UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1214

Afm Badrul Alam

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Graeme Colgan Judge John Raymond Murphy
Case Nos.:	2021-1518
Date:	18 March 2022
Registrar:	Weicheng Lin

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Maryam Kamali

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. The Appellant, formerly a Logistics Operations Officer at the P-4 level at the United Nations Multidimensional Integrated Stabilization Mission in Central African Republic (MINUSCA), contested his unsuccessful job application to the position of Logistics Operations Officer in the Office of Peacekeeping Strategic Partnerships in New York (the contested decision).

2. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal), in Judgment No. UNDT/2020/201 (the Impugned Judgment), rescinded the contested decision as it found the Appellant's application did not receive full and fair consideration, but the Dispute Tribunal did not order in lieu or moral compensation due to lack of sufficient supporting evidence. Before the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) the Appellant appeals the lack of a compensation award which is the only issue in this appeal.

3. For reasons set out below, we grant the appeal in part.

Facts and Procedure

4. The Appellant was formerly a Logistics Operations Officer at the P-4 level at MINUSCA prior to his retirement sometime in July, 2020

5. On 13 March 2017 the position of Logistics Operations Officer at the P-4 level in the Office of Peacekeeping Strategic Partnerships in New York (the advertised post) was advertised.

6. The Appellant applied. He was a rostered candidate and invited to take a written assessment along with 11 other rostered candidates. He received a passing score of 65 and proceeded to interview (three others were also interviewed). All four interviewees, including the Appellant, were found not suitable. The Hiring Manager thus reviewed non-rostered candidates and 21 additional candidates were invited to take the same written test the Appellant had taken previously. Four new candidates with a score of 80 proceeded to interview. A candidate from the first written assessment who also received a score of 80 was also interviewed. Following this exercise, five candidates were recommended to the Central Review Body (CRB). The head of the department selected one candidate.

7. On 17 July 2018, the Appellant was informed he was not selected. On 27 July 2018, the Appellant filed a request for management review. By letter dated 10 September 2018, the Management Evaluation Unit (MEU) informed the Appellant that the decision was upheld.

8. In the Impugned Judgment, the UNDT found the Appellant had not been given full and fair consideration for the position. The UNDT reviewed the selection process and determined the process was flawed because of: i) the change of the passing score from 65 to 80 in the middle of the selection process without a documented reason; and ii) the failure to keep contemporaneous notes of the informal interview of the candidates which constituted a violation of Section 7.6 of the ST/AI/2010/3. Therefore, it was unlawful for the Administration to have proceeded with the second round of the selection process with the exclusion of the rostered candidates, including the Appellant.

9. The UNDT thus, rescinded the contested decision, however, it did not order in lieu compensation because the level of the advertised post was the same as that of the post the Appellant encumbered at the time and there was no evidence that he suffered any economic loss. As for the claim for moral damages, the UNDT relied on *Kallon*[1] and held that the testimony of the Appellant was not sufficient to prove harm without corroborating evidence. Finally, regarding the claim for loss of career opportunity, the UNDT found the Appellant decided to take early retirement out of his own volition and therefore any loss of income due to his early retirement was not directly caused by the contested decision.

Submissions

The Appellant

10. The Appellant says the UNDT failed to recognise the totality of the Appellant's pecuniary losses and erred in its refusal to set an alternate amount of compensation as required under Article 10(5)(a) of the UNDT Statute.

11. The Appellant submits it is well established that the Administration has never actually rescinded an appointment, promotion, or termination decision, and always elects to pay an alternate amount of compensation. Consequently, the Impugned Judgment provided a "get out of jail free" card for the Administration. He requests that the Appeals Tribunal award him

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

compensation of 12 months' net base salary under Article 9(1)(a) of the Appeals Tribunal Statute as compensation in lieu.

12. Further, the Appellant submits that the UNDT erred in considering only the base salary of P-4 level posts as the comparator to determine pecuniary losses. It failed to consider that the non-selection for the position in New York resulted in other quantifiable and non-specific losses. He contends that he suffered pecuniary losses such as i) the settling-in grant governed by Staff Rule 7.14 and ST/AI/2016/5; ii) the relocation grant governed by ST/AI/2016/4 and ST/IC/2017/35; iii) the difference in post adjustment for the period of the contested decision to regular age of retirement; iv) rental subsidy governed by Staff Rule 3.7, ST/AI/2018/3 and ST/IC/2018/9; v) not maintaining the cost of two households, one in New York and another in the Central African Republic (CAR), including the rental cost in CAR; vi) access to better medical treatment and care in New York; and, vii) access to "a more normal lifestyle" in New York, rather than the limitations of living in a compound.

13. In rejecting the Appellant's claim for compensation for harm, the Appellant submits the UNDT failed to consider the loss of opportunity and the negative impact of the impugned decision on the Appellant's career, and the impact the decision had on his personal circumstances which led him to resign just seven months prior to his anticipated retirement. He requests the Appeals Tribunal to award him compensation for harm of 12 months' net base salary under Article 9(1)(b) of the Appeals Tribunal Statute.

Secretary-General's Answer

14. The Secretary-General or Respondent submits that the UNDT correctly concluded that the Appellant was not entitled to compensation for the contested decision. Even if the Administration should have conducted a regular selection process more broadly to include both roster and non -rostered candidates, this would not have guaranteed his selection for the position as there were at least 21 other candidates who had higher scores on their written exams. Therefore, the UNDT's finding that he would have had a significant chance for selection had he been included in the regular selection process did not mean he had sufficient chances to merit compensation. Just because he was rostered did not mean that he met all of the requirements for the position as evidenced by his score on the written exam in comparison to other candidates. The UNDT accordingly did not err in finding him not entitled to compensation for his non-selection.

Additionally, the Respondent says that the Appellant has failed to establish any error by the UNDT warranting a reversal. The Appellant argues the UNDT erred in fact and law by not setting an alternate amount of compensation in lieu of rescission as provided by Article 10(5)(a) of the UNDT Statute resulting in a manifestly unreasonable decision.; however, the Appellant has not shown any error in the approach taken by the UNDT. He has not shown pecuniary harm by referring speculatively to entitlements and benefits to which he would have been entitled had he been selected for the Position in New York. Not receiving entitlements and benefits that are designed to cover costs for relocation to another duty station are not evidence of harm for a non-selection. The UNDT, therefore, did not err in law by not considering these factors as proof of harm, and further which were not specifically presented in the application before it by the Appellant.

15. Further, the Respondent submits that the UNAT Judgment in *Krioutchkov*[2] is distinguishable from the present case because the facts in that case were about the unlawfulness of removing the Appellant from a language roster and thereby making him ineligible for a position for which he had applied. In that case, the Appeals Tribunal found that the removal of the appellant from the roster was unlawful and that it prevented the fair assessment of his candidature for the job opening in question. In the present case, the UNDT correctly analysed the post for which he applied and the post he encumbered—both at the P-4 levels—and determined there was no evidence of economic loss and accordingly it could not order in lieu compensation.

16. The Respondent submits that the UNDT did not err by not awarding him compensation for harm, loss of opportunity, and moral damages under Article 10(5)(b) of the UNDT Statute. Article 10(5) does not create a right to compensation. The claimant carries the burden of proof about the existence of factors causing damage to the victim's psychological, emotional and spiritual wellbeing. The Appellant is not entitled to compensation just because no compensation in lieu of rescission was not set. Compensation under Article 10(5)(b) is only set upon evidence of harm. Not every administrative wrongdoing leads to an award of compensation.

[2] *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1067.

17. The Respondent submits that, in this case, the Appellant did not provide evidence of harm for his claims of moral damages or loss of opportunity. In addition, the Appellant's argument that he was deprived relocation grants and differences in post adjustment between New York and CAR assumes he would have been selected to the post and this was not likely. In addition, the alleged pecuniary loses did not consider the amounts he was receiving in CAR such as danger pay, hardship pay, rest or recuperation that are not present in New York duty station. Furthermore, the analysis of loss of opportunity award must contemplate mitigating factors however the Appellant did not present any evidence of mitigating factors like finding another position etc., instead he took early retirement. The UNDT correctly found that any loss of income due to his early retirement was not attributable to the contested decision but he took early retirement on his own volition. He could have taken other courses of actions, such as applying for other positions. Also, the UNDT held that despite asserting he suffered from distress and demoralisation, the Appellant did not provide any supporting evidence for his claim for moral damages (see *Kallon*[3]).

18. The Respondent submits that, further, a loss of opportunity does not mean that the Appellant missed an opportunity to be in a different duty station which he considered to be better. There has to be a significant chance of selection and therefore a real possibility of selection but the opportunity was missed because of flaws in the selection process. Here, the Appellant had no real chance of selection. He took a test on which he scored 65% and had an interview, but was found unsuitable.

19. The Respondent submits that the UNDT correctly rejected his claim for moral damages as there was no evidence supporting it.

Considerations

20. The only issue for consideration and determination in this appeal whether the UNDT erred in not awarding compensation in lieu of rescission and moral damages.

21. Article 10.5 of the UNDT Statute outlines the remedies available to the Dispute Tribunal. It provides that the Tribunal may order one or both of the following awards of compensation:

[3] *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742.

> (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;
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> (b) Compensation for harm, supported by evidence, which shall not normally 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.

Compensation in lieu pursuant to Article 10.5(a) of the UNDT Statute

22. Pursuant to Article 10.5(a) of the UNDT Statute, if the Dispute Tribunal orders rescission of the contested administrative decision and where that decision concerns appointment, promotion or termination (as in the case at bar), the Dispute Tribunal *shall* also set an amount of compensation the respondent may elect to pay as an alternative to rescission (emphasis added). An ordinary and plain reading of the provision indicates that where the administrative decision concerns appointment, promotion or termination, it is mandatory, not discretionary, for the Dispute Tribunal to also set an amount of in lieu compensation.

23. The purpose of in lieu compensation is to place the staff member in the same position he or she would have been in, had the unlawful decision had not been made.[4] Although, the Appeals Tribunal exercises discretion in establishing the amount of in lieu compensation, it shall ordinarily give some justification and set an approximate amount that it considers is an appropriate substitution for rescission or specific performance in the circumstances. In other words, compensation must be set by the UNDT following a principled approach and on a case-by-case basis.

24. In the present case, the Dispute Tribunal, in assessing compensation in lieu, considered the Appellant's chance for selection as "significant", and then reviewed the difference between the level and salary he received at the post he was in at the time and the level and salary of the post he applied for. Having determined that the contested decision was unlawful, it ordered

[4] *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.

rescission of the decision and agreed that it "must set an amount of compensation *in lieu* of rescission or specific performance, which needs to be supported by evidence".[5]

25. Despite recognising its obligation to set an amount to compensation in lieu, the Dispute Tribunal declined to make an award because the level of the post to which the Appellant had applied was the same as the post he encumbered at the time. In other words, the Appellant did not suffer loss in salary due to the non-selection and in lieu compensation could not place the Appellant in the same position he would have been in had he been selected for the relevant post. We do not disagree and this is not disputed.

26. However, by stating that the Appellant had not provided evidence that he suffered any economic loss, therefore, "no amount of *in lieu* compensation can be ordered"[6], the Dispute Tribunal erred by failing to implement the mandatory obligation set out in Article 10.5(a) that it must award an amount of compensation in lieu of rescission.

27. Other than there being no differential in salary for the Appellant, he also alleges that he incurred costs of maintaining two households, medical care costs, and other lifestyle considerations. These costs would not have been incurred had the unlawful contested decision not occurred.

28. 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.[7]

29. In the present case, four roster candidates including the Appellant, were invited for an interview following the initial written assessment and before the Administration changed the selection process unlawfully. If this had not been done, the probability of the Appellant being selected would at most be 1 in 4. We do not have sufficient evidence on any additional costs for medical care costs or lifestyle costs incurred by the Appellant. However, the Appellant says he incurred additional costs for maintaining two households (one in New York and the other in Central African Republic) of about USD1725 per month. The selection decision was made July 2018 and the Appellant retired more than seven months prior to his mandatory retirement

[5] Impugned Judgment, paras. 59-60.
[6] *Ibid*., para. 61.
[7] *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-712, para. 16.

date of 31 January 2021[8], approximately 1 July 2020 or 24 months after the selection decision. Based on this, we calculate that the additional cost of maintaining two households at USD1725 per month amounts to USD41,400 total additional cost. However, given the 25 per cent probability of the Appellant being selected from the roster, the compensable cost should be 25 per cent of the total additional cost or $10,350. This is not an exact science, however, we set this in lieu compensation as the most reasonable in the circumstances and the evidence before us.

30. The Appellant also argues that the Dispute Tribunal failed to consider other losses including grants, difference in post adjustments, and extra costs he incurred as a result of staying in CAR and not relocating to New York. However, we find these entitlements and benefits, including rental subsidy, are designed to cover the actual costs of relocation and living in a certain duty station; they are not intended to provide additional remuneration or salary to staff members for the post. As such, these cannot be regarded as considerations in determining in lieu compensation.

31. In conclusion, we find the Dispute Tribunal erred in law by stating that it could not award in lieu compensation because it had an obligation to do so. We award the Appellant USD10,350 as in lieu compensation.

Compensation for harm pursuant to Article 10.5(b) of the UNDT Statute

32. The Dispute Tribunal rejected the Appellant's claim for compensation for harm for loss of career opportunity and for moral harm due to mental distress and humiliation.

