

UNDT/2022/064, Saleh

UNAT Held or UNDT Pronouncements

The Tribunal found that with clear and convincing evidence, the Respondent only managed to establish that the Applicant intended to assert some, albeit ineffective, pressure on BM in the hiring process of daily workers. Under *Sanwidi*, the Tribunal found that the termination of the Applicant's appointment was manifestly incorrect and led to a disproportionate outcome. The contested decision was therefore unlawful.

Considering its findings on the unlawfulness of the contested decision, the Tribunal found that the most appropriate remedy would be to rescind this decision (in comparison, see *Lucchini* 2021-UNAT-1121). As for reinstating the Applicant in his former post, the Tribunal noted that this is impossible as the evidence shows that a new person has been recruited on it (see, for instance, the testimonies of BK and BM).

In the present case, if the Applicant's temporary appointment had not been unlawfully terminated on 4 June 2020, it is reasonable to assume that he would have kept his job until the expiry of his appointment on 31 December 2020. This means that he would have been paid his regular salary from UNHCR, including all related benefits and entitlements, until then. The Tribunal notes that moral damages can only be awarded under art. 10.5(b) of the Dispute Tribunal's Statute, which requires that such compensation for harm must be supported by evidence. As the Applicant has submitted no evidence of non-pecuniary (moral) harm, the Tribunal finds that no basis exists for awarding any such compensation.

Decision Contested or Judgment/Order Appealed

Imposition of disciplinary sanction of separation from service, with compensation in lieu of notice, without termination indemnity.

Legal Principle(s)

The Appeals Tribunal has consistently held the “[j]udicial review of a disciplinary case requires [the Dispute Tribunal] to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration”. In this context, [the Dispute Tribunal] is “to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence”. In this regard, “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred”, and when “termination is a possible outcome, misconduct must be established by clear and convincing evidence”. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it “means that the truth of the facts asserted is highly probable”.

The Appeals Tribunal has generally held that the Administration enjoys a “broad discretion in disciplinary matters; a discretion with which [the Appeals Tribunal] will not lightly interfere” (see *Ladu* 2019-UNAT-956, para. 40). This discretion, however, is not unfettered. As the Appeals Tribunal stated in its seminal judgment in *Sanwidi* 2010-UNAT-084, at para. 40, “when judging the validity of the exercise of discretionary authority, ... the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate”. The Appeals Tribunal, however, underlined that “it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him” or otherwise “substitute its own decision for that of the Secretary-General” (see *Sanwidi*, para. 40).

The Tribunal observes that the Appeals Tribunal in *Applicant* 2022-UNAT-1187 (para. 67) provided guidance on how to test the credibility of witnesses and review contradicting witness accounts.

The Statute of the Dispute Tribunal provides in art. 10.5 an exhaustive list of remedies, which the Tribunal may award. In *Laasri* 2021-UNAT-1122 (para. 63), the

Appeals Tribunal set out that “the very purpose of in lieu compensation is to place the staff member in the same position in which he or she would have been, had the Organization complied with its contractual obligations”. It further held that the Tribunal “shall ordinarily give some justification and set an amount that the Tribunal considers to be an appropriate substitution for rescission or specific performance in a given and concrete situation”.

The Tribunal notes that under the consistent jurisprudence of the Appeals Tribunal, the very purpose of compensation, including in lieu compensation, is that the Applicant is to be placed in the same position he would have been in had UNHCR complied with its obligations. As much as in lieu compensation is “not compensatory damages based on economic loss”), the point of departure for the Tribunal’s considerations is the actual financial impact that the unlawful contested decision had on the Applicant’s situation, also because it “shall not award exemplary or punitive damages” under art. 10.7 of its Statute.

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

Full judgment

[Full judgment](#)

Applicants/Appellants

Saleh

Entity

UNHCR

Case Number(s)

UNDT/NY/2021/048/T

Tribunal

UNDT

Registry

New York

Date of Judgement

30 Jun 2022

Duty Judge

Judge Adda

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary measure or sanction

Abuse of authority

Facts (establishment of) / evidence

In-lieu compensation

Non-pecuniary (moral) damages

Disciplinary matters / misconduct

Compensation

Applicable Law

Staff Regulations

- Regulation 1.2(b)

- Regulation 1.2(e)
- Regulation 1.2(g)
- Regulation 1.2(m)

Staff Rules

- Rule 1.2(q)
- Rule 10.2(a)(viii)

UNDT Statute

- Article 10.5(a)
- Article 10.5(b)
- Article 10.7

Related Judgments and Orders

2019-UNAT-955
2015-UNAT-550
2013-UNAT-302
2011-UNAT-164
2019-UNAT-956
2020-UNAT-1024
2010-UNAT-084
2014-UNAT-403
2019-UNAT-913
2018-UNAT-862
2018-UNAT-819
2018-UNAT-811
2014-UNAT-410
2021-UNAT-1121
2021-UNAT-1122
2010-UNAT-059
2014-UNAT-469
2017-UNAT-764
2020-UNAT-1040