



Before: Judge Joelle Adda

Registry: New York

Registrar: Isaac Endeley

HEURTEMATTE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON REMEDIES

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Michel Boulianne, UN Women

Prue Smith, UN Women

Introduction

1. The Applicant, a former staff member of UN Women, contested the decision to abolish his post which caused the non-renewal of his fixed-term appointment beyond 30 September 2021.
2. In its Judgment No. UNDT/2022/131, this Tribunal found that the decisions to abolish the Applicant's post and not to renew his appointment were unlawful. Consequently, the Tribunal granted the application but decided to instruct the parties to file their final submissions on remedies before determining said issue.
3. For the reasons stated below, the Tribunal decides to grant the Applicant the remedies set out in para. 29 of this judgment.

Facts

4. In September 2008, the Applicant started his employment as a driver at the G-3 level with UN Women in Panama and continued in this function until his separation from the Organization on 12 October 2021.
5. In 2019, a new Regional Director for the Americas and the Caribbean took office in Panama ("the Regional Director"). The Applicant was assigned to her as a driver, and he alleges that the Regional Director treated him disrespectfully on various occasions.
6. In 2020, due to the COVID-19 pandemic, most activities in the office of UN Women in Panama were converted into telework and conducted remotely from outside the office.
7. By letter dated 30 June 2021, the Regional Director informed the Applicant that his post was to be abolished and his fixed-term appointment would not be renewed beyond September 2021. The reason provided was that UN Women did not have a physical office and did not expect to have one in the medium term, nor did it have any need for transportation, or for the delivery of official letters. All the tasks that the Applicant previously performed had now been converted to online procedures.

8. By Judgment No. UNDT/2022/131 dated 13 December 2022, the Tribunal granted the application on its merits. It further ordered that before determining the issue of remedies, by separate written order, it would instruct the parties to file their final submissions thereon, taking into consideration the findings made in the Judgment UNDT/2022/131.

9. By Order No. 109 (NY/2022), the Tribunal ordered the parties to file their respective final pleadings on remedies, which they did.

Consideration

Applicable law

10. Article 10.5 of its Statute outlines the Tribunal's powers regarding the award of remedies, providing that:

As part of its judgment, 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 and in lieu compensation under art. 10.5(a) of the Dispute Tribunal's Statute

11. As indicated by this Tribunal in its Order No. 109 (NY/2022), under art. 10.5(a) of its Statute, in certain types of cases, the Administration may elect to pay *in lieu* compensation as an alternative to rescission. The Appeals Tribunal held in *Allen* 2019-UNAT-951 that a case concerning the non-renewal of an appointment is encompassed by this provision.

12. The Applicant does not indicate a precise amount as *in lieu* compensation, but he requests the sum of USD749,531.91 as compensation for material damages.

13. The Respondent submits that the Tribunal should award no more than *in lieu* compensation equal to one year's net base salary given that one year was the duration of the bulk of the former renewals of the Applicant's fixed-term appointment, in particular, the last regular renewal and that his appointment expired at its term.

14. In *Laasri* 2021-UNAT-1122, para. 63, the Appeals Tribunal held 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". In other words, compensation must be set by the UNDT following a principled approach and on a case-by-case basis.

15. It is settled jurisprudence that "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 appointment, and their expectancy of renewal" (see *Afm Badrul Alam* 2022-UNAT-1214, para. 28).

16. Considering that the evidence provided by the Respondent shows that the duration of most of the former renewals of the Applicant's fixed-term appointment including the last regular renewal was for a duration of one year and that there is no expectation of renewal for a fixed-term appointment, the Tribunal determines that the amount of *in lieu* compensation must be equal to one year's net base salary.

Compensation for harm under art. 10.5(b) of the Dispute Tribunal's Statute

17. Under art. 10.5(b) of the Statute of the Dispute Tribunal, compensation for harm must be “supported by evidence”. The Appeals Tribunal has consistently held since the amendment of art. 10.5 (b) that “a breach of staff member’s rights, despite its fundamental nature, is thus not sufficient to justify such an entitlement. There must indeed be proven harm stemming directly from the Administration’s illegal act or omission for compensation to be awarded (see *Kebede* 2018-UNAT-874, para. 21).

18. The Appeals Tribunal also held in *Kebede* that:

20. It is universally accepted that compensation for harm shall be supported by three elements: the harm itself, an illegality, and a nexus between both. It is not enough to demonstrate an illegality to obtain compensation; the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien. If one of these three elements is not established, compensation cannot be awarded. Our case law requires that the harm be shown to be directly caused by the administrative decision in question.

...

22. Our jurisprudence holds that, generally speaking, a staff member’s testimony alone is not sufficient as evidence of harm warranting compensation under Article 10(5)(b) of the UNDT Statute. The testimony of an applicant in such circumstances needs the corroboration of independent evidence (expert or otherwise) to support the contention that non-pecuniary harm has occurred. Much 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.

19. In his submission on remedies, the Applicant refers to several health issues, which will be considered in detail below, and claims that the decision not to renew his appointment “forced” him “to accept an early pension”.

20. First, the Applicant indicates that he tested positive for COVID-19 in June 2020 when he “endeavored to defy the official restrictions as he continued to render his services by order of the Administration”. According to him, he then began to

suffer other health problems including a “psychiatric condition”. He indicates that he was hospitalized in intensive care and isolated from his immediate family.

21. The Tribunal notes that contrary to what the Applicant claims, the evidence shows that most of the health issues that he refers to occurred before the unlawful decision to abolish his post was made which led to his separation from service on 30 September 2021 following the non-renewal of his appointment. The timeline of events shows that the Applicant was notified of the decision to abolish his post on 30 June 2021 whereas the medical condition he describes occurred in June 2020. Consequently, his alleged medical condition predates the unlawful administrative decision and could not have been directly caused by it. Furthermore, the Applicant himself acknowledges that “from being declared a positive patient for COVID-19, [he] began to suffer health breakdowns”.

22. Second, the Applicant claims that his health condition deteriorated as a result of the illegal decision. He refers to a surgery (coronary angioplasty) performed in October 2022, which according to him, was due to his high blood pressure caused by stress and anxiety for not receiving an income since his separation from service. Third, he indicates that he was diagnosed with moderate depression and that he was scheduled to have a second surgery for coronary angioplasty in January 2023.

23. The Tribunal has reviewed the evidence on record and finds that while the Applicant’s coronary artery disease and his moderate depression are well documented by medical reports, there is no evidence that such conditions stem from the unlawful decision.

24. The evidence rather shows that the Applicant’s coronary problems most likely existed prior to 30 June 2021 when he was notified of the unlawful decision to abolish his post. In this regard, the Tribunal notes that a medical certificate dated 22 December 2022 states that the Applicant “has a history of arterial hypertension and coronary artery disease”.

25. Similarly, the medical certificate dated 30 December 2022 from his psychiatrist diagnosed the Applicant with a “moderate depressive episode” but did not provide any further information concerning the circumstances that may have

led to such a condition. Furthermore, this medical certificate was issued more than a year after the Applicant's separation from service.

26. Therefore, the Tribunal finds that none of the medical reports on record show any evidence of a *nexus* between the Applicant's health problems and the unlawful decision.

27. Under such circumstances, the Tribunal concurs with the Respondent that the Applicant has not shown the required causal link between the alleged harm experienced and the decision to abolish his post and the subsequent non-renewal of his appointment. As such, the Tribunal cannot grant the Applicant compensation for harm under art. 10.5 (b) of its Statute.

28. Lastly, the Applicant alleges that the decision to abolish his post and separate him from service "forced" him "to accept an early pension". In this respect, the Tribunal considers that he was not "forced" to "accept an early pension". He may have opted for early retirement since he had reached the age of 55 years, to ensure an income following his separation from service. Be that as it may, this fact alone does not prove harm under art. 10.5(b) as any difference in his income would be offset by the compensation *in lieu* that the Tribunal has decided to grant him as per para. 16 above.

Conclusion

29. In view of the foregoing, the Tribunal DECIDES that:

- a. As compensation *in lieu* under art. 10.5(a) of the Dispute Tribunal's Statute, the Respondent is to pay the Applicant one year's net base salary as per the salary scale in effect at the time of the Applicant's separation from service;
- b. No compensation for harm is granted under art. 10.5(b) of the Dispute Tribunal's Statute.

- c. The aforementioned compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable; and
- d. All other claims are rejected.

(Signed)

Judge Joelle Adda

Dated this 31st day of May 2023

Entered in the Register on this 31st day of May 2023

(Signed)

Isaac Endeley, Registrar, New York