



Before: Judge Francesco Buffa

Registry: Geneva

Registrar: René M. Vargas M.

QUATRINI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT
ON REMEDIES**

Counsel for Applicant:

Maria Teresa Cirelli

Counsel for Respondent:

Jérôme Blanchard, LPAS, UNOG

Miriana Belhadj, LPAS, UNOG

Introduction

1. By Judgment No. UNDT/2020/043 dated 19 March 2020 on liability, the Tribunal granted the application on its merits finding that the provided reason for not renewing the Applicant's P-5 level fixed-term appointment ("FTA") was not properly based on facts and, consequently, that the impugned decision was unlawful.

2. By Order No. 36 (GVA/2020) dated 19 March 2020, the Tribunal ordered the parties to file their closing statements and final observations on remedies in the following sequence: the Applicant (25 March 2020), the Respondent (1 April 2020) and the Applicant (6 April 2020). The parties duly complied with these instructions.

Consideration

General legal framework on remedies

3. The remedies that the Dispute Tribunal may award are outlined in art. 10.5 of its Statute as follows:

As part of its judgement, the Dispute Tribunal may only order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

Rescission of the contested non-renewal decision

4. The Applicant submits that, considering the fact that the selection process for a readvertised P-5 position is under way at this very time, and that he regularly applied for it on 31 January 2020, the most appropriate remedy for the damage he has suffered

would be the rescission of the unlawful decision, and his reinstatement in the currently open P-5 level position.

5. The Respondent has made no submissions on reinstatement in response to the Applicant's contentions.

6. In its Judgment *Quatrini* UNDT/2020/043, the Tribunal found that the Organization failed to justify the non-renewal of the contract of the Applicant and that the decision to separate him from service was therefore flawed (see, in particular, paras. 38 and 39).

7. The Tribunal further held, comparing the P-5 level position formerly encumbered by the Applicant with the one advertised in the Global Mechanism, that the two positions are essentially the same (see paras. 36 and 37), the Tribunal thus drew the inference that the position still exists.

8. In these circumstances, the most appropriate remedy is the rescission of the unlawful decision not to renew the Applicant's FTA and the reinstatement of the Applicant in the same position he encumbered (see for similar rescission in case of FTAs' non-renewal, *Applicant* UNDT/2020/16, *Loose* UNDT/2020/38, and *Maslei* UNDT/2015/41).

Determination of the compensation in lieu

9. A non-renewal decision concerns an "appointment" pursuant to art. 10.5 of the Dispute Tribunal's Statute, and the Tribunal must therefore set an amount, which the Respondent can choose to pay as an alternative to the rescission of the contested administrative decision and the reinstatement of the Applicant.

10. It clearly results from art. 10.5(a) of the Dispute Tribunal's Statute, as consistently interpreted by the United Nations Appeals Tribunal ("UNAT"), that compensation in lieu is not compensatory damages based on economic loss, but only the amount the administration may decide to pay as an alternative to rescinding the challenged decision or execution of the ordered performance (see, for instance, *Eissa* 2014-UNAT-469).

11. As the compensation is just a mandatory alternative for the Administration if it prefers not to rescind the challenged decision and it does not concern the economic loss suffered by a staff member, the Applicant does not have to demonstrate to have mitigated his loss. Indeed, UNAT found in *Eissa* 2014-UNAT-469, para. 27, that “[in lieu] compensation is not compensatory damages based on economic loss. Thus, there is no reason ... to require mitigation” (same principle was affirmed in, for instance, *Zachariah* 2017-UNAT-764, para. 36, and *Fasanella* 2017-UNAT-765, para. 34).

12. As to the amount of the compensation in lieu, the above recalled article of the Dispute Tribunal’s Statute sets a general framework for its determination, stating that, apart from exceptional circumstances, it “shall normally not exceed the equivalent of two years’ net base salary of the applicant”.

13. The Appeals Tribunal in *Ashour* 2019-UNAT-899 found that “the amount of in lieu compensation will essentially depend on the circumstances of the case” and that “due deference shall be given to the trial judge in exercising his or her discretion in a reasonable way following a principled approach” (see para. 21).

14. This Tribunal finds that the determination of the compensation in lieu between the minimum and the maximum provided in its Statute must take into account—so graduating the amount accordingly—the specific circumstances of the case, and in particular the type and duration of the contract held by the staff member, the length of his/her service, and the issues at the base of the dispute. The compensation in lieu is not related at all to the economic loss suffered and to the salary of the staff member, the latter being the parameter of the outcome of the decision on compensation and not also the precondition of the compensation (so we can have compensation in lieu also in case where no economic damage has been suffered). More specifically, it seems reasonable—for instance—to grant the largest compensation in cases of termination of permanent appointments of senior staff members, and to limit the compensation in cases of non-renewal of FTAs for recently appointed staff members (where there is not a security of tenure, but only a chance of renewal).

15. In the present case, having in mind the above-mentioned criteria and applying them to the specific case at hand (and so having considered the seniority of the Applicant, the type of contract held, and the chance of renewal of the contract in a position still required by the Administration), the Tribunal sets the amount of the compensation in lieu at six months' net-base salary at the P-5, step X level as per the salary scale in effect at the time of the Applicant's separation from service.

Compensation for harm

16. In addition to and irrespectively of the so-called compensation in lieu, compensation under art. 10.5(b) of the Dispute Tribunal's Statute may be awarded for (a) pecuniary damages, such as income loss, and (b) non-pecuniary damages, such as stress, anxiety, and reputational harm.

Pecuniary damages

17. The Tribunal notes that the Appeals Tribunal held that in a non-renewal case, the compensable period is typically the same as the last appointment (see, for instance, *Gakumba* 2013-UNAT-387, para. 16, *Kasmani* 2013-UNAT-305, para. 36, and *Belkhabbaz* 2018-UNAT-895, para. 38).

18. In the present case, it follows from the Applicant's latest letter of appointment, which is appended to the application, that his latest fixed-term appointment was for two years from 1 January 2016 to 31 December 2017. The Tribunal notes, however, that, following the further extension of his fixed-term appointment, the Applicant kept on working (and earning a salary) till mid-2018, being separated from service with the Global Mechanism only on 30 June 2018.

19. The Applicant submits that he would incur an income loss from his separation from service until 31 December 2021, which is the "earliest date until which he would have encumbered his P-5 [level] position, had the Organization complied with its contractual obligations". If the unlawful decision had not been made, "the Applicant's P-5 level] contract would still be in place today, running at least until the end of 2021 given the core budget and staffing decisions taken by [the Conference of Parties ("COP") of the United Nations Convention to Combat

Desertification (“UNCCD”)] at its 14th session in September 2019”. The Applicant assumes, in fact, that “following the contested decision not to renew his contract after 31 December 2017, he would have been entitled to two fixed-term contracts: one for the period 2018-2019, and a second one for the period 2020-2021”.

20. The Respondent contends that “the calculation of the loss of income should be limited to the period from 1 July 2018 to 31 December 2019 and not through to 31 December 2021”, on the ground that holding a contract up to this date is “too speculative” and, consequently, that “any estimate of loss of income should not go beyond December 2019”.

21. The Tribunal considers that there is too much uncertainty as to whether the Applicant would have been offered an additional FTA after the first renewal. In particular, while the Applicant submits that the budget maintained a position at the P-5 level throughout the entire period until 2021, the Tribunal finds that it would be too speculative under the Appeals Tribunal’s jurisprudence to extend the compensable period any further than that two years as of the date of separation and at the P-5 level. The Tribunal notes that it could legitimately have been decided to not renew the Applicant’s appointment for other legitimate grounds than budgetary reasons.

22. Therefore, the basis for the calculation of loss of income should be limited to the period from 1 July 2018 to 31 December 2019, namely 18 months. As a point of departure, the Tribunal therefore finds that it would be appropriate to award the Applicant 18 months of net-base salary at the P-5, step X level as per the salary scale in effect at the time of the Applicant’s separation from service.

23. UNAT consistently stated in the judgments above recalled (see para. 17, as well as *Zachariah* and *Fasanella* referred to in para. 11) that the staff member has to demonstrate to have done efforts to mitigate the economic loss arising from an administrative decision impacting on his employment.

24. In this regard, the Applicant submits that he applied for more than 100 other jobs, but only succeeded in a part-time and short-term job along with some consultancies.

25. The Tribunal is satisfied that the Applicant did make real and consistent efforts to mitigate his loss.

26. The Respondent argues that the Applicant did not appropriately mitigate his losses as he failed to accept a) the P-3 position that he was offered instead of renewing his P-5 level position, and b) month-by-month extensions of his P-5 level FTA while his case was pending before the Ethics Office. To this, the Applicant, *inter alia*, responds that the offer for the P-3 level position was “humiliating” and the offer for monthly extension of his P-5 level was not appropriate for various personal reasons.

27. The Tribunal finds that the Applicant’s refusal to accept the P-3 level position was legitimate, as this offer—being totally unrelated to the experience of the Applicant and concerning a grade much inferior in the same office—was definitively improper in the circumstances and also humiliating and contrary to the obligation of the Administration to respect the dignity of the employee. This is, moreover, considering the difficult circumstances in the workplace, which in his final observations the Applicant describes as a “working environment within UNCCD [that] had become quite poisonous” while recalling “that he reported repeated acts of discrimination and mobbing being perpetrated against him by his superiors”, and the situation of the Applicant highlighted by the Ethics Office in the findings, recalled in para. 41 of the principal Judgment *Quatrini* UNDT/2020/043.

28. Also, the Applicant’s refusal of the position at the same P-5 level was legitimate, as the offer was only for a month (although renewable) and did not grant the same security of an FTA, which lasts instead two years and gave the possibility to organize private life in a more stable way.

29. The Tribunal therefore finds that the said offers cannot have any incidence in the determination of the economic loss suffered by the Applicant.

30. It is, however, relevant to consider income from alternative employment during the compensable period.

31. For the relevant period since his separation from UNCCD, the Applicant submits that he has had net earnings in the amounts of: USD59,333 (31,877+33,825-6,369) during six months in 2018; USD73,500 (67,264+12,605-6,369) in 2019. He provides as proof a copy of the taxation decision made by the Swiss Federal Tax Administration on his income for 2018, together with a provisional calculation for the income tax 2019, given that the deadline for filing tax returns for last year is yet to expire.

32. The Respondent opposes that the income earned for the period 1 July 2018 to 31 December 2019 “seems to be incomplete”, but no specific evidence on that was given or required by the Respondent.

33. Based on the documentation at hand and the parties’ submissions, the Tribunal accepts the amounts presented by the Applicant, which have to be deducted from the amount of damages.

34. Therefore, should the calculation of damages give a positive balance in favour of the Applicant, the Respondent is to pay the Applicant 18 months’ net-base salary provided for the P-5 level position, minus USD132,833.

Non-pecuniary (moral) damages

35. The Applicant submits that he suffered moral damages to be compensated in the amount of USD50,000.

36. The Applicant contends that he suffered harm to “his employment record and career prospects”. This is shown by the fact that for the majority of his job applications he did not receive any reply or received only dismissive negative replies, and that he obtained only short-term or part-time employment, so being confined in a “precarious situation which he and his family are confronted with”.

37. The Applicant submits that evidence of non-pecuniary damage is “further contained in the recognition by the Ethics Office of a possible abuse of authority by the UNCCD Executive Secretary in reclassifying his P-5 [level] post to [the] P-3 level without following the procedures laid out in ST/AI/1998/9, and excluding him twice, in 2017 and 2018, from the selection process for the Managing Director position of the

Global Mechanism for unspecified reasons”. The consequences of “these unlawful actions on the Applicant’s professional career and personal health have been catastrophic”.

38. The Respondent submits that the “failure by the Applicant to mitigate his loss had a direct impact on the alleged moral damage linked to the professional image”. The harm to the professional reputation is “not established by the evidence on the record and the mere allegation of being excluded from recruitment process cannot establish a damage, nor a causal link”.

39. Regarding the Applicant’s alleged reputational damage, the Tribunal notes that art. 10.5(b) of its Statute requires that compensation for harm is subject to evidence. In this regard, it is, inter alia, necessary for an applicant to demonstrate a “nexus” between the “harm” and the “illegality” (see *Kallon* 2017-UNAT-742, para. 68, and *Kebede* 2018-UNAT-274, para. 20).

40. The Tribunal is aware that the Applicant has not been able to find steady employment since his separation from the Organization, although he had unsuccessfully applied for many jobs. The Tribunal, however, is unconvinced that the Applicant’s lack of success in finding alternative employment can be attributed to the non-renewal decision as other prospective employers would not likely even be aware of this decision and its background. The Applicant, at least, has not proved this in any possible manner.

41. The Applicant’s claim for compensation for reputational damage is therefore rejected.

42. Finally, the Applicant also contends that he has suffered from severe psychological pathologies and related health issues, as testified by the provided medical certifications and reports. The Respondent contends that unsworn written testimony, such as the medical notes submitted by the Applicant, is insufficient to reach the threshold of proof required to receive compensation under 10.5(b) of the Dispute Tribunal’s Statute. In response, the Applicant submits that the Respondent has “already officially recognized the validity of the medical certificates submitted by the

Applicant's physicians, which have been further verified by the [United Nations] Chief Medical Officer".

43. The Tribunal notes that the Applicant has submitted the following documentation in evidence of his stress and anxiety:

a. A medical certificate from a private medical doctor according to which the Applicant suffered from different psychological injuries because of the non-renewal of his contract dated 23 April 2018;

b. The same medical doctor certified in various other documents dated 16 March, 29 March, 9 April and 30 May 2018 that the Applicant was not able to work;

c. In another certificate from a "Psychological Counseling Services" at a university, it is stated that the Applicant had visited them on 16 May 2018, 26 June and 26 September 2018 and that "[t]he psychological consultations showed that the anxieties and sleeping problems existing at that time were part of the psychosocial stress within the difficult professional situation"; and

d. Some email correspondence between 27 and 28 June 2018 between the him and the Medical Service, United Nations Office at Geneva regarding the scheduling of a telephone meeting on 2 July 2018.

44. The Respondent, however, contends that the documentation provided by these medical professionals is "unsworn" and therefore without evidentiary value under the jurisprudence of the Appeals Tribunal in *Auda* 2017-UNAT-787 (para. 63) and *Pacheco* 2013-UNAT-281 (para. 27). The submission is without merits. Improper are, indeed, the references made by the Respondent to UNAT case law, as in *Auda*, UNAT found the testimony on non-pecuniary harm by an applicant alone not satisfactory without corroboration by independent evidence (expert or otherwise), and in *Pacheco*, UNAT found the oral evidence rendered without a prior swearing by the witness in violation of the UNDT's Rules of Procedure.

45. In the case at hand, the Applicant provided documents (in particular medical documents, certifications and correspondence), which are relevant means of proof irrespectively of the fact that they are not sworn documents, as in general an evidence on paper does not require the formalities of a witness. The Appeals Tribunal, in *Maslei* 2016-UNAT-637, paras. 29-31, upheld the award of moral damages by the Tribunal, supported by evidence with reference to an unsworn medical report (with also a witness declaration given by the Applicant).

46. The Tribunal notes also that, under UNAT's jurisprudence, the level of stress and anxiety depends on the person in question, and when assessing the evidence on record, a "common sense" approach must be applied whereby no "absolute requirement" exists "by way of a medical, psychological report or otherwise" (see *Kallon*, para. 70). Furthermore, "[m]uch will depend on the circumstances of the situation at hand, as the existence of moral damages shall be assessed on a case-by-case basis" (see *Kebede*, para. 22).

47. The Tribunal further observes that as the Respondent's objection is purely of a procedural nature, he does not explicitly challenge the veracity of the contents of the provided documentation, and he has not even requested to challenge any of the medical doctors' opinions calling them as witnesses in a hearing. His contention must necessarily be rejected. In conclusion, the Tribunal finds that the documents provided by the Applicant are credible and does not doubt their veracity; it can therefore rely on them as adequate means of evidence of the moral harm suffered by the Applicant.

48. As for the compensation amount, the Tribunal finds that the Applicant's suffering was indeed relevant and that he did not contribute thereto himself. It has to be noted, however, that the moral harm has been proved by the Applicant only for a few months, namely up to September 2018.

49. Considering the Appeals Tribunal's jurisprudence, the Tribunal awards the Applicant USD10,000 in compensation for stress and anxiety (in comparison, see, for instance, the Appeals Tribunal's awards in *Kallon* (USD50,000) and *Belkhabbaz* UNAT-2018-873 (USD10,000)).

Conclusion

50. In light of the foregoing, the Tribunal DECIDES that:

- a. The decision to not renew the Applicant's fixed-term appointment is rescinded and the reinstatement of the Applicant is ordered;
- b. As compensation in lieu under art. 10.5(a) of the Dispute Tribunal's Statute, the Respondent is to pay the Applicant six months' net-base salary at the P-5, step X level as per the salary scale in effect at the time of the Applicant's separation from service;
- c. As compensation for pecuniary damage under art. 10.5(b) of the Dispute Tribunal's Statute, the Respondent is to pay to the Applicant 18 months' net-base salary at the P-5, step X level as per the salary scale in effect at the time of the Applicant's separation from service minus USD132,833, but only if a balance in the Applicant's favor results from this calculation;
- d. As compensation for moral damage under art. 10.5(b) of the Dispute Tribunal's Statute, the Applicant is awarded USD10,000; and
- e. The aforementioned compensations shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensations. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Francesco Buffa

Dated this 14th day of April 2020

Entered in the Register on this 14th day of April 2020

(Signed)

René M. Vargas M., Registrar, Geneva