UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2020-UNAT-1040

Herbert Robinson

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Graeme Colgan Judge Jean-François Neven
Case No.:	2019-1335
Date:	26 June 2020
Registrar:	Weicheng Lin

Counsel for Mr. Robinson:	Aleksandra Jurkiewicz
Counsel for Secretary-General:	Maryam Kamali

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. The Appellant was a staff member of the Economic Commission for Africa (ECA) on a fixed-term appointment that expired 31 December 2015. He filed an application to the United Nations Dispute Tribunal (the UNDT or Dispute Tribunal) to dispute the decision to not renew the appointment. In Judgment No. UNDT/2019/137 (the Judgment), the Dispute Tribunal partially granted the application and awarded compensation for financial damage, with interest, in the amount of eight months' net base salary plus attendant entitlements payable by the Respondent to the Appellant. It declined to award moral damages. For the following reasons, we affirm the Dispute Tribunal's Judgment.

Facts and Procedure

2. The Appellant held fixed-term appointments with the ECA since August 2012 with the latest appointment serving as Head of the Training Division at the African Institute for Economic Development and Planning (IDEP) at the P-4 level. From August 2014 to December 2014, the Appellant was on short-term appointments. From January to December 2015, he was on a one-year fixed-term appointment that expired 31 December 2015.

3. In paragraphs 32 to 62 of its Judgment, the Dispute Tribunal detailed the relevant factual findings to support its determination that the Appellant's non-renewal was due to an improper purpose and that the ECA's refusal to provide reasons was unlawful. As this determination is not contested before us, it is not necessary to recite those facts in detail.

4. On 11 January 2016, the Appellant requested reasons for the non-renewal of his appointment which was not provided. The Chief of Human Resources/ECA testified before the Dispute Tribunal that he was instructed by the ECA/DoA not to respond to the Appellant. On the same date, the Appellant received a memorandum from the ECA/DoA that stated, *inter alia*. "(f)or expiration of an appointment the organization need not provide a reason for an expiry because it is in the nature of the contract itself to expire on the date indicated in the Letter of Appointment".

5. By e-mail dated 4 March 2016, the Appellant requested management evaluation of the decision not to renew his appointment.

6. By letter dated 8 March 2016, the Officer-in-Charge of the Management Evaluation Unit (MEU) acknowledged receipt of the request and indicated the request was received on 7 March 2016 and stated that the 45-day period for evaluation of the administrative decision would begin to run from the date the request was received. That 45-day period ended 20 July 2016.

7. On 20 July 2016, the Appellant filed an application to the Dispute Tribunal.

8. On 23 August 2016, the Under Secretary-General for Management responded to the request for management evaluation.

9. The Appellant received other employment eight months after the non-renewal of his appointment with IDEP.

10. In its Judgment, the Dispute Tribunal held:

(a) the non-renewal was an administrative decision subject to review and appeal;

(b) in the case of a non-response to a request for management evaluation, the time to file an application to the Dispute Tribunal is to be calculated from the date of receipt of the request by MEU which in this case is 7 March 2016;

(c) the application to the Dispute Tribunal, is, therefore, receivable *ratione temporis*;

(d) the ECA's refusal to give reasons for the impugned decision was unlawful;

(e) the Appellant's non-renewal was due to an improper purpose, namely retaliation and repression, due to the arbitrariness and lack of transparency exhibited by the ECA's Administration;

(f) because of the re-organization of the ECA, the Appellant's post was eliminated, and the rescission of the impugned decision would not be appropriate;

(g) the proven financial damage for the Appellant in nexus with the unlawful separation consisted of eight months of unemployment and the attendant loss of emoluments; and

(h) the Appellant's plea for moral damages fails as he relied solely on his testimony to support the claim, which did not meet the requisite proof established in Kallon.[1]

Submissions

Appellant's Appeal

11. The Appellant submits that the Dispute Tribunal erred in law resulting in a manifestly unreasonable decision, by:

a) reducing the amount of compensation for loss of employment taking into consideration mitigating factors and limited economic loss; and

b) applying the *Kallon* jurisprudence to the Appellant's testimony without providing him with the opportunity to supplement his pleadings and without requesting additional documentation.

12. Regarding the first ground of appeal, the Appellant argues the Dispute Tribunal erred in considering mitigating factors when determining compensation for loss of employment. The Dispute Tribunal found that the non-renewal of the Appellant's appointment was animated by improper motive and purpose and the Appellant could have expected a one year extension of his appointment, but he was able to obtain other employment eight months after the non-renewal. The Appellant argues it was an error of law to discount the compensation award for mitigation or termination indemnity.[2]

13. With regards to the second ground of appeal, the Appellant submits that the Dispute Tribunal erred in applying *Kallon,* without providing the Appellant with the opportunity to supplement his pleadings and requesting additional documentation.

14. He submits that he suffered severe emotional distress following the non-renewal and suffered anxiety and chronic insomnia corroborated by medical evidence he provides to the Appeals Tribunal, but which such medical evidence was not provided to the Dispute Tribunal.

[1] *Kallon v. Secretary-General of the United Nations,* Judgment No. 2017-UNAT-742.
[2] *Zachariah v. Secretary-General of the United Nations,* Judgment No. 2017-UNAT-764.

The Secretary-General's Answer

15. The Respondent submits that the Dispute Tribunal correctly awarded the compensation for loss of employment given the Appellant had obtained other employment and did not provide any evidence about his new employment or how it compared to his employment at the IDEP. In addition, the Dispute Tribunal correctly determined compensation by relying on the fact that the Appellant's post has since been subsumed by a P-5 post.

16. The Dispute Tribunal is in the best position to determine the amount of compensation based on the facts of each case and the Appeals Tribunal will not lightly interfere in such determination absent an error or law or fact.[3]

17. The Appellant has failed to establish any error of fact or law by the Dispute Tribunal warranting a reversal of the Judgment.

18. The Dispute Tribunal did not award compensation in lieu of reinstatement and therefore, it did not err in considering mitigating factors. In order to award in lieu compensation, the Dispute Tribunal would have first had to rescind the impugned decision and order reinstatement, but it did not, therefore there can be no in lieu compensation. The Dispute Tribunal only awarded financial damages.

19. As for moral damages, *Kallon* was handed down before pleadings closed before the Dispute Tribunal. The Appellant had ample opportunity to provide the Dispute Tribunal with evidence of the moral harm he allegedly suffered. The Respondent requests the medical certificates provided to the Appeals Tribunal be ignored and stricken from the record as they were not before the Dispute Tribunal and the Appellant has not requested leave to file this additional evidence.

[3] *Flores v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-525; *Goodwin v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-346.

Considerations

20. The Dispute Tribunal held, and it is not disputed, that the Appellant's non-renewal was due to an improper purpose and that the ECA's refusal to provide reasons was unlawful. The appeal raises the following issues regarding the Dispute Tribunal's award of compensation and damages for this illegality:

i. Did the Dispute Tribunal err in the amount of compensation it awarded for loss of employment?

ii. Did the Dispute Tribunal err in refusing to issue an award for moral damages without corroborating independent evidence due to the application of the Appeals Tribunal's decision in *Kallon*?

iii. Should the Appeals Tribunal accept the medical certificates tendered by the Appellant in this appeal which were not before the Dispute Tribunal?

Did the Dispute Tribunal err in the amount of compensation it awarded for loss of employment?

21. Article 10(5) of the Dispute Tribunal Statute provides that 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.

22. Article 10(5) contemplates two main heads of compensation for the Administration's illegality: a) rescission of the contested administrative decision or specific performance but where the administrative decision concerns appointment, promotion or termination, compensation "in-lieu" of specific performance or rescission can be set by the

Dispute Tribunal; b) compensation for harm, "supported by evidence" which shall normally not exceed the equivalent of two years' net base salary of the applicant. They are two different heads of compensation; "in-lieu compensation differs from compensation from harm. The former is an alternative to rescission or specific performance and should be as equivalent as possible to what the person concerned would have received, had the illegality not occurred."[4]

23. Whether mitigation is necessary depends on the remedy awarded and the circumstances of each case. In *Zachariah,* the Appeals Tribunal relied on prior jurisprudence in *Eissa* that "[in-lieu] compensation is not compensatory damages based on economic loss. Thus, there is no reason to reduce this award by the amount of the termination indemnity"[5] or to require mitigation. The Appeals Tribunal in *Zachariah* found the UNDT erred in reducing Mr. Zachariah's in-lieu compensation by the amount of his termination indemnity, to which he had a right under the Staff Regulations and Staff Rules.

24. In the instance case, the Dispute Tribunal did not award in-lieu compensation because it could not award this remedy under Article 10(5)(a). It did not order rescission of the contested administrative decision or specific performance which would allow the Dispute Tribunal to set an amount of in-lieu compensation as an alternative to the rescission or specific performance. Rather, the Dispute Tribunal correctly held it could not order rescission or specific performance as the Appellant's post had been subsumed in a level P-5 position and instead awarded compensation for financial harm.

25. The Dispute Tribunal awarded compensation for financial harm pursuant to Article 10(5)(b) and attempted to compensate for the Appellant's economic loss resulting from the non-renewal of his appointment. Article 10(5)(b) of the Dispute Tribunal Statute (as well as Article 9(1)(b) of the Appeals Tribunal Statute) does not only allow compensation for non-pecuniary damage (i.e. stress and moral injury) but also allows for pecuniary or economic loss other than the "value" of the rescinded administrative decision if the harm is directly caused by the administrative decision in question.[6] In circumstances where compensation for economic loss or financial harm is awarded under Article 10(5)(b), the

[4] *Ashour v. Secretary-General of the United Nations,* Judgment No. 2019-UNAT-899, para. 20.
[5] *Zachariah v. Secretary-General of the United Nations,* Judgment No. 2017-UNAT-764, para. 36 quoting *Eissa v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-469, para. 27.
[6] See *Ho v. Secretary-General of the United Nations,* Judgment No. 2017-UNAT-791.

Dispute Tribunal can consider mitigating factors as part of its principled approach in determining the quantum of compensation.[7]

26. In setting compensation, the Appeals Tribunal has stated the Dispute Tribunal should follow a principled approach on a case by case basis.[8] In the case before us, the Dispute Tribunal followed this approach. It found there was harm directly caused by the impugned administrative decision to not renew the Appellant's appointment and exercised its remedial discretion in awarding compensation. In doing so, the Dispute Tribunal appropriately considered all relevant circumstances including the nature of the illegality, the Appellant's history of reappointments and his reasonable expectations, and the proven financial loss suffered by the Appellant, as well as the mitigating factor of the Appellant obtaining alternative employment.[9] It considered the Appellant obtaining other employment after eight months and whether the new employment was similar to what the Appellant lost. We find no error in the Dispute Tribunal's finding that the proven financial damages "in nexus" with the unlawful separation consisted of eight months' of unemployment and attendant loss of emoluments. This award of compensation was for the actual financial harm or economic loss suffered by the Appellant.

27. The Appeals Tribunal has consistently held that we will not lightly interfere with the Dispute Tribunal's decision in awarding compensation absent a compelling argument that the Dispute Tribunal erred on a question of law or on a question of fact resulting in a manifestly unreasonable decision. The Dispute Tribunal has discretion in assessing compensation and is best placed as the trier of fact to assess the nature and weight of the evidence before it.[10]

28. Here, we find the Dispute Tribunal did not commit an error of law or manifestly unreasonable factual findings in its award of financial damages, which we find was fair and reasonable in the circumstances. Therefore, we find there is no compelling argument or reason to interfere with this award and decline to do so.

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[7] See *Krioutchkov v. Secretary-General of the United Nations,* Judgment No. 2017-UNAT-712.
[8] *Id*., para. 16.
[9] Impugned Judgment para. 99.
[10] *Ho v. Secretary-General of the United Nations,* Judgment No. 2017-UNAT-791; *Faraj v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-587; *Flores v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-525.

Did the Dispute Tribunal err in not awarding moral damages?

29. The Dispute Tribunal relied on *Kallon* in determining that it could not award moral damages based solely on the Appellant's testimony and without "independent corroborating evidence of his non-pecuniary loss".[11] The Appellant says he should have been given the opportunity to adduce that evidence before the Dispute Tribunal.

30. Article 10(5)(b) provides that the Dispute Tribunal may order "(c)ompensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant."[12] This language is repeated in Article 9(1)(b) of the Appeals Tribunal Statute.

31. In *Kallon*, with a full bench, the Appeals Tribunal interpreted the words "supported by evidence" in these provisions. Judge Knierim in a concurring opinion set out the determination of the majority of the bench on this point, namely "that the harm for which compensation is requested must be supported by evidence and that a staff member's testimony alone is not sufficient to present evidence supporting harm under Articles 9(1)(b) of the Appeals Tribunal Statute and 10(5)(b) of the UNDT Statute."[13]

32. Before the Dispute Tribunal, the Appellant argued in his closing submissions that "in the recent [Appeals Tribunal] Judgment of Kallon, the Tribunal acknowledged that in some instances the presumption of *res ipsa loquitur* may apply in which the circumstances of a case may speak for themselves."

33. The Dispute Tribunal disagreed and correctly applied *Kallon* as binding authority. It is the prevailing jurisprudence on the interpretation of "(c)ompensation for harm, supported by evidence" under Article 10(5)(b) of the UNDT Statute. The majority decision in *Kallon* has been applied in subsequent decisions[14] and the Dispute Tribunal did not err in law in applying it to this case. As binding authority, it must be followed by the Dispute Tribunal in

[11] *Kallon v. Secretary-General of the United Nations,* Judgment No. 2017-UNAT-742.
[12] Emphasis added.
[13] *Kallon v. Secretary-General of the United Nations,* Judgment No. 2017-UNAT-742, Concurrence of Judge Sabine Knierim, para. 2, agreed in the partial dissent of Judge Deborah Thomas Felix, Judge Richard Lussick, and Judge Rosalyn Chapman at para. 11.
[14] See *Langue v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-858, *Timothy v. Secretary-General of the United Nations,* Judgment No. 2018-UNAT-847, paras. 64-69.

requiring corroborating independent evidence to support a claim for moral damages; in his submissions before the Appeals Tribunal, the Appellant now does not dispute this.

34. As an aside, we find that what constitutes "compensation for harm, supported by evidence" is not entirely settled given the split decision in *Kallon* and this issue may be revisited by a full bench of the Appeals Tribunal in the appropriate appeal. However, this is not the appeal because, here, the Appellant does not dispute the correctness or reasonableness of the *Kallon* decision nor does he seek its re-visitation by the Appeals Tribunal.

35. Rather, the Appellant relies on a different argument and says the Dispute Tribunal's error was procedural, specifically in the implementation of *Kallon* without providing him the opportunity to supplement his pleadings and in the failure to request additional documentation. He submits that although the Appeals Tribunal in *Ross*[15] indicated that the principle in *Kallon* was "abundantly clear", it admitted "the evident confusion of the UNDT" in applying *Kallon* over the period of the last two years. Therefore, the Appellant argues the Dispute Tribunal should have requested further evidence from him.

36. There is no obligation on the Dispute Tribunal to request evidence from the parties, particularly when both are represented by counsel who are presumed to be aware of the relevant law and appeal processes to ensure their client's interests are adequately represented. In Ross, the Appeals Tribunal did not find that any alleged confusion from the *Kallon* jurisprudence justified an award for moral damages supported only by the applicant's testimony. It also held in Ross that there was no duty on the Secretary-General to give the applicant "notice of jurisdictional developments" particularly when the applicant was a lawyer who had "ample opportunity to acquaint himself with the law as stated in *Kallon* …"[16].

37. Therefore, the Dispute Tribunal did not err in law in refusing to award moral damages based solely on the Appellant's testimony. Also, the Dispute Tribunal proceeded fairly in not requesting further evidence from the Appellant. The Appellant had the opportunity before the Dispute Tribunal to apply to adduce additional evidence but failed to do so. There is no obligation on the Dispute Tribunal to independently seek this evidence.

[15] *Ross v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-926, para. 57.
[16] *Id.,* para. 59.

Should the Appeals Tribunal accept the medical certificates tendered by the Appellant?

38. Despite not presenting corroborating evidence before the Dispute Tribunal, the Appellant provides to the Appeals Tribunal medical certificates by a general practitioner that confirms that from January to May 2016, the Appellant presented neuropsychiatric problems that appeared to be work-related (related to conflicts with superiors). This is tendered to corroborate the Appellant's testimony on the injurious effect of the unlawful conduct by the Administration.

39. Because this evidence was not before the Dispute Tribunal, we must decide whether we should admit and accept this new evidence pursuant to Article 2(5) of the Appeals Tribunal Statute.

40. Article 2(5) provides that additional evidence may be received on appeal only in "exceptional circumstances" where the Appeals Tribunal determines that the facts are likely to be established with documentary evidence if it is in the interest of justice and the efficient and expeditious resolution of the appeal provided such evidence was not known to parties at the time of the Dispute Tribunal proceedings and should have been presented at that level.

41. In this instance, the medical certificate may establish facts to corroborate the claim for moral damages, however, the questions are whether the Appellant should have known of the need to provide this evidence upon the issuance of *Kallon* in July 2017 and whether he had the opportunity to present the evidence to the Dispute Tribunal prior to the Tribunal's subsequent determination.

42. As a starting point, the Appellant has not applied to the Appeals Tribunal to seek leave to present the medical certificates as additional evidence and has not shown what exceptional circumstances exist to permit the Appeals Tribunal to accept this additional evidence pursuant to Article 2(5) of the Statute.

43. Also, as indicated above, the Appellant had the opportunity to obtain and tender the medical certificates before the Dispute Tribunal as *Kallon* was issued before pleadings in the proceeding closed. The Dispute Tribunal is not obligated to request a party to supplement their pleadings particularly when the party is represented. Rather than attempt to tender this additional evidence, the Appellant instead made closing submissions arguing that *Kallon* need not apply in these circumstances and that the Dispute Tribunal should rely on the

Appellant's testimony alone in making the moral damage award. The Appellant was aware of the *Kallon* decision and therefore, had notice that the Dispute Tribunal could apply it as binding authority; consequently, he should have applied to the Dispute Tribunal to supplement his pleadings and tender this additional evidence.

44. Article 10(1) of the Rules of Procedure of the Appeals Tribunal reiterates that the Appeals Tribunal "shall not receive additional written evidence if it was known to the party seeking to submit the evidence and should have presented it to the Dispute Tribunal". In this instance, the Appellant certainly knew the need for this additional evidence and had the opportunity to present it to the Dispute Tribunal prior to the issuance of its Judgment and the close of pleadings. As a result, we do not accept or admit into evidence the medical certificates.

45. In summary, we find the Dispute Tribunal committed no error, factual, legal, or procedural, in not awarding moral damages in its Judgment based on the lack of corroborating evidence.

Judgment

46. We affirm the Dispute Tribunal's Judgment No. UNDT/2019/137 and dismiss the appeal.

Original and Authoritative Version: English

Dated this 26th day of June 2020.

(Signed)	*(Signed)*	*(Signed)*
Judge Sandhu, Presiding Vancouver, Canada	Judge Colgan Auckland, New Zealand	Judge Neven Brussels, Belgium

Entered in the Register on this 19th day of August 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar