



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

Judgment No. 2022-UNAT-1304

James Michel Songa Kilauri

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Dimitrios Raikos Judge Martha Halfeld
Case No.:	2021-1632
Date of Decision:	28 October 2022
Date of Publication:	28 December 2022
Registrar:	Juliet Johnson

Counsel for Appellant: Julia Kyung Min Lee, OSLA

Counsel for Respondent: Sylvia Schaefer

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. Mr. James Michel Songa Kilauri, a former staff member of the United Nations Development Programme (UNDP or the Administration) challenged the termination of his fixed-term appointment due to facts anterior to the appointment, but relevant to the staff member's suitability, that became known after his appointment (the contested decision).
2. In Judgment UNDT/2021/107 (the Judgment), the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) determined that the contested decision was unlawful because Mr. Kilauri's due process rights had been violated. The Dispute Tribunal ordered rescission of the contested decision with *in-lieu* compensation, but denied his request for compensation for harm.
3. Mr. Kilauri appeals the Judgment and says the Dispute Tribunal erred in setting the amount it awarded as compensation. There is no issue as to the Dispute Tribunal's decision on the lawfulness of the contested decision. The only issue is the amount of compensation awarded by the Dispute Tribunal.
4. For the reasons given below, the appeal is granted, in part.

Facts and Procedure

5. In 2015, Mr. Kilauri began work as a Programme Specialist on a UNDP-administered service contract (non-staff modality) with the Office of the High Commissioner for Human Rights (OHCHR) in Goma, Democratic Republic of the Congo.
6. In August 2018, UNDP's Office of Audit and Investigations (OAI) started an investigation into allegations that Mr. Kilauri had submitted fraudulent claims for reimbursement of medical expenses under his medical benefits. On 14 September 2018 OAI informed him that he was placed under investigation for fraud.
7. On 24 December 2018, Mr. Kilauri applied for a fixed-term appointment with UNDP. On 10 April 2019, Mr. Kilauri was notified that he had been selected for a one-year, fixed-term post with a starting date of 1 May 2019.
8. On 11 April 2019, Mr. Kilauri informed UNDP of his resignation from his service contract, effective 30 April 2019. On 29 April 2019, UNDP notified Mr. Kilauri that his service contract was terminated for misconduct with immediate effect.

9. On 1 May 2019, Mr. Kilauri started working under his fixed-term appointment.
10. By letter dated 16 January 2020, UNDP notified Mr. Kilauri of the contested decision, namely that his fixed-term appointment was terminated pursuant to Staff Regulation 9.3(v), due to his misconduct under the service contract. UNDP further stated that, had this been known to the Organization in April 2019, it would have barred his appointment to a fixed-term post. He was granted a one-month salary in lieu of notice as well as a termination indemnity of one week of salary for each remaining month left under his fixed-term appointment.

The UNDT Judgment

11. In its Judgment, the Dispute Tribunal found that the contested 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 Dispute Tribunal rescinded the contested decision. It further established *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. But it denied Mr. Kilauri's request for compensation for moral and material damage because he did not identify and provide appropriate evidence of harm.

Submissions

Mr. Kilauri's Appeal

12. Mr. Kilauri appeals the Judgment and challenges the overall amount of compensation *in lieu*, the deductions made, as well as the denial of compensation for loss of opportunity and career advancement.
13. He submits that the Dispute Tribunal erred in fact and law resulting in a manifestly unreasonable decision by failing to consider all relevant factors in determining compensation *in lieu* of rescission. It failed to consider the nature and level of the post that he formerly occupied and the chances of renewal beyond the expiry of his fixed-term contract but for the unlawful termination, in addition to the remaining time on the contract.

14. Further, he says the Dispute Tribunal erred in law in deducting the one-month salary *in lieu* of notice of termination and the termination indemnity that Mr. Kilauri received pursuant to the Staff Regulations and Rules. In doing so, it conflated the award of compensation *in lieu* of rescission pursuant to Article 10(5)(a) of UNDT Statute with the award of compensation for harm under Article 10(5)(b) of UNDT Statute.

15. Finally, Mr. Kilauri submits that the Dispute Tribunal erred in law in failing to award compensation for loss of opportunity and career advancement under Article 10(5)(b). An appellant's claims of being deprived of the opportunity to enhance his/her career or improve his/her status within the Organization cannot be taken into consideration for the calculation of the *in-lieu* compensation. Mr. Kilauri's career prospects in the United Nations common system have been "shattered" as a result of the contested decision.

16. He asks that the Appeals Tribunal revise the Dispute Tribunal's award of compensation and substitute it with an award of adequate compensation in lieu of rescission as well as material compensation for loss of opportunity of career advancement.

The Secretary-General's Answer

17. The Secretary-General requests the appeal be dismissed.

18. He says the Dispute Tribunal correctly exercised its discretion in determining the amount of compensation *in lieu* of rescission of the contested decision pursuant to Article 10(5)(a) of the UNDT Statute and attempted to place the staff member in the same position he would have been in had the unlawful administrative decision not occurred. Because Mr. Kilauri's fixed-term appointment would have expired after one year, the UNDT rightfully awarded *in-lieu* compensation amounting to the net base salary for the remainder of his one-year appointment. From this amount the Dispute Tribunal properly deducted termination payments he received, as these would not have been paid had his fixed-term appointment expired at its term.

19. Further, the Secretary-General contends that the Dispute Tribunal followed a principled approach based on the purpose of Article 10(5)(a) of the UNDT Statute, considered prevailing jurisprudence, and provided its reasoning based on the circumstances of the case, and the nature and length of Mr. Kilauri's former fixed-term appointment. There is no mandatory requirement to consider the chances of appointment renewal for setting the amount of compensation *in lieu*, especially if they are speculative as in the present case.

20. Finally, the Secretary-General contends the Dispute Tribunal rightfully denied Mr. Kilauri's request for compensation of moral and material damages, including compensation for loss of opportunity and career advancement, pursuant to Article 10(5)(b) of the UNDT Statute. It correctly noted that Mr. Kilauri did not identify any harm suffered due to the contested decision nor did he submit any corresponding evidence to support his claim.

Considerations

21. The only issue before us is whether the Dispute Tribunal committed an error in law, jurisdiction, procedure, or fact that resulted in a manifestly unreasonable decision when it determined the appropriate compensation for the unlawful contested decision.

22. Article 10(5) of the UNDT Statute confers upon it the following remedial powers it may grant for the Administration's unlawful decisions:

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.

23. The Appeals Tribunal has previously held it 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”.¹

Compensation in lieu under Article 10(5)(a) of the UNDT Statute

24. In the present Judgment, the Dispute Tribunal rescinded the contested decision. As it concerned the termination of Mr. Kilauri’s fixed-term appointment, it proceeded to also set an amount of compensation *in lieu* as required by Article 10(5)(a) of the UNDT Statute.

25. Regarding compensation *in lieu*, it is settled jurisprudence that its purpose 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 as set out above 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”.² 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.³

26. In the present case, the Dispute Tribunal considered Mr. Kilauri’s submissions and evidence requesting two years’ net base salary and appropriately found that it was unwarranted in the present circumstances as it would exceed the emoluments to which he would have been entitled absent the unlawful termination.

27. In awarding compensation *in lieu*, it considered that the Appellant had signed a one-year fixed-term appointment effective 1 May 2019, that his termination took immediate effect on 17 January 2020, and that he was awarded one-month salary in lieu of notice plus a termination indemnity.

¹ *Rhyan Ramsaroop v. Secretary-General of the United Nations & Miksch et al. v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1165, paras. 41 and 42.

² *Yasmina Laasri v. v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1122, para. 63, citing *Ashour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-899, para. 18.

³ *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-712, para. 16.

28. Mr. Kilauri submits that the Dispute Tribunal 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. However, Mr. Kilauri's previous post was as Human Rights Analyst (NOA) for the same office and supervisor since October 2015 under a service contract until April 2019, before accepting his fixed-term contract. He does not identify why his previous post (which appears to be equivalent in nature) should affect the award for compensation *in lieu* or should lead to a higher award for compensation.

29. Also, Mr. Kilauri submits that the Dispute Tribunal's 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 contested decision. Rather, the effect of the award was three and a half months of net base salary (net base salary from 17 January 2020 to 30 April 2020 minus one-month notice and termination indemnity). He says the Dispute Tribunal cannot reduce *in-lieu* compensation by the amount of termination indemnity, to which a staff member has a right under the Staff Regulations and Staff Rules.

30. This submission is not supportable. In the Judgment, the Dispute Tribunal rescinded the contested decision, namely the termination. 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, but he had already received monies in the form of the one-month notice and termination indemnity. The one-month notice and termination indemnity are no longer applicable as there is no longer a termination due to the rescission order.

31. A staff member's entitlements to termination notice and indemnity are set out in Staff Regulation 9.3(c) that "[i]f the Secretary-General terminates an appointment, the staff member shall be given such notice and such indemnity payment as may be applicable".⁴ Therefore, if the termination is rescinded and there is no termination, no payment *in lieu* of notice, and indemnity payment can be made.

32. Mr. Kilauri says 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.

⁴ Emphasis added.

33. We disagree. 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.

34. If the award for compensation *in lieu* failed to deduct monies already paid in termination notice and indemnity, Mr. Kilauri would receive his net base salary for the remainder of this fixed-term appointment along with additional monies for termination; this would award him compensation in excess of what he would have received had the unlawful termination not occurred. This is contrary to the purpose of compensation *in lieu* as outlined above.

35. Further, Annex III(d)(ii) of the Staff Regulations provides that no indemnity payments shall be made to a staff member who has a temporary or a fixed-term appointment that is completed on the expiration date specified in the letter of appointment.

36. Mr. Kilauri argues that the possibility of renewal should be considered. However, fixed-term appointments do not carry any expectancy, legal or otherwise, of renewal, irrespective of the length of service.⁵ 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.⁶ This evidence was not provided in the present case and the Dispute Tribunal did not err in determining compensation without the expectancy of renewal at the end of Mr. Kilauri's fixed-term appointment.

37. 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 the applicant's submissions and evidence. By rescinding the contested termination, Mr. Kilauri is not entitled to the termination notice or indemnities as part of the compensation *in lieu* of rescission. However, Mr. Kilauri is entitled to receive any entitlements

⁵ Staff Regulation 4.5(c) and Staff Rule 4.13(c).

⁶ *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 25.

or payments he would have been entitled to at the expiry of his fixed-term appointment as additional compensation.

Compensation under Article 10(5)(b) of the UNDT Statute

38. Finally, regarding Mr. Kilauri's request for 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.⁷ If the claimant does not discharge this burden, the compensation cannot be awarded.

39. In the Judgment, the Dispute Tribunal held that Mr. Kilauri failed to identify "any harm suffered as a consequence of the unlawful decision or submit evidence in support of his claim for compensation for such harm".⁸ In the appeal, Mr. Kilauri fails to identify specific loss of opportunity or career advancement which the Dispute Tribunal failed to consider in the Judgment.

40. Without identifying the harm or providing evidence in support of the claim, Mr. Kilauri has not discharged his burden and there can be no award for harm or material damages.

⁷ *Mihai v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-724, para. 21.

⁸ Impugned Judgment, para. 38.

Judgment

41. The appeal is granted, in part. Mr. Kilaury 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.

Original and Authoritative Version: English

Decision dated this 28th day of October 2022 in New York, United States.

(Signed)

Judge Sandhu, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Halfeld

Judgment published and entered into the Register on this 28th day of December 2022 in New York, United States.

(Signed)

Juliet Johnson, Registrar