

UNDT/2024/071, Fusco

UNAT Held or UNDT Pronouncements

Compensation *in lieu* is “not related at all to the economic loss suffered” (see *Nega* 2023-UNAT-1393, para. 62) and there is no duty to mitigate loss as a precondition for receiving *in lieu* compensation (see *Zachariah* 2017-UNAT-764). It is, according to the Tribunal’s Statute, an option that the Respondent can take instead of reinstating the Applicant in the service. Therefore, pecuniary loss or gain is not a relevant factor.

Consistent with the requirement to act fairly, justly and transparently, the Respondent bears the burden to show that the Applicant did not possess the core and functional competencies required for the positions (see, for instance, *Smith* 2017-UNAT-768).

In a distinguishable case of *El Kholi* 2017-UNAT-730, the Appeals Tribunal reduced the Dispute Tribunal’s award of two years to 18 months net base salary because it was established that the staff member failed to cooperate fully and to express interest in Job Fairs. Contrast that with *Fasanella* 2017-UNAT-765, where the Appeals Tribunal was satisfied that the staff member had unsuccessfully applied for posts and was awarded two years’ net base salary *in lieu* of reinstatement.

Decision Contested or Judgment/Order Appealed

The Applicant contested the following two decisions:

- 1) the decision to separate him “by termination without applying appropriate priority consideration for suitable available posts”, and
- 2) the decision not to select him for the post of Director, Brussels Office, Public Partnership Division (“PPD”).

Legal Principle(s)

It is a well-established legal principle that to be reviewable, an administrative decision must be final. A reviewable decision is one that “is of an administrative nature, adversely affects the contractual rights of a staff member and has a direct, external legal effect... The rationale for this principle is the idea that judicial review should concentrate pragmatically on consequential decisions of a final nature” (see, *O’Brien* 2023-UNAT-1313, para. 24, and also *Michaud* 2017-UNAT-761, para 50).

Under staff regulation 9.3(i) and staff rule 9.6(c)(i), the Secretary-General may terminate the appointment of a staff member if the necessities of service require abolition of the post or reduction of the staff.

"As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker’s decision" (*Sanwidi* 2010-UNAT-084, para. 42).

When deciding the amount of *in lieu* compensation, the Tribunal must ensure that the staff member is placed in the same position he or she would have been in, had the Organization complied with its contractual obligations (see *Kilauri* 2022-UNAT-1304 and *Ashour* 2019-UNAT-899, para. 18).

Outcome

Judgment entered for Applicant in full or in part
Outcome Extra Text

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Full judgment

[Full judgment](#)

Applicants/Appellants

Fusco

Entity

UNICEF

Case Number(s)

UNDT/NY/2023/008

Tribunal

UNDT

Registry

New York

Date of Judgement

2 Oct 2024

Duty Judge

Judge Sikwese

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Priority consideration

Duty of mitigation

Burden of proof

Permanent appointment

Restructuring

Termination of appointment (see also, Termination of appointment)

Full and fair consideration

Abolition of position

Abolition of post

Compensation

Non-renewal

Appointment (type)

Reassignment or transfer

Separation from service

Staff selection (non-selection/non-promotion)

Termination (of appointment)

Applicable Law

Staff Rules

- Rule 11.2 (c)
- Rule 13.1
- Rule 9.3
- Rule 9.6 (c)(i)
- Rule 9.6(e)

UNDT Statute

- Article 10.5(a)
- Article 8.1

UNICEF Administrative Instructions

- CF/AI/2010-001
- CF/AI/2016-005

Related Judgments and Orders

2023-UNAT-1313

2017-UNAT-761

2010-UNAT-084

2018-UNAT-847

2021-UNAT-1088

2017-UNAT-765

2017-UNAT-730

2016-UNAT-688

2017-UNAT-762

2023-UNAT-1393

2017-UNAT-768

2022-UNAT-1304

2019-UNAT-899

2017-UNAT-764