



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

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Judgment No. 2024-UNAT-1498/Corr.1

**Houria Kembouche  
(Respondent/Applicant)**

**v.**

**Secretary-General of the United Nations  
(Appellant/Respondent)**

**JUDGMENT**

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Before:	Judge Kanwaldeep Sandhu, Presiding Judge Nassib G. Ziadé Judge Graeme Colgan
Case No.:	2023-1864
Date of Decision:	25 October 2024
Date of Publication:	9 December 2024
Registrar:	Juliet E. Johnson

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Counsel for Houria Kembouche: Ana Giulia Stella and Robbie Leighton, OSLA

Counsel for Secretary-General: Amanda Stoltz

**JUDGE KANWALDEEP SANDHU, PRESIDING.**

1. Ms. Houria Kembouche (Ms. Kembouche), a former staff member of the Office of the United Nations High Commissioner for Refugees (UNHCR), contested the decision of the Administration to terminate her indefinite appointment due to a change of position title (contested decision).

2. On 17 August 2023, by Judgment No. UNDT/2023/o88 (impugned Judgment),<sup>1</sup> the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) granted Ms. Kembouche's application on the grounds that the change of position title did not constitute an abolition of post that would authorize the termination of her employment. It rescinded the contested decision, fixed the alternative compensation in lieu of rescission at two years' net base salary and awarded compensation for moral damages in the amount of USD 8,000. The Secretary-General appeals and argues that the change of position title is equivalent to an abolition of post as authorized by the applicable legal framework or, in the alternative, that the Dispute Tribunal erred in awarding compensation.

3. For the reasons set out below, the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) grants the appeal in part and modifies the impugned Judgment.

**Facts and Procedure**

4. Ms. Kembouche joined UNHCR in 1989, primarily serving as a Secretary in Brussels, Belgium, from the G-4 to G-6 level.

5. By letter dated 17 April 1998, Ms. Kembouche was granted an indefinite appointment, effective 1 January 1998, with the special condition that the High Commissioner would not "terminate [her] appointment except by applying the criteria provided in Staff Regulation 9.1(a) relating to the termination of a permanent appointment, or in accordance with the provisions of Staff Regulation 10.2".<sup>2</sup>

6. By memorandum dated 18 August 2020, Ms. Kembouche was informed that she qualified for the Personal Grade Award and was promoted retroactively to the G-7 level, effective

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<sup>1</sup> *Kembouche v. Secretary-General of the United Nations*, Judgment No. UNDT/2023/o88.

<sup>2</sup> Letter of appointment dated 17 April 1998.

1 April 2020, while holding the G-6 position of Executive Support Associate in the Multi-Country Office in Belgium.<sup>3</sup>

7. On 27 April 2021, Ms. Kembouche was informed during a meeting with her supervisor and a representative of the Division of Human Resources, UNHCR, of the Administration's intent to change the title of the position she encumbered.

8. On 28 April 2021, Ms. Kembouche was placed on full-time sick leave. As of 15 November 2021, her status changed to half-time sick leave.

9. On 30 April 2021, Ms. Kembouche was informed by letter from the Representative of EU Affairs (Representative), UNHCR, of the Administration's intent to "reclassify (change of title) [the position she held] (...) from Executive Support Associate to Protection Associate (G-6), Multi-Country Office, Belgium". The letter further provided, *inter alia*, that:<sup>4</sup>

Following a thorough review of the structure of the Multi-Country Office in Belgium and in line with current operational needs and resources, I write to inform you that the position of Executive Support Associate which you encumber has been identified for change of title to Protection Associate effective 1 December 2021.

This letter constitutes written notice of my intention to initiate the process to change the status of your position.

Should the change to your position be approved, I will notify you of the decision and confirm to you the effective date of the change of title.

In the event the change of title is approved, the position will be advertised.

10. On 2 May 2021, Ms. Kembouche applied for a position of Senior Finance Assistant, at the G-5 level, in Brussels, but did not respond to the invitation for a written test. Furthermore, according to the Secretary-General, she did not submit any other application for vacancy announcements before her separation from service on 1 May 2022.

11. On 29 September 2021, Ms. Kembouche was formally notified by letter from the Representative of the Administration's decision to change the title of the position she encumbered from Executive Support Associate, at the G-6 level, to Protection Associate, also

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<sup>3</sup> Memorandum of endorsement of the Personal Grade Award in the General Service Category from the Administration to Ms. Kembouche.

<sup>4</sup> Letter dated 30 April 2021 from the Representative to Ms. Kembouche.

at the G-6 level, resulting in the advertisement of the position. The letter mentioned, *inter alia*, that:<sup>5</sup>

[Y]ou may be entitled to ‘Consideration on a Preferred Basis’ in respect of vacant positions in your duty station. In the absence of a new appointment, it will be determined if a comparative review process will need to be undertaken (...). We will let you know in due time if such exercise will be required.

...

In light of the above, you are encouraged to apply for all suitable vacant positions from now on. (...)

...

(...) I would like to (...) reassure you that all efforts will be made to support you throughout this process.

12. On 24 November 2021, Ms. Kembouche requested management evaluation of the decision to reclassify her position.

13. On 14 February 2022, the Director of the Division of Human Resources, UNHCR, informed Ms. Kembouche by letter that her position was reclassified and that, consequently, her indefinite appointment would be terminated effective 1 April 2022, under the terms of Staff Regulation 9.3(a)(i).<sup>6</sup> The letter further stated that Ms. Kembouche was entitled to receive a termination indemnity pursuant to Staff Rule 9.8 (calculated in accordance with Annex III to the Staff Regulations as 12 months’ salary) as well as compensation in lieu of the notice period (of one and a half months) in accordance with Staff Rule 9.7(d), since the circumstances had not allowed the Administration to provide the required period of notice of three months.<sup>7</sup>

14. On 16 February 2022, the Deputy High Commissioner, UNHCR, informed Ms. Kembouche by letter that her request for management evaluation was not receivable, as when she submitted it, no action had been taken with respect to the termination of her indefinite contract. In any event, the Deputy High Commissioner, UNHCR, examined the

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<sup>5</sup> Letter dated 29 September 2021 from the Representative to Ms. Kembouche.

<sup>6</sup> Secretary-General’s Bulletin ST/SGB/2018/1 (Staff Regulations and Rules of the United Nations).

<sup>7</sup> Letter dated 14 February 2022 from the Director of the Human Resources, UNHCR.

merits of her request and found that the Administration had lawfully exercised its operational and managerial discretion in the position change.<sup>8</sup>

15. On 23 March 2022, Ms. Kembouche requested management evaluation of the contested decision.<sup>9</sup> On the same day, she also filed an application for suspension of action, pending the outcome of the management evaluation of the contested decision before the UNDT.<sup>10</sup>

16. On 28 March 2022, by Order No. 46 (GVA/2022), the Dispute Tribunal concluded that the application for suspension of action was moot, as the Secretary-General had already undertaken to suspend Ms. Kembouche's termination of appointment and not to implement her separation from service pending the outcome of the management evaluation request.<sup>11</sup>

17. On 13 April 2022, the Deputy High Commissioner, UNHCR, informed Ms. Kembouche by letter of its decision to uphold the contested decision, stating, *inter alia*, that:<sup>12</sup>

[F]or the purpose of determining UNHCR's and an affected staff member's rights and obligations under the Staff Regulations and Rules, a 'change of position title' pursuant to UNHCR's legal framework legally and factually amounts to an abolition of the old position and a creation of a new one.

...

The Organization acknowledges that a change of position title may displace a staff member in the same way as a post discontinuation or any other position change requiring advertisement. For this reason, UNHCR's legal framework equates these situations in terms of procedural protection and consequences.

...

In view of the above, I conclude that the 'change of the position title' is legally and factually equivalent to the abolition of a post within the meaning of Staff Regulation 9.3(a)(i), and that UNHCR has met its obligation under its internal policy framework and the UNAT jurisprudence to consider you for available suitable posts.

18. On 1 May 2022, Ms. Kembouche was separated from service.

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<sup>8</sup> Management evaluation response dated 16 February 2022.

<sup>9</sup> Management evaluation request dated 23 March 2022.

<sup>10</sup> *Kembouche v. Secretary-General of the United Nations*, Order No. 46 (GVA/2022), para. 1.

<sup>11</sup> *Ibid.*, paras. 4-6.

<sup>12</sup> Management evaluation response dated 13 April 2022.

19. On 12 July 2022, Ms. Kembouche filed an application with the Dispute Tribunal challenging the contested decision.

*Impugned Judgment*

20. In the impugned Judgment, the Dispute Tribunal found that Ms. Kembouche's change of position title did not constitute an abolition of post pursuant to Staff Regulation 9.3(a)(i). In this regard, the UNDT clarified that, although a change in title may arguably produce similar effects as an abolition of post, the two actions are not equivalent under the applicable legal framework. The UNDT further highlighted that, under Section 6.4 of Administrative Instruction UNHCR/AI/2019/7/Rev.1 (New Resource Allocation Framework—Part 1) (Resource Allocation Instruction), the "discontinuance" of a position—explicitly described as being the "same as abolition of a post defined in the Staff Regulations and Rules"—is referred to separately from a "change of position title". This distinction indicates that they are independent actions not legally equivalent.<sup>13</sup> Relying on Section 6.6 of the Resource Allocation Instruction, which outlines situations where changes to an existing position do not necessitate the advertisement of the post (such as in an harmonization exercise or in case of redeployment), the UNDT observed that a change of position title may or may not displace a staff member in the same way as a post discontinuation.<sup>14</sup>

21. Having determined that Ms. Kembouche's change of position title did not constitute an abolition of post, the UNDT concluded that the contested decision was unlawful, as it violated her clear terms of employment. Specifically, her letter of appointment dated 17 April 1998 included a clause stipulating that her appointment could not be terminated except in accordance with the termination criteria outlined in former Staff Regulation 9.1(a)<sup>15</sup> (subsequently amended as Staff Regulation 9.3(a)), namely "if the necessities of the service require abolition of the post or reduction of the staff, if the services of the individual concerned prove unsatisfactory or if he or she is, for reasons of health, incapacitated for further service".<sup>16</sup>

22. On this basis, the UNDT rescinded the contested decision. In awarding compensation in lieu of rescission at two years' net base salary, the Dispute Tribunal considered that Ms. Kembouche had a distinguished 33-year career with the Organization and would have

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<sup>13</sup> *Ibid.*, paras. 33-34.

<sup>14</sup> *Ibid.*, para. 36.

<sup>15</sup> Secretary-General's Bulletin ST/SGB/Staff Rules/1/Rev.8 of 1 June 1995 (Staff Rules).

<sup>16</sup> *Ibid.*, paras. 42-46.

remained employed with UNHCR until her normal retirement age in four years.<sup>17</sup> The UNDT also rejected the Secretary-General's contention that the termination indemnity received by Ms. Kembouche should be deducted from the amount of compensation in lieu of rescission.<sup>18</sup>

23. Last, in awarding USD 8,000 in moral damages, the UNDT relied on two medical reports dated 7 and 28 March 2022, as well as her statement that "she suffered, for the first time in her life, from a persistent severe stress and serious depression and anxiety, which required psychiatric therapy and medication" to determine that she had established a causal link between her medical condition and the contested decision.<sup>19</sup> Additionally, the UNDT found that the indication in the medical report dated 28 March 2022 that she had experienced psychological issues since 2018 did not constitute contradictory evidence for her claim and that "there [could] be no doubt that the contested decision further aggravated [her] health issues".<sup>20</sup>

### **Submissions**

#### **The Secretary-General's Appeal**

24. The Secretary-General requests the Appeals Tribunal to vacate the impugned Judgment.

25. First, the Secretary-General submits that the Dispute Tribunal erred in law and in fact when it determined that Ms. Kembouche's position was not abolished pursuant to Staff Regulation 9.3(a)(i). The Secretary-General recalls that the UNHCR legal framework treats a title change as legally and factually equivalent to the abolition of a position and that the UNDT erred in concluding otherwise.

26. The Secretary-General contends that the UNDT's conclusions in this regard included several "overlapping and at times contradictory findings". Specifically, the Secretary-General argues that the UNDT's finding that a change of position title and an abolition of post cannot have the same effect, as they are treated separately in the Staff Regulations and Rules, is erroneous and lacks reference to specific provisions.<sup>21</sup>

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<sup>17</sup> *Ibid.*, paras. 53-54.

<sup>18</sup> Impugned Judgment, paras. 56-57.

<sup>19</sup> *Ibid.*, paras. 62 and 65.

<sup>20</sup> *Ibid.*, paras. 63-64.

<sup>21</sup> *Ibid.*, para. 35.

27. The Secretary-General also notes that it is precisely because Ms. Kembouche's title change was equivalent to an abolition of her position that she benefitted from all the protections and requirements outlined in Staff Rule 9.6 (c) to (e), which apply in the event of termination due to the abolition of a post.

28. The Secretary-General submits that he did not use erroneous terminology by referring to the abolition of Ms. Kembouche's position instead of the discontinuation of her position. In any event, he contends that any differences in the terminology were of no practical significance.

29. Second, the Secretary-General submits that the UNDT erred in law and in fact when it concluded that the contested decision was unlawful. In this regard, he contends that the procedures governing the termination of appointment of staff members affected by an abolition of post were fully complied with. In particular, he highlights that the Administration undertook "proper, reasonable, and good faith efforts" to retain Ms. Kembouche, despite her lack of cooperation in timely and completely applying for suitable vacant positions. Additionally, the Secretary-General notes that the Administration correctly determined that there were no suitable positions for Ms. Kembouche and, therefore, a comparative review could not take place prior to the termination of her appointment.

30. Third, the Secretary-General argues that the Appeals Tribunal should also set aside the award of compensation as compensation cannot be awarded when no illegality has been established.

31. In any event, even if the UNAT were to conclude that the contested decision is unlawful, the Secretary-General contends that the UNDT erred in fact, in law, and exceeded its jurisdiction in its award of compensation. In this regard, the Secretary-General asserts that the UNDT erred in law and exceeded its jurisdiction by awarding compensation exceeding two years' net base salary in the absence of any exceptional circumstances.

32. The Secretary-General argues that the UNDT also erred by not deducting the termination indemnity received by Ms. Kembouche from its award of compensation in lieu.

33. Last, the Secretary-General argues that the UNDT erred in law and in fact by awarding moral damages in the absence of any evidence establishing a cause-effect nexus between the contested decision and Ms. Kembouche's medical issues. In this regard, the Secretary-General reiterates that Ms. Kembouche presented "no evidence (...) that these medical issues resulted from,



or even that they worsened as a result of, the [contested decision]”. On the contrary, he notes that the 28 March 2022 medical report indicated that she had been experiencing psychological issues since 2018, which had been worsening for nearly a year and also refers to an accumulation of stress at work in recent years. Additionally, he points out that the 7 March 2022 medical report also refers to a diagnosis of depression since August 2021.

**Ms. Kembouche’s Answer**

34. Ms. Kembouche requests the Appeals Tribunal to dismiss the appeal and uphold the impugned Judgment.

35. First, Ms. Kembouche contends that the UNDT did not err in determining that her position was not abolished pursuant to Staff Regulation 9.3(a)(i). She asserts that a change in position title is different from an abolition of post. This is illustrated by the UNHCR legal framework, where “change of position title” and “abolition of post” are different legal actions with different meanings. They are even referred to separately in Section 6.4 of the Resource Allocation Instruction.

36. Ms. Kembouche submits that the Secretary-General erroneously asserts that the UNHCR legal framework may differ from the Staff Rules and that “the employed terminology in the [Resource Allocation Instruction] grants UNHCR a degree of flexibility in discerning the nature of a change to the status of a position (in this case, a title change)”. She argues that this assertion implies that UNHCR Administrative Instructions can contravene the Staff Rules, when in fact, the latter are higher in the hierarchy of rules.

37. Second, Ms. Kembouche contends that the Secretary-General’s argument that actions with the same effects are legally identical lacks support. On the contrary, she observes that actions with identical effects are not necessarily the same. Consequently, just because her change of position title resulted in her displacement does not mean that it is equivalent to a discontinuance or an abolition of post. In this regard, Ms. Kembouche also highlights that the effects of a discontinuance and a change of position title are not the same.

38. Third, Ms. Kembouche submits that the UNDT did not err in finding that a change of position title may or may not displace a staff member. In this regard, she reiterates that the Secretary-General’s contention that all actions displacing a staff member are identical lacks support and should be disregarded.

39. Fourth, Ms. Kembouche submits that the UNDT did not err in law and in fact when it concluded that the contested decision was unlawful. She asserts that her letter of appointment dated 17 April 1998 included a clause explicitly stating that her appointment could not be terminated except under limited circumstances which did not include the interest of the Organization, unless she consented to it, which she did not.

40. Last, Ms. Kembouche submits that the UNDT did not err in law or in fact or exceeded its jurisdiction in its award of compensation. She contends that her “extremely long service, possession of the most protected form of contract, her separation shortly before retirement when opportunities for reemployment are minimal coupled with the impact on her health are all sufficient to justify an award in excess of two years’ net base pay”.

41. Additionally, Ms. Kembouche submits that, contrary to the Secretary-General’s submission, she was not suitable for the advertised vacant positions, either due to the notice of intent to change the title of her position or because she was on sick leave and unable to apply.

42. Furthermore, she points out that the Administration failed to conduct a comparative review, despite the presence of a suitable G-5 position occupied by another staff member at the relevant time of events.

43. Ms. Kembouche argues that the UNDT did not err in dismissing the Secretary-General’s argument that the termination indemnity that she received should be deducted from the amount of compensation in lieu of rescission. She further highlights that the UNDT’s findings in this regard are consistent with established Appeals Tribunal jurisprudence.<sup>22</sup> Last, Ms. Kembouche submits that there is a causal nexus between the contested decision and her medical issues, and that the UNDT’s findings in this regard are free of error.

### **Considerations**

44. The present appeal concerns the lawfulness of UNHCR’s decision to terminate the permanent appointment of Ms. Kembouche, specifically whether the termination was an

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<sup>22</sup> *El-Kholy v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-730, para. 39; *Fasanella v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-765, para. 34; *Eissa v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-469, para. 27.

“abolition of post”, as authorized by Staff Regulation 9.3(a)(i). If unlawful, the appeal also concerns the appropriate compensation for the illegality.

45. In the letter of intent dated 30 April 2021, UNHCR notified Ms. Kembouche that there had been a “thorough review of the structure of the Multi-Country office in Belgium and in line with current operational needs and resources”, her position of “Executive Support Associate (...) ha[d] been identified for *change of title* to Protection Associate effective 1 December 2021”.<sup>23</sup> The letter further mentioned that in the event the change of title was approved, the position would be advertised. On 29 September 2021, the Administration informed Ms. Kembouche of its decision to change the title of her position and its intent to advertise the position.

46. On 14 February 2022, the contested decision to terminate Ms. Kembouche’s indefinite appointment effective 1 April 2022 under Staff Regulation 9.3(a)(i) was communicated to Ms. Kembouche.

47. It is well-settled law that:<sup>24</sup>

... The Administration has broad discretion to reorganize its operations and departments to meet changing needs and economic realities. According to the Appeals Tribunal’s well-settled jurisprudence, ‘an international organization necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff. (...) Even in a restructuring exercise, like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members.

48. In reviewing this discretionary decision of the Administration, the Dispute Tribunal reviews whether the exercise of such discretion is legal, rational, reasonable, and procedurally correct to avoid unfairness, unlawfulness or arbitrariness. Specifically, the Dispute Tribunal “can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General

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<sup>23</sup> Emphasis added.

<sup>24</sup> *Timothy v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-847, para. 25 (internal footnotes omitted).

amongst the various courses of action open to him. Nor is it the role of the Dispute Tribunal to substitute its own decision for that of the Secretary-General”.<sup>25</sup>

49. The issue in the appeal is whether the contested decision was lawful and in accordance with the Staff Regulations and Rules and terms of Ms. Kembouche’s appointment.

50. The employment contract between UNHCR and Ms. Kembouche set out the special condition that the High Commissioner would not “terminate [her] appointment except by applying the criteria provided in Staff Regulation 9.1(a) relating to the termination of a permanent appointment, or in accordance with the provisions of Staff Regulation 10.2”.<sup>26</sup>

51. Former Staff Regulation 9.1(a) provided:<sup>27</sup>

The Secretary-General may *terminate the appointment of a staff member who holds a permanent appointment* and whose probationary period has been completed, *if the necessities of the service require abolition of the post or reduction of the staff*, if the services of the individual concerned prove unsatisfactory or if he or she is, for reasons of health, incapacitated for further service.

52. This Staff Regulation was amended in 2018 by Staff Regulation 9.3, which contains similar language:<sup>28</sup>

(a) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment or for any of the following reasons:

(i) *If the necessities of service require abolition of the post or reduction of the staff;*

...

(b) In addition, in the case of a staff member holding a continuing appointment, the Secretary-General may terminate the appointment without the consent of the staff member if, in the opinion of the Secretary-General, such action would be in the interest of the good administration of the Organization, to be interpreted principally as a change or termination of a mandate, and in accordance with the standards of the Charter;

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<sup>25</sup> *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

<sup>26</sup> UNDT application Annex 2, Letter of appointment dated 17 April 1998.

<sup>27</sup> Emphasis added.

<sup>28</sup> Emphasis added.

(c) If the Secretary-General terminates an appointment, the staff member shall be given such notice and such indemnity payment as may be applicable under the Staff Regulations and Rules. Payments of termination indemnity shall be made by the Secretary-General in accordance with the rates and conditions specified in annex III to the present Regulations;

(d) The Secretary-General may, where the circumstances warrant and he or she considers it justified, pay to a staff member whose appointment has been terminated, provided that the termination is not contested, a termination indemnity payment not more than 50 per cent higher than that which would otherwise be payable under the Staff Regulations.

53. Staff Rule 9.6 provides, in relevant parts, that:<sup>29</sup>

(c) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds:

(i) *Abolition of posts* or reduction of staff

...

(e) Except as otherwise expressly provided in paragraph (f) below and staff rule 13.1, if the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post or the reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in [an enumerated] order of preference (...)

54. The question is whether a change of position title as used by UNHCR is the same as the abolition of a post authorized by the Staff Rules and Regulations and the terms of Ms. Kembouche's employment contract.

55. The Secretary-General relies on the Resource Allocation Instruction that provides mandatory guidance and authority for management of structures, financial and staffing resources for UNHCR.<sup>30</sup>

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<sup>29</sup> Emphasis added.

<sup>30</sup> Section 2.6 of the Resource Allocation Instruction.

56. For management of staff, Section 6.4 of the Resource Allocation Instruction sets out authorities for the management of positions as follows:<sup>31</sup>

- a. authority to create a new position (standard or expert);
- b. authority to extend an existing position (as-is without any change);
- c. authorities to change status of an existing position:
  - *discontinue (same as abolition of a post defined in the Staff Regulations and Rules of the United Nations)*;
  - redeploy from one location to another (as-is without any change);
  - upgrade or downgrade;
  - harmonization exercise;
  - *change of position title*.

57. There are no definitions of “change of position title” or “abolition of post” in the applicable framework. Furthermore, the Staff Regulations and Rules do not refer to a “change of position title” but only to an “abolition of post”, while the Resource Allocation Instruction refers to both.

58. As there are no definitions to assist in determining whether Ms. Kembouche’s change of position title was an abolition of post or something different, one must have a principled approach to the interpretation of the relevant legislative provisions. This means reading and interpreting “the words of a legislative provision (...) in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the legislation, the object of the legislation, and the intention of the legislature, i.e., the General Assembly”.<sup>32</sup>

59. The General Assembly, under the Charter of the United Nations, enacts the Staff Regulations and Rules. The purpose and scope of the Staff Regulations and Rules is to “set out the broad principles of human resources policy for the staffing and administration of the Secretariat and the separately administered funds and programmes. (...) The Staff Regulations embody the fundamental conditions of service and the basic rights, duties

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<sup>31</sup> Emphasis added.

<sup>32</sup> *Monica Ioana Barbulescu v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1392, para. 43 citing *Reilly v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-975, para. 33.

and obligations of the United Nations Secretariat. They represent the broad principles of human resources policy for the staffing and administration of the Secretariat”.<sup>33</sup>

60. UNHCR is a separately administered entity authorized by the General Assembly. Its instructions, including the Resource Allocation Instruction, outline “delegation of authority and simplified processes”, including “for the day-to-day management of approved financial resources, organizational structure, positions and affiliate workforce arrangements”, as stated in Sections 2.1, 2.4 and 2.5 of this Administrative Instruction.

61. Therefore, the Staff Regulations and Rules are the primary legislation, and the Resource Allocation Instruction is delegated legal authority. The primary legislation must prevail if there is any conflict or confusion between provisions in the primary legislation and the delegated authority.<sup>34</sup>

62. Staff Regulation 9.3 only provides for two instances in which the Secretary-General can terminate a permanent appointment if the necessities of service require it: the abolition of a post or a reduction of the staff. It does not include a change of position title.

63. In defining “abolition” as used in the Staff Rules, regard may be had to the common definitions and grammatical use of the word. In the Merriam-Webster Dictionary, “abolish” is defined as “to end the observance or effect of (something, such as a law): to completely do away with (something)”.<sup>35</sup> The Cambridge Dictionary defines “abolition” as “the act of ending an activity or custom officially”.<sup>36</sup>

64. Consequently, an ordinary and grammatical reading of Staff Regulation 9.3 is that the Secretary-General can terminate a permanent appointment if the necessities require a post to be ended or “completely done away”.

65. The Secretary-General argues that the relevant provisions of the UNHCR legal framework, read together, demonstrate that a change of position title legally and factually amounts to the abolishment of the incumbent’s position and creation of a different position.

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<sup>33</sup> Preamble of the Staff Regulations and Rules.

<sup>34</sup> *De Aguirre v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-705, paras. 43-44.

<sup>35</sup> See <https://www.merriam-webster.com/dictionary/abolish> (accessed on 15 November 2024).

<sup>36</sup> See <https://dictionary.cambridge.org/us/dictionary/english/abolition> (accessed on 15 November 2024).

66. The Secretary-General observes that, contrary to the UNDT’s findings, all changes to an existing position under the Resource Allocation Instruction requires advertisement of the new position, except for the specific circumstances outlined in Section 6.6 of this Administrative Instruction, which do not include title changes.<sup>37</sup>

67. Section 6.7(h) of the Resource Allocation Instruction sets out the process for “[n]otification of intent to change a position”. It specifies that both “discontinuation [and] other changes of the position” are treated in the same manner. It states that an “incumbent is notified in writing by the manager prior to formal steps *pertaining to discontinuation or other changes of the position*”.<sup>38</sup> Its Section 6.7(i) further provides that “the staff member, who will have received a notification of intent, is then informed in writing by the manager once the decision is taken, including the effective date of the position change”.

68. However, just because the legal authority and process is the same for the discontinuance or abolition of a post as for a change of position title does not necessarily mean that they are identical for the purposes of the Staff Regulations and Rules and the employment contract. The legal framework provides for the same protections for staff members facing termination of appointment, whether due to the discontinuance of their post or a change of position title, because both actions involve the same threat of termination – not because they are identical administrative decisions. For example, termination due to misconduct is not the same as termination due to the abolition of a post, although both may offer similar protections. Furthermore, the advertisement requirement for position changes would likely not apply if the post were discontinued or abolished, as the post would no longer exist. This supports the argument that a change of position title is not the same as an abolition of post, which means the post is entirely “done away with”.

69. The Secretary-General also argues that the fact that “discontinue” and “change of position title” are mentioned separately in the Resource Allocation Instruction does not mean that a title change does not also amount to an abolition of post. He submits that the UNDT’s conclusion to the contrary is “almost exclusively” based on an incorrect and narrow interpretation of this Administrative Instruction. He argues that the title change of Ms. Kembouche’s position falls within the category of an abolition of post, as it involved the creation of an entirely different

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<sup>37</sup> Impugned Judgment, para. 36.

<sup>38</sup> Emphasis added.



position with significantly different functions and requirements, in a different job group, and with a new position number.

70. We disagree and find that the Secretary-General's analysis is flawed. First, he relies primarily on the authority provided in Administrative Instructions, including the Resource Allocation Instruction, and argues that the Dispute Tribunal erroneously interpreted those instructions narrowly. However, the Secretary-General's reliance on delegated authorities cannot override the primary legislation, namely the Staff Regulations and Rules, which only authorize the termination of a permanent appointment in two situations: abolition of post or reduction of staff. If there is any confusion or conflict between these Administrative Instructions and the Staff Regulations and Rules, the latter must prevail. Since the Staff Regulations and Rules do not specifically allow for a change of position title as a rationale for terminating a permanent appointment, the only way it can be authorized is if it amounts to an abolition of post or reduction of staff.

71. Having regard to the ordinary definition of "abolition", the ordinary and plain reading of "abolition of post" in Staff Rule 9.6 would be the ending of a post, or a post that is completely "done away with".

72. As stated by the Dispute Tribunal in the impugned Judgment, changing the title of a position may, in certain circumstances, carry the same effect as the abolition of a post on a staff member (i.e., displacement), but the two actions are not necessarily synonymous, even within the UNHCR legal framework.<sup>39</sup> Section 6.4 of the Resource Allocation Instruction authorizes the change of status of an existing position and enumerates situations to which this applies, including the abolition of a post or the change of a position title. These are mentioned separately and, by virtue of the application of the principle of *expressio unius est exclusio alterius*, it is presumed that the express reference to abolition of post excludes the other situations enumerated, such as a change of position title. In other words, they are intended to apply to different factual situations and are not the same.

73. In the present case, the Secretary-General contends that the post was effectively abolished, as it had different functions and requirements, in a different job group, and with a new position number.

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<sup>39</sup> Impugned Judgment, para. 33.

74. However, the evidence shows that a vacant G-6 Protection Associate position was “abolished” in 2020 due to budget cuts. Later, the Administration deemed it “crucial to re-engage and boost back up the protection capacity”, and they “chose the Executive Support Associate position [Ms. Kembouche’s position] to be *reclassified* to a Protection Associate position”. This confirms that the post was not abolished or discontinued but rather reclassified.<sup>40</sup>

75. Therefore, we find that the Dispute Tribunal did not err in finding that Ms. Kembouche’s non-consensual change of position title did not amount to an abolition or discontinuance of post and, as such, her termination was not lawful pursuant to the Staff Regulations and Rules and the terms of her employment contract.

*Did the UNDT err in its award of compensation?*

76. Considering the conclusion that Ms. Kembouche’s termination was unlawful, the Dispute Tribunal rescinded the contested decision and awarded compensation in lieu of two years’ net base salary, with no reduction for termination indemnity, along with USD 8,000 in moral damages pursuant to Article 10(5) of the Dispute Tribunal Statute (UNDT Statute).

77. Article 10(5) of the UNDT Statute provides that:

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 higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

a) *Compensation in lieu*

78. As we outlined in *Yasmina Laasri*, it is well settled 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

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<sup>40</sup> Management evaluation response dated 16 February 2022.

been, had the Organization complied with its contractual obligations. (...) To this extent, the elements which can be considered are, among others, the nature and the level of the post formerly occupied by the staff member (i.e. continuous, provisional, fixed-term), the remaining time on the contract, and chances of renewal”.<sup>41</sup>

79. We find that the Dispute Tribunal did not err in awarding compensation in lieu. The Dispute Tribunal considered that Ms. Kembouche was on a permanent appointment with a specific undertaking that she could only be terminated with an abolishment of post or reduction of staff. The Dispute Tribunal also factored in Ms. Kembouche’s 33 years of unblemished career at the United Nations to support the reasonable assertion that she would have been employed with UNHCR until her normal retirement age. At the time of the contested decision, she had another four years left before retirement.<sup>42</sup>

80. The Secretary-General argues that the UNDT erred in fact by assuming this. He submits that this conclusion fails to take into consideration the absence of an operational need for the G-6 Executive Support Associate position in the Multi-Country Office in Belgium as well as Ms. Kembouche’s failure to apply for other vacant positions.

81. We find no merit to this argument. There is no requirement that a staff member must show mitigation.

82. In *Haroun*, we reiterated the following principle:<sup>43</sup>

... (...) [T]he UNDT is in the best position to decide on the level or quantum of compensation given its appreciation of the case. Compensation must be set by the UNDT following a principled approach on a case-by-case basis having regard to the nature of the irregularity in relation to the contested administrative decision, the staff member’s length of service and any consequential prejudice. The Appeals Tribunal ordinarily will be reluctant to interfere with an award of compensation by the UNDT because the amount of compensation is necessarily a matter of estimation and discretion. However, the Appeals Tribunal is entitled and obliged to interfere where: i) there has been an irregularity or misdirection (such as considering irrelevant facts; ignoring relevant ones; or a material error of law); ii) no sound or reasonable basis exists

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<sup>41</sup> *Yasmina Laasri v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1122, paras. 63-64.

<sup>42</sup> Impugned Judgment, para. 53.

<sup>43</sup> *Haroun v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-909, para. 32 referring to *Sarrouh v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-783, para. 25.

for the award made by the UNDT; or iii) there is a substantial variation or a striking disparity between the award made by the UNDT and the award that the Appeals Tribunal considers ought to have been made.

83. In the present case, we do not find any irregularity, sound/reasonable basis or substantial variation in the Dispute Tribunal's award of compensation in lieu.

84. However, we do accept the Secretary-General's submission that the UNDT erred by not deducting the amount of termination indemnity from the award.

85. Staff Regulation 9.3(c) provides 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 under the Staff Regulations and Rules. Payments of termination indemnity shall be made by the Secretary-General in accordance with the rates and conditions specified in annex III to the present Regulations".

86. Further, pursuant to Annex III to the Staff Regulations, a staff member that completed 15 or more years of service and holds a fixed-term or continuous appointment *shall* be paid 12 months of termination indemnity.

87. In the impugned Judgment, the Dispute Tribunal rescinded the contested decision, namely the termination of Ms. Kembouche's appointment. Had the termination not occurred, Ms. Kembouche would have been entitled to receive her base salary for the remainder of her appointment. However, pursuant to Staff Regulation 9.3(c) and Annex III to the Staff Regulations, she was already paid an amount *due to her termination*, namely a termination indemnity of 12 months' salary.

88. However, Staff Regulation 9.3(c) applies "[i]f the Secretary General terminates an appointment". Therefore, as we previously held in *Jafar Hilmi Wakid* and *James Michel Songa Kilauri*,<sup>44</sup> if there is no termination, the provision regarding compensation in lieu of notice and termination indemnity cannot apply. In the present case, since the contested decision was rescinded, there is no termination; therefore, Staff Regulation 9.3(c) does not

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<sup>44</sup> *Jafar Hilmi Wakid v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2024-UNAT-1417, paras. 80-84; *James Michel Songa Kilauri v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1304, paras. 30-31.

apply. Consequently, the payments already made must be deducted from the award of compensation in lieu.

*b) Compensation for harm*

89. As for the award of compensation for harm, we find that the UNDT did not err in its award under Article 10(5) of the UNDT Statute.

90. The Secretary-General argues that Article 10(5) limits the total of all compensation ordered under paragraphs (a) *and* (b) to a maximum of two years' net base salary, except, in exceptional circumstances (which were not identified by the UNDT in the impugned Judgment).

91. However, with the deduction of the termination indemnity and compensation in lieu of notice payments from the award of compensation in lieu, the total compensation falls below two years' net base salary. Therefore, we do not need to address this argument.

92. Nonetheless, we do opine that Article 10(5), as currently drafted, creates confusion on whether there is a limit on the total compensation that the Dispute Tribunal can award.

93. Article 10(5)(b) requires that “[c]ompensation for harm [be] supported by evidence”. It also states that “[c]ompensation for harm (...) shall normally not exceed the equivalent of two years' net base salary of the applicant”. It gives authority to the Dispute Tribunal to order payment of “higher compensation for harm” “in exceptional cases (...) supported by evidence, and [with] (...) reasons for that decision”.

94. As for compensation in lieu of rescission, there is nothing in Article 10(5) that speaks to a limit on compensation in lieu or total compensation. Article 10(5)(a) simply provides that “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 administration decision or specific performance subject to subparagraph (b) of the present paragraph”. There is some ambiguity as to what is meant by “subject to subparagraph (b)”.

95. The original text of Article 10(5)(b) did not refer to compensation for harm but only to “compensation”. As a result, the Appeals Tribunal consistently interpreted this provision to

limit or cap the total compensation payable by the Dispute Tribunal under Article 10(5) to two years' net base salary, based on the plain language of the original text of Article 10(5)(b).<sup>45</sup>

96. In 2014, the General Assembly adopted the current text of Article 10(5) of the UNDT Statute (and Article 9(1) of the UNAT Statute) in paragraph 38 of General Assembly resolution 69/203. Unfortunately, the amendments to Article 10(5)(b), although clarifying requirements for compensation for harm, have created uncertainty regarding the limits on total compensation. The express reason for the amendment was to clarify that, for moral damage awards, there must be actual "harm" supported by evidence to prove it. However, there is no indication that the General Assembly considered the impact of total compensation or compensation in lieu when making these amendments.

97. Notwithstanding the foregoing observations, we express no concluded views on this question of interpretation of Article 10(5) as it is not necessary for the purposes of this appeal.

98. If, in the future, the General Assembly wishes to clarify that there is a limit on the total compensation that is payable pursuant to Article 10(5), it should do so with the appropriate amendments.

99. Finally, the Secretary-General argues that the UNDT erred in awarding compensation for harm in the absence of supporting evidence. We disagree. The Dispute Tribunal had before it medical reports that supported the award of moral damages. It did not err in finding a link between the contested decision and Ms. Kembouche's medical condition.

100. In fact, the medical report dated 7 March 2022 explicitly stated that Ms. Kembouche's health issues followed an unexpected restructuring at the professional level, which she experienced as a real trauma.<sup>46</sup> Furthermore, the medical certificate dated 28 March 2022 noted that her psychological issues had been worsening for just under a year, despite her

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<sup>45</sup> *Hersh v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-433, paras. 39 and 44; *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-305, paras. 27-29; *Cohen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-131, paras. 16 and 19-20; *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092, paras. 26, 28 and 30.

<sup>46</sup> The original version of the medical report dated 7 March 2022 was in French and stated that Ms. Kembouche's health issues "[faisaient] suite à une restructuration inattendue au niveau professionnel (...) vécu par la patiente comme un réel traumatisme".

having never previously exhibited such significant symptoms. This worsening was found to be likely due to an accumulation of major stress at work in recent years.<sup>47</sup>

101. In conclusion, the appeal is granted in part.

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<sup>47</sup> The original version of the medical report dated 28 March 2022 was in French and stated that Ms. Kembouche's health issues were "en aggravation depuis un peu moins d'une année (...) [alors qu'elle] n'a jamais présenté par le passé une symptomatologie aussi significative et très probablement, cela est dû à un effet d'accumulation de stress majeur au travail ces dernières années".

**Judgment**

102. The Secretary-General's appeal is granted in part, and Judgment No. UNDT/2023/088 is hereby modified. The amount of compensation in lieu of two years' net base salary is reduced by the payments made in termination indemnity and compensation in lieu of notice. The remainder of Judgment No. UNDT/2023/088 is affirmed.

Original and Authoritative Version: English

Decision dated this 25<sup>th</sup> day of October 2024 in New York, United States.

*(Signed)*

Judge Sandhu, Presiding

*(Signed)*

Judge Ziadé

*(Signed)*

Judge Colgan

Judgment published and entered into the Register on this 9<sup>th</sup> day of December 2024 in New York, United States.

*(Signed)*

Juliet E. Johnson, Registrar