer and Cross-Appeal

31. The Respondent submitted that the UNDT was correct in finding a complete disconnect between the reasons provided internally when the contested decision was made and the reasons provided in response to the management evaluation request.

32. He contended that there were sufficient budgetary reserves to extend the FTAs of all staff members equally and some staff members were even given extension of their contracts in the successor office. He alleged that a new National Officer (B) post was recently advertised three times through the UNDP website, which falls under his same grade, office and with similar tasks.

33. He concluded that the UNDT was correct in finding that he had rebutted the Administration's presumed regularity by virtue of the flawed and inconsistent justifications. He further submitted that given the proffered Administration rationale was false, the only

logical conclusion is that the contested decision was personal and motivated by *animus* designed to harm him. This, according to the Respondent, demonstrates that the Administration had ulterior motives.

34. In the cross-appeal, the Respondent submitted that given a similar post was allegedly re-advertised, such re-advertisement should serve as evidence that his functions continued on in the successor organization, and therefore his appointment would have purportedly been renewed. He submitted that the calculation for compensation should thus be increased to two year's net base pay.

35. He also argued that the UNDT erred when it found that the 25 March 2018 psychiatrist report he provided only stated that he had developed severe depression and other symptoms but did not go far enough to state what caused such symptoms. He submitted that in the "absence of any prior condition and timing of the diagnosis (...) the supporting evidence should be sufficient." He therefore requested the Appeals Tribunal to grant him two year's net base pay in moral and consequential damages.

The Secretary-General's Answer to the Cross-Appeal

36. The Secretary-General argued the UNDT correctly held there was no basis to find that the Respondent would have been retained beyond 30 June 2018, and as such the claim for additional compensation should be rejected. If there was an illegality in this case it would be the separation of the Respondent two months earlier than similarly situated colleagues.

37. The Secretary-General questioned the purported evidence submitted by the Respondent in the form of a hyperlink, which does not lead to any specific job opening but rather to hundreds of UNDP vacancies. In the absence of a particular job post, the Secretary-General could not respond to the Respondent's assertion regarding the opening of a similar job post.

38. Additionally, the Secretary-General posited that it is incompatible with the legal framework of FTAs to grant the Respondent additional compensation, where he had no legitimate expectation of renewal.

39. As for the claim for moral damages, the Secretary-General argued that the letter from the psychiatrist provided by the Respondent was general in nature and did not link his condition to the administrative action. As such, the psychiatrist letter could not provide a basis for moral damages.

Considerations

40. The Secretary-General's submission that the UNDT inappropriately substituted its decision for that of the Administration misconstrues the *ratio decidendi* of the Judgment. The UNDT merely set aside the decision on the grounds of its irrationality. The UNDT summed up the problem with the contested decision in para. 38 of its Judgment when it remarked:

The question is why there is a complete disconnect between the reasons provided internally when the contested decision was made and the reasons provided in the response to the management evaluation request.

41. The UNDT accepted that it should defer to the discretion of the Administration to restructure departments through the abolition of posts and that there were genuine budgetary issues at play in this instance. However, the reasons for selecting the Respondent for separation suffered from incoherence. The RR/RC justified the selection on the grounds that the Respondent was involved in the project for economic development in the Northern Emirates – this was the main goal assigned to his position and that there was no further funding for that project, as it had not met its goals. When this was subsequently shown to be incorrect because the post was not specifically funded for that purpose, and the Respondent's main role was not giving support to that project, the reason for his selection for non-renewal from among all the staff changed.

42. The Respondent's supposed main roles in the economic development project in the Northern Emirates and the discontinuance of the project were not the reason provided by the MEU for the non-renewal of his appointment, thus suggesting that the initial reason was in fact an irrelevant consideration to which undue weight was given in making the selection of the Respondent rather than another staff member. The irrational basis of the RC/RC's decision as reflected in the initial reasons for the selection tainted the decision-making going forward in that it possibly involved an unjustifiable pre-selection.

43. The MEU justified the decision for not extending the appointment to the end of June 2018 along with all the other staff members on the basis that the Respondent was the second most junior staff member, was working on an *ad hoc* basis on Partnerships and the abolition of his post would lead to significant savings. It may have been fairer to have selected the staff member with the least service. But allowing the Administration a margin of appreciation on the amount it wanted to save, the fact is that all the staff members were working on Partnerships and any selection would have led to savings. These *ex post facto* reasons for selecting the Respondent rather than one of the other staff members provide an inadequate justification, especially in light of the incoherence and the fact that the initial reason for the selection was unsustainable. As the UNDT correctly noted, there was a disconnect between the reasons provided internally and those provided in the management evaluation process.

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

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

46. Should a decision-maker fail to furnish adequate or coherent reasons in circumstances where a duty to do so exists, a factual presumption will arise (rebutting the general presumption of regularity) that the decision was taken without good reason. Where incoherent

reasons are furnished, the appropriate remedy is not for the UNDT to make an order compelling adequate or coherent reasons or to select one of the various competing reasons on offer. A tribunal can make an order for reasons to be furnished only if it concludes that the decision-maker did not give reasons at all. It should not prescribe to the decision-maker what his or her reasons should be. If it is shown that the reasons (being inadequate, incoherent or irrational) do not justify the contested decision, the appropriate remedy is to set the decision aside and for the Administration to take another decision on a proper basis.

47. In this case, the UNDT, in view of the evident incoherence, held that there was no rational link between the decision, the reasons given for it and the information before the RR/RC. It did not inappropriately substitute its decision for that of the Administration. It set aside an irrational decision and did not err in doing so. As it was obliged to do, it afforded the Secretary-General an opportunity to purge the irrationality by paying in lieu compensation.

48. There is no merit in the Respondent's cross-appeal for increased compensation or damages. The country office did close in June 2018 (although some staff members were retained). If a rational decision regarding the Respondent had been made initially, it seems unlikely that he would have been employed beyond June 2018. The belated evidence about advertised job positions long after the contested decision was taken is speculative and insufficient to conclude that it was the Respondent's post that was re-advertised; and were it true such might well have been the legitimate result of changed circumstances. The fact that the Respondent is suffering the harsh effects of losing his appointment, while deserving of sympathetic consideration, is insufficient basis for an award of moral damages.

49. The appeal and the cross appeal should accordingly be dismissed.

Judgment

50. The appeal and the cross-appeal are dismissed, and the Judgment of the UNDT is affirmed.

Original and Authoritative Version: English

Dated this 19th day of March 2021.

(Signed)

Judge Murphy, Presiding
Cape Town, South Africa

(Signed)

Judge Halfeld
Juiz de Fora, Brazil

(Signed)

Judge Sandhu
Vancouver, Canada

Entered in the Register on this 23rd day of April 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar