



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

Judgment No. 2022-UNAT-1265

**Faraj El-Awar
(Appellant/Respondent)**

v.

**Secretary-General of the United Nations
(Respondent/Appellant)**

JUDGMENT

Before: Judge Sabine Knierim, Presiding
Judge John Raymond Murphy
Judge Dimitrios Raikos

Case No.: 2021-1586 & 2021-1587

Date of Decision: 1 July 2022

Date of Publication: 19 August 2022

Registrar: Weicheng Lin

Counsel for Appellant/Respondent: Omar Yousef Shehabi, OSLA

Counsel for Respondent/Appellant: Noam Wiener

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal or UNAT) has before it two appeals against Judgment No. UNDT/2021/060 (Impugned Judgment) issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) on 26 May 2021. The UNDT found that Mr. El-Awar's non-renewal was unlawful as the proffered reason that there was lack of funds for Mr. El-Awar's post was not matched by the facts. It awarded Mr. El-Awar three months' net-base salary as in-lieu compensation to rescission of the non-renewal decision and three months' net-base salary as pecuniary damages. The Secretary-General appeals on merits. Mr. El-Awar appeals solely on the compensation. For the reasons set out below, we grant the Secretary-General's appeal in part; Mr. El-Awar's appeal is dismissed.

Facts and Procedure

2. Mr. El-Awar, a former Senior Coordination Officer with the UN Human Settlements Programme (UN-Habitat), contested before the UNDT the non-renewal of his fixed-term appointment beyond 30 September 2018.

3. In May 2008, Mr. El-Awar joined UN-Habitat as a Programme Manager for the Global Water Operators Partnerships Alliance (GWOPA), UN-Habitat, on a fixed-term appointment at the L-5 level. In 2015, Mr. El-Awar was appointed as Head, GWOPA Secretariat, at the P-5 level, following a competitive selection process. His fixed-term appointment was renewed multiple times on an annual basis. Until his transfer to Nairobi in November 2017, the funds for his post were allocated from the GWOPA funds.

4. By a memorandum dated 31 August 2017 from the Under-Secretary-General and Executive Director of UN-Habitat, Mr. El-Awar was informed that he was to be transferred to a post in the Urban Basic Services Branch (UBSB) at the UN-Habitat Headquarters in Nairobi, effective 1 October 2017. The transfer was implemented as a lateral move at the P-5 level, and Mr. El-Awar was given a one-year fixed-term appointment. Mr. El-Awar's job in UBSB was, according to the 31 August 2017 memorandum, to support "the development and implementation of Urban Basic Services Programme activities, with a focus on Water and Sanitation, in collaboration with partners at various levels of engagement". Mr. El-Awar was further to "promote and oversee projects and programmes in the expansion of sound urban basic services for the urban poor through the implementation of the approved work programme of the

organization as well as support capacity development, tool development and facilitating networking with partners and programmes contributing to the enhancement of policy dialogues at UN-Habitat and globally”. Finally, Mr. El-Awar was to “provide strategic advice on the programmes on water and sanitation”. Nothing was stated regarding the funding source of Mr. El-Awar’s UBSB post.

5. On 6 September 2017, by e-mail, Mr. El-Awar accepted the reassignment, indicating, *inter alia*, that he understood that his reassignment would “not have any implications on the nature of [his] Fixed Term renewable contract”. Mr. El-Awar thereafter took up the position.

6. In an e-mail dated 30 July 2018, the Coordinator of UBSB informed M. El-Awar about the possibility of his post not being renewed:

This is to keep you informed as a project funded staff member.

As you are already aware, the organization has been facing major budgetary constraints. More specifically the water and sanitation project portfolio in UBSB is facing a very tight financial situation in 2018. I note with concern that to date no new projects earmarked towards water and sanitation have been raised, with the exception of one small project earmarked towards the Mekong Region facilitated by [first name of a person redacted]. Over the last seven years the water and sanitation project portfolio of UBSB has shrunk and as a consequence we have not been able to replace project funded colleagues who retired and in some cases have not been able to extend contracts when projects expired.

I am therefore informing you of this situation and that we may not be able to renew your appointment if it continues.

7. By a memorandum dated 31 August 2018 from the Director of the Programme Division in UN-Habitat, Mr. El-Awar was notified that his fixed-term appointment would not be renewed beyond its expiry on 30 September 2018. The Director explained that “This decision is due to the fact that there are no resources available to fund your position even after efforts have been made to look for funding and suitable positions funded by other projects”.

8. On 29 November 2019, Mr. El-Awar filed his application with the UNDT. In the application, Mr. El-Awar claimed that the stated reasons for non-renewal were not supported by the facts. He was never informed of the source of funding for his post and was unable to identify the specific project from which the funds were derived. In response to Mr. El-Awar’s request for suspension of action, UN-Habitat stated that he was assigned to the UBSB Central Project;

however, UN-Habitat did not disclose the terms of reference of that project, its budget and structure, and Mr. El-Awar's specific role and contribution to the alleged project.

9. To support his claim that the proffered reason for the contested decision was not supported by evidence, Mr. El-Awar presented a screenshot from Umoja (the official Enterprise Resource Planning system of the United Nations Secretariat) showing that he was one of six staff members assigned to the UBSB Trust Fund cost centre and yet he was the only staff whose contract was not renewed. As remedies, Mr. El-Awar requested the rescission of the contested decision and reinstatement, or, as alternative, the award of two years' net-base salary as "compensation for the harm suffered".

10. On 17 February 2021, the UNDT issued Order No. 53 (GVA/2021). In the Order, the UNDT defined the issues of the case as follows: (a) whether the non-renewal decision was lawful; (b) In case the non-renewal was unlawful, what remedies Mr. El-Awar would be entitled to under the UNDT's Statute. The UNDT then ordered the Secretary-General to file additional evidence supporting its claim that the contested decision was due to lack of funds and instructed the parties to file closing submissions.

11. On 3 March 2021, Mr. El-Awar filed a motion to request a case management discussion (CMD) and to seek production of evidence in the Organization's possession and present further evidence.

12. On 5 March 2021, the Secretary-General submitted the following additional evidence: (a) a written statement of the Programme Management Officer, UBSB; (b) a project financial report for the Urban Basic Services Programme Development as of 31 August 2018, accompanied by Umoja record dated 19 October 2018; and (c) a chart providing detailed financial information of eight UBSB project portfolios in 2018.

13. On 10 March 2021, by Order No. 66 (GVA/2021), the UNDT rejected Mr. El-Awar's motion dated 3 March 2021, noting that the factual circumstances at the basis of the non-renewal decision were already fully briefed.

14. On 19 March 2021 and 2 April 2021, respectively, Mr. El-Awar and the Secretary-General submitted closing submissions. On 7 April 2021, Mr. El-Awar submitted the final observations and reiterated his request for order of disclosure of further documents.

Impugned Judgment

15. The UNDT held that the non-renewal decision was unlawful because the provided reason for it, namely, lack of funding, was not based on correct facts.

16. The UNDT first examined the underlying funding sources for Mr. El-Awar's post. After reviewing e-mails from the Coordinator of UBSB and Mr. El-Awar's workplan for 2018-2019, the UNDT concluded that Mr. El-Awar's job was related to more than just one of the projects on water and sanitation in UBSB and rather concerned the entire portfolio and he also undertook other and more general tasks and functions related to UN-Habitat. The UNDT concluded that there was no documentary evidence supporting UN-Habitat's claim that the funding source for Mr. El-Awar's post was limited to only one of the water and sanitation projects and programmes on UBSB's portfolio, namely "Urban Basic Services Programme Development". In this regard, the UNDT ruled that the written statement provided by the UBSB Program Manager Officer, where this Officer indicated otherwise, had no probative evidentiary value as it was specifically tailored for the present litigation.

17. The UNDT further noted that Mr. El-Awar accepted the reassignment with the understanding that his reassignment would "not have any implications on the nature of [his] Fixed Term renewable contract". The UNDT found that since UN-Habitat proceeded with the reassignment without making any comments on Mr. El-Awar's condition, it silently accepted it and therefore the funding sources of his fixed-term appointment never changed upon reassignment. The UNDT held that since Mr. El-Awar never accepted or was informed that the funding sources for his UBSB post were to be limited to one single project in UBSB's portfolio of water and sanitation projects and programmes and there was no other documentary evidence showing such limitation, Mr. El-Awar's post was to be funded through the entire portfolio of projects and programmes on water and sanitation in UBSB.

18. The UNDT noted that pursuant to the 2018 portfolio spreadsheet, the total estimated fund balance was USD 717,121 at the relevant time, also taking into account future commitments, and one-year extension of Mr. El-Awar's contract would have been easily covered by the available funds. UN-Habitat argued that the funding of some of the other projects on the portfolio were specifically earmarked for other projects and therefore not available for Mr. El-Awar's post under the Financial Rules and Regulations, but referring to *Loose*, the UNDT rejected this argument on the basis that UN-Habitat provided no evidence or further submissions thereon.

19. Further, the UNDT noted that even if it accepted UN-Habitat's argument that funding for other projects could not be used for Mr. El-Awar's post, USD 50,294.71 was available at the relevant time for the "Urban Basic Services Programme Development" project and therefore Mr. El-Awar's contract could have been extended for some months if not a full year. In this regard, UN-Habitat argued that USD 33,986 out of USD 50,294.71 had already been committed for other purpose, but the UNDT rejected this argument as such commitments were not reflected in the contemporaneous Umoja record dated 19 October 2018 and only reflected in the 2018 portfolio spreadsheet prepared specifically for this litigation.

20. Based on the above analysis, the UNDT held that the provided reason for the contested decision, namely lack of funding, was not supported by evidence. The UNDT therefore decided that it was not necessary to examine whether the contested decision was tainted by ulterior motives, as argued by Mr. El-Awar.

21. With regard to remedies, the UNDT observed that the parties had failed to provide evidence of economic loss: the UNDT noted that in accordance with Order No. 53 (GVA/2021), when the parties were directed to provide closing statements, they were evidently also expected to present their submissions on relief, since the question of remedies was explicitly outlined as one out of two issues of the present case in para. 9(b) of that Order. As both parties failed to do so, the UNDT proceeded based on the other pleadings and documents on record. In this regard, the UNDT noted that in Order No. 53 (GVA/2021), the parties were informed that the UNDT would proceed to adjudication after submission of the parties' respective closing statements.

22. The UNDT first ordered the rescission of the contested decision, which it found to be unlawful, and proceeded to set the in-lieu compensation. The UNDT noted that under the Appeals Tribunal's jurisprudence, in-lieu compensation is not compensatory damages based on economic loss and the amount is determined based on the circumstances of the case, allowing due deference to the trial judge in exercising his or her discretion in a reasonable way following a principled approach. In light of the Appeals Tribunal's jurisprudence and several factors such as Mr. El-Awar's seniority, the type of contract held, and the chance of renewal of the contract in a position still required by the Administration, the UNDT set the amount at three months' net-base salary at the P-5 level at the time of Mr. El-Awar's separation.

23. As to pecuniary damages, the UNDT noted that in a non-renewal case, the compensable period is typically the same as the last appointment and a staff member has to demonstrate to have made efforts to mitigate the economic loss. Noting that Mr. El-Awar failed to show his efforts to mitigate damages and taking into account his successful career with UN-Habitat, which should give him a good chance of finding new employment, the UNDT awarded three months' net-base salary as pecuniary damages. The UNDT did not award non-pecuniary damages as Mr. El-Awar did not make any specific claim for it, nor did he provide any evidence for such harm.

Procedure before the Appeals Tribunal

24. On 26 July 2021, the Secretary-General filed an appeal which was registered as UNAT Case No. 2022-1586.

25. On 27 September 2021, Mr. El-Awar filed an answer.

26. On 26 July 2021, Mr. El-Awar filed an appeal which was registered as UNAT Case No. 2021-1587.

27. On 27 September 2021, the Secretary-General filed his answer to Mr. El-Awar's appeal.

Submissions

Mr. El-Awar's Appeal (2021-1587)

28. Mr. El-Awar's appeal contests the UNDT's assessment of in-lieu compensation and economic loss. He requests the UNAT to modify the impugned Judgment and award two years' net-base salary as alternative compensation and economic loss. Alternatively, he seeks the UNAT to remand the case to the UNDT for additional findings of facts regarding whether the non-renewal decision had an improper motive; if so, Mr. El-Awar's chance of renewal in a position still required by the Administration in the absence of improper motive; and his economic loss.

29. In support, Mr. El-Awar argues the UNDT failed to present convincing reasoning for limiting in-lieu compensation and compensation for economic loss at three months' net-base salary, respectively. Firstly, by deeming it unnecessary to examine Mr. El-Awar's evidence of

prejudice, bias or improper motive, the UNDT failed to determine the “nature of the irregularity” affecting the contested judgment, as the UNAT’s jurisprudence requires in setting in-lieu compensation. Secondly, the UNDT erred in concluding that it would be too speculative to extend the compensable period beyond Mr. El-Awar’s first one-year renewal, where the evidence shows that all UN-Habitat staff on the same funding source at the time of non-renewal either remain with UN-Habitat today or have left voluntarily. Even then, the UNDT inexplicably awarded only three months’ net-base salary, i.e., one-fourth of the compensable period. Thirdly, given that UN-Habitat based the non-renewal decision exclusively on a lack of funding, the UNDT erred by considering that Mr. El-Awar might “legitimately” have been separated on other grounds, in reference to disparaging, unfounded and irrelevant comments UN-Habitat made in this litigation regarding Mr. El-Awar’s work performance and other matters. The resulting award of a cumulative six months’ net-base salary is a substantial variation from the compensation awarded in comparable cases, lacking a sound or reasonable basis, and is manifestly unreasonable.

30. By declining to consider evidence of prejudice, bias or improper motive, the UNDT failed to determine the nature of the contested decision’s irregularity. The UNAT jurisprudence requires the UNDT to consider the “seriousness of the breaches” in setting compensation and thus the UNDT has erred in law in failing to make the assessment as to whether there was prejudice, bias or improper motive as is required to set the compensation. Rather, determining that the non-renewal decision was not justified by a bona-fide lack of funding, the UNDT considered it “not necessary ... to examine whether the decision was tainted by ulterior motives,” as Mr. El-Awar alleged. Under the UNAT’s established jurisprudence, in setting compensation the UNDT was required to decide whether the non-renewal decision was just a good faith administrative error or a deliberate act of revenge. Its failure to do so constitutes clear prejudicial error.

31. In Order No. 53 (GVA/2021), its first judicial action, the UNDT erroneously determined the circumstances of Mr. El-Awar’s reassignment wholly irrelevant to the present litigation, i.e., not bearing on the nature of the irregularity of the non-renewal decision. It directed closing submissions and indicated judgment on the documents, thereby ruling out an oral hearing, a CMD, or production of evidence. It denied Mr. El-Awar’s motion for relief from this order.

32. As evidence of ulterior motives, Mr. El-Awar thus directed the UNDT to the sworn declaration by senior UN-Habitat managers submitted in Case No. UNDT/GVA/2017/035, including Dr. C (who made the transfer decision), Mr. RT (who made the non-renewal decision), and Mr. AD, his supervisor before and after the reassignment. The declarants averred that they held a series of meetings regarding GWOPA in mid-February 2017, in which they “deplored [Mr. El-Awar]’s actions” concerning the alliance’s hosting arrangements and discussed with concern the “perceived loyalty of GWOPA staff to [Mr. El-Awar] *vis-à-vis* their loyalty to the Organization”. “A measure of common sense, logic and human experience” dictates that the senior managers who ousted Mr. El-Awar from GWOPA for his supposed disloyalty towards UN-Habitat might not have, one year later, used best efforts to renew his appointment, as UN-Habitat claimed. If Mr. El-Awar had proven that his non-renewal was motivated by prejudice, bias or improper purpose, then three months’ net-base salary unquestionably would be a derisory level of compensation under this Tribunal’s jurisprudence. By unjustifiably denying Mr. El-Awar the opportunity to litigate that claim fully, and declining to consider existing evidence supporting that claim in rendering judgment on the papers, the UNDT failed to ascertain the nature of the irregularity tainting the contested decision. It thus erred in assessing the in-lieu compensation.

33. In addition, the UNDT erred in defining the compensable period and failed to consider relevant criteria for in-lieu compensation and economic loss. The UNDT was in no position to assess “the chance of renewal of the contract in a position still required by the Administration” given that it declined to examine any aspect of the position to which UN-Habitat reassigned Mr. El-Awar, other than its funding. Additionally, the UNDT erred by imposing artificial bright-line limits on in-lieu compensation for fixed-term appointments. This Tribunal has routinely awarded in-lieu compensation in excess of the time remaining on an applicant’s fixed-term appointment or her/his last contract duration. Even if the UNDT were justified in breaking with the weight of the UNAT’s jurisprudence and capping in-lieu compensation and economic damages each at 12 months’ net-base salary (which Mr. El-Awar disputes), it gave no indication why it awarded only one-fourth of that amount. The UNDT identified one year from the date of separation—not three months—as the compensable period, beyond which “it would be too speculative under the Appeals Tribunal’s jurisprudence to extend beyond the compensable period any further”. However, Mr. El-Awar was a senior staff member with over 10 years of distinguished service with UN-Habitat. The Secretary-General represented in this litigation that it reassigned him based on urgent

need. It is thus manifestly unreasonable to set in-lieu compensation at three months' net-base salary.

34. The UNDT further erred by ignoring uncontroverted evidence and factoring in extraneous consideration in setting compensation. The UNDT erred in considering that UN-Habitat might have not renewed his fixed-term appointment for reasons other than lack of funding as related to his prior sick leave. The UNAT has cautioned against assuming continued employment in relation to compensation awards beyond the statutory limit of two years' net-base salary and cautioned that various possibilities for separation render an award fraught with ambiguity and uncertainty.

35. Lastly, Mr. El-Awar was denied the opportunity to present evidence of economic loss before the UNDT. Order No. 53 (GVA/2021), the UNDT's first judicial action, came 26 months after Mr. El-Awar filed his application. Except for allowing UN-Habitat to file additional evidence of its "critical financial situation", the UNDT declared the record closed and directed closing submissions, expressly stating that "the closing statement is solely to be based on previously filed pleadings and evidence, and no new pleadings or evidence are allowed at this stage". The Order made no similar exception for Mr. El-Awar to address economic loss accruing over the intervening two years. The UNDT denied Mr. El-Awar's motion for relief from the Order and his request to hold a CMD to resolve evidentiary issues, including evidence of economic loss. Because Order No. 53 (GVA/2021) instructed "no new pleadings or evidence" and without the benefit of a CMD to clarify, Mr. El-Awar believed that the trial judge would bifurcate merits and liability, as he did last year in another non-renewal case, *Quatrini*.¹

36. In sum, Mr. El-Awar's evidence of economic loss was, quite obviously, not available at the time of the application, but accrued in the two-plus year period between the application and the UNDT's first judicial action, which declared the evidentiary record in the case closed (with one exception for UN-Habitat). Mr. El-Awar moved unsuccessfully to reopen the record and for a CMD to clarify how evidence of economic loss might be introduced, contrary to the terms of Order No. 53 (GVA/2021).

¹ *Quatrini v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/053.

The Secretary-General's Answer

37. The Secretary-General respectfully requests that the UNAT dismiss the Appeal. Alternatively, should the UNAT not be persuaded by the appeal submitted by the Secretary-General on 26 July 2021, he requests that the case be remanded, as also requested by Mr. El-Awar. The Secretary-General requests, however, that in such eventuality the remand be made for a *de novo* trial on the merits before a new judge.

38. The UNDT correctly found Mr. El-Awar failed to meet its burden and did not demonstrate that the non-renewal decision was motivated by bias or improper motives.

39. Mr. El-Awar claims that the decision by UN-Habitat's senior management to limit his authority when he served as the head of GWOPA and his transfer from the role of head of GWOPA in Barcelona to the position of Senior Coordination Officer in Nairobi are evidence that should have prompted the UNDT to hold that the non-renewal decision was motivated by prejudice and bias. Mr. El-Awar's argument is misplaced. Contrary to the misleading presentation in his Appeal, the question of whether the decision to withdraw the authority previously delegated to Mr. El-Awar was lawful was not just submitted for review with the UNDT on 1 June 2017. Rather, it was the subject of UNDT Judgment No. UNDT/2018/116 (El-Awar) issued on 23 November 2018, which held that the decision was lawful. It was also the subject of UNAT Judgment No. 2019-UNAT-931 (El-Awar), issued on 28 June 2019, which upheld the UNDT judgment and held that "the decisions to subject [Mr. El-Awar] to stricter supervision were, moreover, tailored proportionally to the desired outcome of ensuring GWOPA's continued presence in Barcelona without unduly restraining [Mr. El-Awar] from carrying out his job. As such the contested decisions were a legitimate, rational and proportional exercise of the managerial prerogative". Mr. El-Awar's challenge to the lawfulness of the decisions to limit his authority when he served as the head of GWOPA and to transfer him from the role of head of GWOPA to that of Senior Coordination Officer in Nairobi, therefore, is *res judicata*, and Mr. El-Awar is collaterally estopped from raising that issue in this case.

40. Even if the contested decision had been tainted by bias or improper motives, that fact alone is not a reason to alter the quantum of damages. Mr. El-Awar is wrong, because if the contested decision were determined to be unlawful, any award to Mr. El-Awar would compensate him for damages he had actually sustained, and not for the mere alleged

unlawfulness of the decision itself. The quantum of the compensation is determined based on the damages actually sustained, not on the type of unlawfulness that brought on that damage. Mr. El-Awar did not ask for compensation for pecuniary damages and therefore the UNDT did not err when it did not request additional evidence. In Mr. El-Awar's request for management evaluation, in his application, and in his closing arguments, Mr. El-Awar had consistently requested the same relief: that the contested decision be rescinded or that damages in lieu of rescission be awarded to him. In the absence of a request to receive compensation for pecuniary damages, the UNDT had no authority to award Mr. El-Awar such damages, and the UNDT had no reason to provide the parties with an opportunity to provide evidence to prove the existence of such damages.

41. The UNDT determined the quantum of compensation in lieu of rescission of the contested decision by taking into consideration "the seniority of [Mr. El-Awar], the type of contract held, and the chance of renewal of the contract in a position still required by the Administration". The argument made by Mr. El-Awar, that in other cases greater compensation has been awarded in lieu of rescission of the contested decision is not compelling absent a comparison of the specific circumstances of each case.

Secretary-General's Appeal (2021-1586)

42. The Secretary-General requests the UNAT to vacate the impugned Judgment in its entirety and affirm the non-renewal decision. In support, he argues that the UNDT erred in fact and law by shifting to the Organization the burden to prove the lawfulness of the contested decision.

43. Mr. El-Awar failed to provide evidence to establish a sufficient or apparent case of adequacy of resources. Mr. El-Awar's application largely referred to arguments raised by him and rejected by both the UNDT and the UNAT in relation to his previous position and arguments related to his transfer from the previous position to the position he held at the time of the non-renewal of his fixed-term appointment. As the UNDT correctly held, the issues related to Mr. El-Awar's previous position were the subject of UNDT Judgment No. UNDT/2018/116 (El-Awar) and UNAT Judgment No. 2019-UNAT-931 (El-Awar). The issues related to Mr. El-Awar's transfer to his new position at the UN-Habitat headquarters were time-barred. It was only in the last two sentences of the last paragraph of Mr. El-Awar's application that he alleged, erroneously, that all UBSB staff members other than him have

been retained in employment and claimed that this was proof that the decision not to renew his fixed-term appointment could not have been brought about by lack of funding.

44. The UNDT erred in law and fact in finding that Mr. El-Awar's fixed-term appointment was not discontinued due to a lack of funding. The UNDT found that the evidence provided by Mr. El-Awar was insufficient to prove that UN-Habitat had acted lawfully when it determined it did not have sufficient funding to renew Mr. El-Awar's fixed-term appointment and held that, therefore, the contested decision was "wrong and not based on correct facts". This finding was erroneous. The Secretary-General provided ample evidence to support the factual basis underlying the contested decision in the form of a declaration by the UBSB Program Management Officer (Declaration); a printout from Umoja of the 31 August 2018 Balance of the Urban Basic Services Programme Development project, the project from which Mr. El-Awar's post was programmed (31 August 2018 Project Balance); and a chart produced by the UBSB Program Management Officer providing an accounting of the funds dedicated to the various projects financed by the Urban Basic Services Fund (Chart).

45. The UNDT erred when it found that Mr. El-Awar's salary could have been paid from other projects financed by the Urban Basic Services Fund. The UNDT found that at the time the contested decision was taken, USD 717,121 remained in Urban Basic Services Fund and that Mr. El-Awar's ongoing salary could have been paid from these moneys. This finding is erroneous, as it is inconsistent with the Financial Regulations and Rules of the United Nations. According to Financial Regulations 3.12 and 3.13, voluntary contributions may be accepted by the Secretary-General for specific purposes and treated as trust funds under Financial Regulations 4.13 and 4.14. A trust fund can include amounts contributed by various donors for various projects. In the present case, in accordance with the Financial Regulations and Rules, the Urban Basic Services Fund contained moneys contributed by various donors that were already earmarked for specific projects. The moneys donated for each project, though kept in one trust fund, could only be used for the project for which they were donated and were not available to pay the ongoing salary of Mr. El-Awar.

46. The Chart presented the eight different projects that were financed by the Urban Basic Services Fund. However, contrary to the UNDT's findings, the fact that all eight projects were financed from the same trust fund did not mean that the moneys contributed for one project and placed in the trust fund could be diverted to a different project. For example, according to the Chart, the European Investment Bank contributed USD 1,996,263

for a sanitation project in Lake Victoria. These moneys, which were deposited in the Urban Basic Services Fund, could only be used to finance the materials required for and the salaries staff members assigned to that sanitation project. They could not be diverted to fund Mr. El-Awar's salary on a completely different project. In view of the foregoing, the UNDT's finding that "no mention is anywhere in the documentary evidence that the funding source of [Mr. El-Awar's position] would be limited to only one of the water and sanitation projects and programmes on [UBSB's] portfolio" demonstrates a fundamental error with respect to the financial operations of the Organization. Positions are programmed to be financed from a specific programme or project, not from any moneys in a given trust fund. As expressly stated by the Secretary-General in his Reply, Mr. El-Awar's position was financed from the Urban Basic Programme Development project. Mr. El-Awar's position could not be financed by moneys earmarked by donors and maintained in the trust fund for other projects. There was no "mention" of this in the documentary evidence because it is part of the basic operations of finances of the United Nations—positions are not funded by "slush" funds but according to programme budgets.

47. The UNDT erred in finding that evidence prepared by the Secretary-General for presentation to the UNDT had no probative value. The UNDT found that the Chart prepared by the UBSB Programme Management Officer had little probative value because it was produced "for the present litigation" and included information that was not reflected in the Umoja 31 August 2018 Project Balance. This finding is erroneous.

48. Pursuant to the evidence submitted by the Secretary-General to the UNDT, Mr. El-Awar's position was programmed against the Urban Basic Services Programme Development project, whose funds were held in the Urban Basic Services Fund along with the funds for seven other projects. When the Chart was produced on 24 September 2018, USD 32,427 was left in the budget for the Urban Basic Services Programme Development project kept in the Urban Basic Services Fund, of which USD 33,986 was slated to be paid to Mr. El-Awar as salary and entitlements for the duration of his appointment, leaving a net debt of USD 1,558 in the Urban Basic Services Programme Development project. Contrary to the UNDT's finding, other moneys kept in the Urban Basic Services Fund, relating to other projects, could not be used to finance Mr. El-Awar's salary, as that would constitute a violation of the Financial Regulations and Rules (and a breach of the contribution agreements with the donors of those funds who had agreed to donate them for specific other

purposes). Thus, the UNDT erred in finding that the evidence prepared by the Secretary-General for presentation to the UNDT had no probative value.

49. The UNDT erred in failing to distinguish the facts in *Loose*² from the facts in the present case. The UNDT refers to the UNAT's holding in *Loose*³ on two separate occasions as a basis for finding that in the instant case the Secretary-General did not adequately demonstrate that there were insufficient funds to renew Mr. El-Awar's appointment. The UNDT erred in making these references. The facts in *Loose*⁴ are significantly different from those in the instant case. In *Loose*,⁵ a position was financed through the contributions of Member States of the Convention on Certain Conventional Weapons. The Member States were in arrears in paying their dues to the Convention, and therefore no funds were available to pay Ms. Loose's salary. Consequently, the Administration informed Ms. Loose that her appointment would not be renewed. The UNAT found, however, that after the decision was made not to renew Ms. Loose's appointment, some of the Member States who were previously in arrears paid their dues, thereby enabling the renewal of Ms. Loose's appointment. In the instant case, there were no additional funds that could finance Mr. El-Awar's position. The facts of the instant case, therefore, are different than those in *Loose*,⁶ because in the instant case the Secretary-General provided evidence of the financial situation of the Urban Basic Services Programme Development project not only when the contested decision was made but also right up to the time of Mr. El-Awar's separation from service. Unlike in *Loose*,⁷ in the instant case there was no later infusion of funds into the Urban Basic Services Programme Development project's budget that could have enabled the renewal of Mr. El-Awar's fixed-term appointment. Thus, the UNDT erred in failing to distinguish the facts in *Loose*⁸ from the facts in the present case.

50. The UNDT erred in law when it awarded Mr. El-Awar compensation for pecuniary damages. The Statute of the UNDT provides in Article 10(5)(b) that the UNDT may award "compensation for harm, supported by evidence..." The UNAT has consistently held that "not

² *Hine-Wai Kapiti Loose v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1043.

³ *ibid.*

⁴ *ibid.*

⁵ *ibid.*

⁶ *ibid.*

⁷ *ibid.*

⁸ *ibid.*

every administrative wrongdoing will necessarily lead to an award of compensation under Article 10(5)(b) of the UNDT Statute,” and that “Article 10(5)(b) of the UNDT Statute only provides for an award of compensation for harm when supported by evidence”. In the instant case, although Mr. El-Awar neither sought compensation for damages, nor provided any proof of such damages, the UNDT nonetheless awarded him compensation for pecuniary damages at the rate of three months’ net-base salary. Accordingly, the UNDT erred in its award of pecuniary damages to Mr. El-Awar. In both his application and his closing arguments, Mr. El-Awar sought solely “rescission of the contested decision and reinstatement” or compensation in lieu of such reinstatement. Mr. El-Awar never requested compensation for damages. Mr. El-Awar also failed to present any proof that he sustained any damages. Indeed, the UNDT noted in the impugned Judgment that Mr. El-Awar had the onus of proving that he had sustained damages, and that he had not done so. Consequently, the UNDT had no grounds on which to determine Mr. El-Awar sustained any damages, and its award of pecuniary damages was not based on any evidence in the record. This is inconsistent with Article 10(5) of the UNDT Statute and the UNAT’s jurisprudence regarding the award of compensation for harm.

Mr. El Awar’s Answer

51. Mr. El-Awar urges the UNAT to dismiss the Secretary-General’s Appeal in its entirety, affirm the contested Judgment as it pertains to the merits, and grant Mr. El-Awar’s Appeal as it pertains to damages.

52. The UNDT properly applied the UNAT’s judgment in *Loose*.⁹ First, the Secretary-General claims that the UNDT erred in fact and law in applying the burden-shifting framework in cases of non-renewal for lack of funding that the UNAT inaugurated in *Loose*.¹⁰ He claims that this misapplication impermissibly shifted the burden of proof to him to justify the non-renewal decision and contravened the presumption of regularity. Relatedly, the Secretary-General claims that the UNDT erred by failing to distinguish the present case from *Loose*¹¹ on its facts. The general rule in cases of non-renewal (for any reason) has long been that the applicant must prove, by a preponderance of the evidence, that the non-renewal of

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ *ibid.*

his fixed-term appointment was “arbitrary or motivated by bias, prejudice or improper motive”; or that the reason which the administration gives for its exercise of discretion regarding appointments is not based on correct facts. This rule reflects the standard burdens of production and proof in cases challenging discretionary decisions. In *Loose*,¹² however, the UNAT recognised “the impracticability, if not the impossibility, and therefore the injustice, of putting a blanket onus (or burden as it was termed) of proof on a staff member” in cases of non-renewal for lack of funding because “the relevant financial and operational information relied on, supporting and justifying this decision, is likely to be unknown to the staff member”. The UNAT thus ruled that a “more nuanced application of a shifting onus of proof is appropriate for such cases”. *Loose*¹³ expressly held that cases of non-renewal for lack of funding should be resolved through the burden-shifting framework it established. The Secretary-General recognises this was the holding of the case. He later contradicts himself with a half-hearted and frivolous argument that *Loose*¹⁴ should be confined to its facts, as though the UNAT suggested a burden-shifting framework as obiter dictum.

53. Under *Loose*’s burden-shifting framework, “there is an initial onus on a staff member ... to establish a sufficient or apparent case of adequacy of resources to support a renewal or extension or other relevant grounds for not discontinuing the employment”.¹⁵

54. Thereafter, the burden does not shift back to the applicant. Rather, the UNDT is to decide the case on the evidence presented, without consideration of any burden of proof. Mr. El-Awar’s application included a payroll record which showed that at the time of his non-renewal, he was one of six staff members funded by the UBSB Trust Fund. He pleaded in his application that “[a]ll [other] staff members whose posts are funded by the same cost center remain in employment and/or have had their appointments renewed”. UN-Habitat never disputed this fact. The Secretary-General conspicuously makes no mention of Mr. El-Awar’s closing submission or his final observations to UN-Habitat’s closing submissions, his two substantive pleadings filed after the UNAT decided *Loose*.¹⁶ In his final observations, Mr. El-Awar clearly and succinctly demonstrated that he met his initial burden. Mr. El-Awar established that UN-Habitat claimed it could not renew his contract alone with

¹² *ibid.*

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ *ibid.*, para. 41.

¹⁶ *ibid.*

USD 50,295 in the relevant fund at the same time it managed to renew five GWOPA staff with USD 54,343 total in the corresponding fund (i.e., with USD 10,868 per staff member). The UNDT correctly found that Mr. El-Awar satisfied his initial burden under *Loose*¹⁷ by adducing these facts, all of which were either uncontroverted by UN-Habitat or clearly documented in the recorded evidence.

55. As requested in his Appeal in Case No. 2021-1587, Mr. El-Awar requests the UNAT to modify the impugned Judgment so as to award two years' net-base salary as alternative (in-lieu) compensation and for economic loss. Alternatively, should the UNAT decline to modify the impugned Judgment, or should it grant any part of the Secretary-General's Appeal, Mr. El-Awar requests the UNAT to remand the case to the UNDT for additional findings of fact regarding whether the non-renewal decision had an improper motive, Mr. El-Awar's chance of renewal of his appointment in the absence of improper motive, and his economic loss.

56. The UNDT correctly determined that the facts "demonstrated that [Mr. El-Awar] never accepted, or was ever informed of, that the funding source(s) for his UBSB post was/were to be limited to one single project in UBSB's portfolio of water and sanitation projects and programmes". The UNDT also correctly found that UN-Habitat failed to demonstrate there was no funding in other water and sanitation projects that could have been used to fund Mr. El-Awar's position, although his duties and responsibilities as specified in the reassignment memo spanned UBSB's entire water-and-sanitation portfolio. The UNDT noted that UN-Habitat "provided no evidence" to substantiate the claim that all other UBSB water-and-sanitation funding was earmarked this restrictively. The Secretary-General's argument on appeal here again rests on the fiction that Mr. El-Awar worked "on a completely different project" (Central Project) than any of the actual projects in the water-and-sanitation portfolio. As the UNDT correctly ruled, Mr. El-Awar's cross-cutting duties and responsibilities as set forth in the reassignment memo foreclose this argument. Accordingly, the UNDT correctly determined that for purposes of determining availability of resources for renewal, Mr. El-Awar's post was to be funded through the entire UBSB water-and-sanitation portfolio.

¹⁷ *ibid.*

57. The UNDT properly concluded that resources for renewal were available even if Mr. El-Awar's position were confined to a single project and funding source.

Considerations

58. As both the Secretary-General and Mr. El-Awar have appealed the UNDT judgment, the Appeals Tribunal will review the issues of the case in their chronological order.

The UNDT's findings on the legality of the non-renewal decision (the Secretary-General's appeal)

59. The UNDT found the non-renewal decision unlawful because the Secretary-General did not show that it was motivated by a lack of funds. Although the UNDT committed several errors of law, its main finding is not put into doubt by the Secretary-General's appeal. Therefore, in this respect, the Secretary-General's appeal cannot succeed.

60. With regard to Mr. El-Awar's 6 September 2017 comments on his reassignment, the UNDT held as follows:

38. When accepting the reassignment in an email of 6 September 2017, [Mr. El-Awar], however, stated that he understood that his reassignment would "not have any implications on the nature of [his] Fixed Term renewable contract" (emphasis added). This could be interpreted as that [Mr. El-Awar] made his acceptance of [Mr. El-Awar's] comments to the transfer reassignment conditioned upon that the funding of source(s) for his post would continue as it was on the post he encumbered before his reassignment to UBSB.

39. In the case of [Mr. El-Awar], it does not follow from the case record that UN-Habitat ever as much as contemplated [Mr. El-Awar]'s statement regarding his understanding of the "nature" of his fixed-term appointment. Rather, it appears that UN-Habitat simply proceeded with the reassignment and, by doing so, it silently accepted [Mr. El-Awar]'s condition. If so, this would reasonably also mean that the funding source(s) of [Mr. El-Awar]'s fixed-term appointment as such never changed despite him being reassigned to UBSB.

40. [Mr. El-Awar] has, however, not made this contention to the Tribunal and the issue will not be further examined. The stipulation in his 6 September 2017 acceptance email, nevertheless, demonstrates that [Mr. El-Awar] never accepted, or was even informed of, that the funding source(s) for his UBSB post was/were to be limited to one single project in UBSB's portfolio of water and sanitation projects and programmes. As the Dispute Tribunal held in *Teo* UNDT/2018/044 and *Teo* UNDT/2018/107 (as affirmed by

the Appeals Tribunal in para. 42 of *Chemingui* 2019-UNAT-930), a staff member cannot, at least against her/his will, be transferred to a post with a less secure financial funding.

41. Consequently, as no limitations were stated anywhere in the documentary evidence regarding [Mr. El-Awar]'s tasks and functions being limited to the "Urban Basic Services Programme Development" project or otherwise indicating that the funding source was limited to this one single project, the Tribunal finds that, with reference to *Loose*, [Mr. El-Awar]'s post was to be funded through the entire portfolio of projects and programmes on water and sanitation in UBSB.

61. The UNDT then examined the 24 September 2018 portfolio spreadsheet and found that the available funding was USD 717,121 which would have allowed a one-year extension of Mr. El-Awar's appointment.

62. These findings of the UNDT are erroneous. Mr. El-Awar's comment, that he understood that his reassignment would "not have any implications on the nature of his Fixed Term renewable contract", are too vague and unspecific to draw any legal conclusions from them. In particular, the funding of the post is not mentioned at all. Even if Mr. El-Awar had stated that he understood that the reassignment would not have any implications on the funding conditions of his appointment, this could not be interpreted as a "silent acceptance of Mr. El-Awar's condition by UN-Habitat", as the UNDT put it. A reassignment is an administrative decision, a unilateral act imposed on the staff member by the Administration. It is not a contract which can be bargained or (implicitly) altered by the staff member. Consequently, when receiving an administrative decision, a staff member must decide whether he/she will accept this decision or whether it shall be challenged by a request for management evaluation and later by an application to the Dispute Tribunal. However, any comments the staff member should make with reference to an administrative decision cannot change the nature and content of this decision. Mr. El-Awar did not contest the reassignment decision; therefore, it is legally irrelevant for the present case whether this reassignment might have been unlawful because Mr. El-Awar might have been transferred to a post with a less secure financial funding than his previous post at the GWOPA Secretariat (we note, however, that according to the materials before us and the submissions of the parties, while Mr. El-Awar's appointment at UBSB was for one year, his former colleagues at GWOPA only received appointments of a shorter duration).

63. Further, the documentary evidence shows that Mr. El-Awar's appointment was financed by a specific grant called Urban Basic Services Programme Development (M1-32FWS-000023/R1-32FWS-000026). We accept the Secretary-General's contention that positions are financed from specific programmes or projects and that UN-Habitat was not allowed, under the Financial Regulations and Rules, to divert the moneys contributed for a specific project to fund Mr. El-Awar's salary on a different project. The relevant legal provisions provide as follows:

Financial Regulations and Rules

Regulation 3.12. Voluntary contributions, whether or not in cash, may be accepted by the Secretary-General provided that the purposes for which the contributions are made are consistent with the policies, aims and activities of the Organization and provided further that the acceptance of voluntary contributions that directly or indirectly involve additional financial liability for the Organization shall require the consent of the appropriate authority.

Regulation 3.13. Moneys accepted for purposes specified by the donor shall be treated as trust funds or special accounts under regulations 4.13 and 4.14.

...

Trust funds and reserve and special accounts

Regulation 4.13. Trust funds and reserve and special accounts may be established by the Secretary-General and shall be reported to the Advisory Committee.

Regulation 4.14. The purpose and limits of each trust fund and reserve and special account shall be clearly defined by the appropriate authority. Unless otherwise provided by the General Assembly, such funds and accounts shall be administered in accordance with the present Regulations.

Rule 104.3

Trust funds and reserve and special accounts may be established by the General Assembly or the Secretary-General in respect of specific activities entrusted to the Organization. In respect of trust funds and reserve and special accounts established under the authority of the Secretary-General, he or she shall determine their purposes and limits.

64. The Secretary-General's understanding is in accord with these provisions. As the purpose and limits of each trust fund and reserve and special account shall be clearly defined, it is lawful and reasonable to assume that the moneys for specific projects may not be diverted to fund positions in different projects.

65. However, the UNDT continued as follows:

44. Even if the [Secretary-General]’s submission is accepted and no funds were to be used from any other UBSB project to finance [Mr. El-Awar]’s post than those related to the project of “Urban Basic Services Programme Development”, it follows from the [Secretary-General]’s own figures that USD50,294.71 were available at the relevant time, which is also reflected in the 2018 portfolio spreadsheet. Although this would not have been enough for an extension of a full year, it would, at least, as also argued by [Mr. El-Awar], have been enough for some months.

45. The [Secretary-General] contends that commitments for USD33,986 had already been made of the available USD50,294.71, which is also indicated in the 2018 portfolio spreadsheet. The Tribunal is, however, unconvinced about this figure as no such commitments are reflected in the contemporaneous [Umoja] records (dated 19 October 2018), which has also been provided by the [Secretary-General]. In comparison, the 2018 portfolio spreadsheet was specially prepared by the UBSB Program Manager Officer for the present litigation and therefore of less, if any, probative value.

66. We find that this part of the UNDT judgment is not put into doubt by the Secretary-General’s appeal as it was not sufficiently challenged. Firstly, the Secretary-General does not challenge the UNDT’s finding that USD 50,294.71 was sufficient to finance Mr. El-Awar’s post “for some months”. Further, the UNDT specifically pointed to the 19 October 2018 Umoja record which, in comparison to the 24 September 2018 portfolio spreadsheet, did not contain commitments for USD 33,986 already made of the available USD 50,294.71. On appeal, the Secretary-General does neither explain how the 19 October 2018 Umoja record can still show an available USD 50,294.71 at that time, nor does he state that the 19 October 2018 record lacks legal relevance. The 19 October 2018 record is not even mentioned in the Secretary-General’s appeal. As the UNDT mainly based its finding on this document, the Secretary-General had the onus of addressing it on appeal.

67. In the light of the above, the other issues raised by the Secretary-General are of no legal relevance for the appeal and will not be reviewed by the Appeals Tribunal.

Remedies ordered by the UNDT (Secretary-General’s and Mr. El-Awar’s appeal)

68. The UNDT set in-lieu compensation at three months’ net-base salary and awarded compensation for pecuniary harm in the amount of three months’ net-base salary. Mr. El-Awar appeals both the amount of in-lieu compensation and compensation for pecuniary harm. The

Secretary-General, apart from his submissions regarding the lawfulness of the non-renewal decision, does not object to the amount of in-lieu compensation, but requests the Appeals Tribunal to vacate the UNDT's order on compensation for pecuniary harm.

69. The UNDT's orders on compensation are governed by Article 10(5) and (7) of the UNDT Statute which provide as follows:

5. 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.

...

7. The Dispute Tribunal shall not award exemplary or punitive damages.

In-lieu compensation

70. This Tribunal has consistently held that "compensation must be set by the UNDT following a principled approach and on a case by case basis" and that the Appeals Tribunal will not interfere lightly as "[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case".¹⁸

71. In the present case, the UNDT took into account the specific circumstances of the case, in particular the type and duration of the appointment held by Mr. El-Awar, the length of his service, and the chance of renewal of the appointment in a position still required by the Administration, and set an in-lieu compensation of three months' net-base salary.

¹⁸ *Mihai v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-724, para. 15, *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-691, para. 28, citing *Rantisi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-528, para. 71, and *Solanki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-044, para. 20.

72. Mr. El-Awar complains that the UNDT should also have taken into account the nature of the irregularity of the administrative decision and reviewed the evidence of prejudice, bias or improper motive. We do not agree.

73. In-lieu compensation under Article 10(5)(a) of the UNDT Statute shall be an economic equivalent for the loss of rescission or specific performance the Tribunal has ordered in favor of the staff member. When the Secretary-General chooses not to accept this order, he must pay compensation as an alternative to replace (in-lieu) such rescission or specific performance. Hence, the most important factor to consider in this context is the pecuniary value of such rescission or specific performance for the staff member in question. In case of rescission of a non-renewal decision, it is reasonable for the UNDT to focus on the seniority and type of appointment held by the staff member, and particularly the chance of renewal of this appointment.

74. The nature and degree of the irregularities committed by the Administration, on the other hand, are of no legal relevance for the pecuniary value of the ordered rescission or specific performance. On the contrary, as the UNDT may not award punitive damages according to Article 10(7) of the UNDT Statute, we find the UNDT is not allowed to consider these factors when deciding on the amount of in-lieu compensation.

75. Given the seniority and type of Mr. El-Awar's appointment, and his chance of renewal, the amount of in-lieu compensation of three months set by the UNDT is free of error. Particularly considering the evidence presented by the Secretary-General with regard to the financial situation of UN-Habitat, it is unlikely to assume that Mr. El-Awar's appointment could have been renewed for more than three months.

76. Consequently, Mr. El-Awar's appeal fails.

Compensation for pecuniary harm

77. In Mr. El-Awar's case, the UNDT granted compensation "for his income loss in the amount of 3 months of net-base salary". It considered that Mr. El-Awar's last fixed-term appointment was for one year and that there is too much uncertainty as to whether he would have been offered an additional fixed-term appointment after the first renewal, and that it would be too speculative to extend the compensable period any further than that one year as of the date of separation and at the P-5 level. The UNDT further noted that a staff member has to

demonstrate to have done efforts to mitigate the economic loss arising from an administrative decision impacting on his employment. As none of the parties made any submissions on that point and the onus of proof rests with Mr. El-Awar, and also taking into account his successful career with UN-Habitat, which should give him a good chance of finding new employment, and considering that Mr. El-Awar has not alleged to have applied for other jobs and did not show his revenues declaration for the relevant year, the UNDT ordered compensation of three months' net-base salary.

78. Both the Secretary-General and Mr. El-Awar appeal the UNDT's order on compensation. While the Secretary-General submits that no compensation for harm under Article 10(5)(b) of the UNDT Statute should have been granted, Mr. El-Awar thinks the amount of compensation should be much higher.

79. We find that the UNDT's order of compensation is erroneous as it does not take into account that Article 10(5)(b) of the UNDT Statute, different from Article 10(5)(a) UNDT Statute, requires evidence for harm. Under the constant jurisprudence of the Appeals Tribunal, a staff member must show that he or she suffered harm, and that this harm was directly caused by the administrative decision in question.¹⁹ In case of a rescinded non-renewal decision this means, firstly, that the staff member must show that he or she was either unemployed or employed on a lower salary after the non-renewal decision and, secondly, that this unemployment or disadvantageous employment occurred despite reasonable efforts of the staff member to find another position.

80. These conditions are not met in the present case. We note that both in his 19 November 2018 application and his 19 March 2021 closing submissions, Mr. El-Awar requests compensation only as an alternative for rescission, hence under Article 10(5)(a) of the UNDT Statute. At no point in these documents does he specify what kind of pecuniary harm he suffered after and due to the non-renewal decision; he does not submit that he was unemployed or only employed on a lower salary after the non-renewal decision despite reasonable efforts to find a new employment, nor does he present any evidence for it.

¹⁹ *Mihai* Judgment, *op. cit.*, para. 21 and many others.

81. Mr. El-Awar's submission on appeal, that he lacked the opportunity to present evidence of economic loss at the UNDT level, has no merit. As Article 10(5)(b) of the UNDT Statute clearly requires "harm, supported by evidence", it is the onus of every staff member to describe, in his or her application to the UNDT, the harm suffered by the administrative decision in question, and to present or offer evidence for it.

82. Mr. El-Awar's request that the Appeals Tribunal receives the additional evidence in annexes 15 and 16 of his appeal "which shows that he has been unsuccessful at securing a position commensurate with his expertise and experience, despite consistent efforts since he separated from Habitat, and has earned approximately USD 60,000 through consulting work over the corresponding period" under Article 2(5) of the UNAT Statute is rejected. Article 2(5) provides as follows:

In exceptional circumstances, and where the Appeals Tribunal determines that the facts are likely to be established with documentary evidence, including written testimony, it may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings. Where this is not the case, or where the Appeals Tribunal determines that a decision cannot be taken without oral testimony or other forms of non-written evidence, it shall remand the case to the Dispute Tribunal. The evidence under this paragraph shall not include evidence that was known to either party and should have been presented at the level of the Dispute Tribunal.

83. To allow Mr. El-Awar's additional evidence is not in the interest of justice and the efficient and expeditious resolution of the proceedings as it has no legal relevance. All communication contained in annex 16 of Mr. El-Awar's appeal dates from either 23 June or 26 July 2021 and thus after the UNDT issued its judgment on 26 May 2021. They show that Mr. El-Awar, in the summer of 2021, unsuccessfully applied for various positions. However, the non-renewal decision had already been issued on 31 August 2018 when Mr. El-Awar was informed that his fixed-term appointment would not be renewed beyond its expiry on 30 September 2018. Compensation for unemployment after an unlawful and rescinded non-renewal decision cannot be granted at infinitum. It will usually not extend the time period for in-lieu compensation, in the present case three months. Consequently, Mr. El-Awar had the onus of showing that he was unemployed after 30 September 2018 despite reasonable efforts at that time to find another position. It is noted that an annex 15 was not among the annexes filed with Mr. El-Awar's appeal.

84. Consequently, in this respect, the Secretary-General's appeal succeeds, and Mr. El-Awar's appeal fails.

Judgment

85. The Secretary-General's appeal is granted in part, and Mr. El-Awar's appeal is dismissed. The UNDT Judgment No. UNDT/2021/062 is modified, and its order on compensation for pecuniary damage is vacated.

Original and Authoritative Version: English

Decision dated this 1st day of July 2022.

(Signed)

Judge Knierim, Presiding
Hamburg, Germany

(Signed)

Judge Murphy
New York, United States

(Signed)

Judge Raikos
New York, United States

Judgment published and entered into the Register on this 19th day of August 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar