

UNITED N

Judgment No. 2022-UNAT-1304



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

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 The Dispute Tribunal rescinded the contested decision.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.

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.

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. Kilauri 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