

# 2022-UNAT-1304, James Songa Kilauri

## UNAT Held or UNDT Pronouncements

UNAT noted that the only issue on appeal was the issue of appropriate compensation for the unlawful contested decision. UNAT found that the UNDT appropriately found that the requested compensation in the amount of two years' net base salary was unwarranted as it would exceed the emoluments to which he would have been entitled absent the unlawful termination. UNAT found no merit in Mr. Kilauri's contention that the UNDT failed to consider the nature and level of the post he formerly occupied and the chances of renewal beyond the expiry of his fixed-term contract but for his unlawful termination. UNAT found that Mr. Kilauri failed to demonstrate how his previous post (which appeared equivalent in nature) should affect the award for compensation in lieu or should lead to a higher award for compensation. UNAT also dismissed Mr. Kilauri's submission that the award of compensation in the amount of the net base salary for the remainder of the fixed-term appointment less monies already paid in lieu of notice and termination indemnity did not place him in the same position in which he would have been had the Administration not made its unlawful decision. Had the termination not occurred, Mr. Kilauri would have been entitled to receive his net base salary for the remainder of his fixed-term appointment. However, he had already received monies in the form of the one-month notice and termination indemnity which were no longer applicable as there was no longer a termination due to the rescission order. UNAT further found no merit in Mr. Kilauri's contention that the Dispute Tribunal conflated in lieu compensation under Article 10(5)(a) with compensation for harm under Article 10(5)(b) when it deducted the one-month notice and termination indemnity. The deduction of these monies was to ensure that Mr. Kilauri was placed in the position he would have been in had the contested decision not occurred. UNAT found that while Mr. Kilauri argued that the possibility of renewal should be considered, he failed to provide evidence to support a conclusion that a renewal of the fixed-term appointment was more probable than not. The Dispute Tribunal judiciously exercised its discretion in awarding the in-lieu compensation by considering relevant circumstances of this case including the length of the fixed-term appointment, the nature of the appointment, funds already reimbursed to the applicant, and Mr. Kilauri's submissions and evidence. UNAT found that by rescinding the contested termination, Mr. Kilauri was not entitled to the termination notice or indemnities as part of the compensation in lieu of rescission; he was however entitled to receive any entitlements or payments he would have been entitled to at the expiry of his fixed-term appointment as additional compensation. Finally, regarding Mr. Kilauri's request for compensation for harm, including for loss of opportunity and career advancement, Mr. Kilauri did not identify specific loss which the UNDT failed to consider; thus no award for harm or material damages could be made.

## Decision Contested or Judgment/Order Appealed

Mr. Kilauri, a former UNDP staff member challenged the termination of his fixed-term appointment due to facts anterior to his appointment, but relevant to his suitability, that became known after his appointment. In Judgment No. UNDT/2021/107, the UNDT determined that the termination decision was unlawful because Mr. Kilauri's due process rights had been violated by the lack of opportunity to make representations on the findings of fraud concerning his previous, non-staff appointment before the termination of his fixed-term appointment. The UNDT rescinded the contested decision and awarded in-lieu compensation in the amount of Mr. Kilauri's net base salary for the remainder of his fixed-term appointment less the one-month salary and the termination indemnity previously granted to him. The UNDT however denied Mr. Kilauri's request for compensation for moral and material damage because he did not identify and provide appropriate evidence of harm.

## Legal Principle(s)

The Appeals Tribunal should only interfere with the Dispute Tribunal's determination of remedy if it concludes the Dispute Tribunal exercised its discretion capriciously or upon wrong principle, did not bring an unbiased judgment to bear on the question, or did not act for substantial reasons. Similarly, regarding the quantum of compensation, the Appeals Tribunal shall show reluctance to interfere with an award of compensation by the tribunal that tried the case but will interfere if the lower tribunal has considered irrelevant facts, ignored relevant ones or where there is a substantial variation or a striking disparity between the award by the lower tribunal and the award the Appeals Tribunal considers ought to have been made. The purpose of in lieu compensation is to place the staff member in the same position in which they would have been had the Administration complied with its contractual obligations. In establishing the amount of in-lieu compensation, the Dispute Tribunal exercises discretion, but it 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 determination of the quantum of in-lieu compensation will depend on the circumstances of each case, but some relevant factors that can be considered, among others, are the nature of the post formerly occupied, the remaining time to be served by a staff member on his or her appointment, and their expectancy of renewal. Fixed-term appointments do not carry any expectancy, legal or otherwise, of renewal, irrespective of the length of service. An applicant must provide evidence to support a conclusion that a renewal of the fixed-term appointment is more probable than not, for example, evidence on whether there was a legitimate expectation of renewal, an implied term of renewal in the employment contract, circumstances of continuous service with verbal representations and/or conduct by the employer that would suggest continuous employment. As to compensation for harm, including for loss of opportunity and career advancement, the claimant bears the burden of establishing the negative consequences resulting from the illegality, namely that there is a "cause-effect" nexus between the illegality of the contested administrative decision and the harm itself. If the claimant does not discharge this burden, the compensation cannot be awarded.

#### Outcome

Appeal granted in part

Outcome Extra Text

The appeal is granted, in part. Mr. Kilaure is entitled to receive any payments he would have been entitled to at the expiry of his fixed-term appointment other than termination notice or indemnities. The remainder of the appeal is dismissed, and the remainder of Judgment No. UNDT/2021/107 is affirmed.

Full judgment

[Full judgment](#)

Applicants/Appellants

James Songa Kilaure

Entity

UNDP

Case Number(s)

2021-1632

Tribunal

UNAT

Registry

New York

Date of Judgement

28 Dec 2022

President Judge

Judge Sandhu

Language of Judgment

English

Issuance Type  
Judgment  
Categories/Subcategories  
Burden of proof  
Evidence of harm  
In-lieu compensation  
Loss of chance  
Pecuniary (material) damages  
No expectancy of renewal  
Disciplinary sanction  
Compensation  
Non-renewal  
Termination (of appointment)  
Applicable Law  
Staff Regulations

- Annex I
- Annex III
- Regulation 9.3(c)

UNDT Statute

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

Related Judgments and Orders

2021-UNAT-1165  
2021-UNAT-1122  
2019-UNAT-899  
2017-UNAT-712  
2017-UNAT-780  
2017-UNAT-724