33. As stated by Appeals Tribunal previously, the claimant bears the burden of proof to establish the existence of negative consequences resulting from the illegality, so that the harm must be directly caused by the contested decision. If these other two elements of the notion of responsibility are not justified, the illegality can be declared but compensation cannot be awarded (see *Sirhan*[9], *Kebede*[10]).

[8] Impugned Judgment, para. 62.
[9] *Sirhan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-860, para. 19.
[10] *Kebede v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-874, para. 20.

34. Regarding the Appellant's claim for loss of opportunity, the jurisprudence on compensation for loss of career opportunity non-selection, even for lateral moves as the basis for irreparable harm, has been considered and established in various non-selection cases. A loss of opportunity can be compensated for but the harm should be directly caused by the contested decision, be supported by evidence, and may not be duplicative compensation (see, for example, *Mihai*[11]*, at paragraph 21)*). In awarding compensation for a loss of opportunity, the Dispute Tribunal must take into account "other factors such as the staff member mitigating his or her loss, or taking up a better position, or earning [other] income"[12]

35. In the present case, the Dispute Tribunal held that any loss of income due to the Appellant's early retirement was not directly caused by the contested decision and that he decided to take early retirement of his own volition. The Appellant has the burden of establishing that this hardship was directly caused by the contested decision and it is not enough to just demonstrate an illegality to obtain compensation. In this instance, we find no error in the Dispute Tribunal's finding that the Appellant had not discharged his burden of proof that the contested decision caused a loss of income due to loss of career opportunity.

36. As for the request for compensation for moral harm, the Appellant provided his testimony of suffering from "immense distress, humiliation, and mental agony". However, the Dispute Tribunal rejected this claim on the basis that the testimony of the Appellant was not sufficient evidence without supporting corroboration by independent evidence.[13]

37. Although the current jurisprudence requires corroborating evidence beyond the testimony of the Appellant to support a claim for moral damages[14], we also note the Appeals Tribunal's dissenting opinion in *Kallon* that evidence to prove moral injury from a fundamental breach of contract may take different forms. The harm to *dignitas* or reputation and career potential or harm, stress or anxiety directly linked or reasonably attributed to the breach of a claimant's substantive or procedural rights (both of which the Appellant here alleges) may be established on the "totality" of the evidence, on the claimant's own testimony or that of others, including experts, or the facts may lead to a *prima facie* conclusion to infer

[11] *Mihai v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-724, para. 21.
[12] *Dube v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-674, para. 59.
[13] Impugned Judgment, para. 65, quoting *Langue v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-858, para. 18, and citing *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742.
[14] Impugned Judgment, para. 65.

harm to personality deserving of compensation pursuant to Article 10(5)(b). As stated in the *Kallon* dissent[15], while corroborating evidence will assist the claimant to meet his/her burden of proof and expert evidence on stress and anxiety suffered by the claimant is the best evidence, and will "ordinarily be required", it is not required in all cases and is not the only permissible evidence.

38. In this present case, the Appellant provided testimony of harm to his reputation and "immense distress, humiliation and mental agony" to the Dispute Tribunal. However, the Dispute Tribunal did not find this testimony as sufficient for an inference or *prima facie* conclusion that the Appellant suffered a moral injury directly caused or attributable to the contested decision; therefore, the Appellant did not discharge the evidentiary burden of proof.

39. As stated in *Kallon*[16], the Appeals Tribunal should give deference to the Dispute Tribunal in the exercise of its discretion and the Dispute Tribunal is best placed to conclude from the evidence whether a claim for moral damages is established and if so, its quantum. The Appeals Tribunal "must not interfere lightly in the exercise of the jurisdictional powers conferred on the tribunal of first instance to enable cases to be judged fairly and expeditiously and for dispensation of justice".[17]

40. The Appellant has not discharged his onus to show that Dispute Tribunal erred as the first instance trier of fact and, as such, we accept the Dispute Tribunals findings on compensation for moral damages.

[15] *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742, para. 69.
[16] *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742, para. 71.
[17] *Nadeau*, 2017-UNAT-733/ Corr.1, para. 32, quoting *Bastet v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-423, para. 14, citing *Khambatta v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-252, para. 15.

Judgment

41. The appeal is granted in part and the Administration is ordered to provide the Appellant with the sum of USD10,350 as in lieu compensation.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)	*(Signed)*	*(Signed)*
Judge Sandhu, Presiding Vancouver, Canada	Judge Colgan Auckland, New Zealand	Judge Murphy Cape Town, South Africa

Entered in the Register on this 6th day of May 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar