



UNITED NATIONS DISPUTE TRIBUNAL

Cases Nos.: UNDT/GVA/2017/112  
UNDT/GVA/2018/096  
Judgment No.: UNDT/2020/016  
Date: 31 January 2020  
Original: English

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**Before:** Judge Teresa Bravo

**Registry:** Geneva

**Registrar:** René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Kevin Browning, UNICEF

Alister Cumming, UNICEF

Notice: The public version of this Judgment has been redacted pursuant to art. 11.6 of the Dispute Tribunal's Statute and art. 18.4 of the Dispute Tribunal's Rules of Procedure.

## **Introduction**

1. By application filed on 7 January 2018 and registered under Case No. UNDT/GVA/2017/112, the Applicant, a former staff member of the United Nations International Children’s Emergency Fund (“UNICEF”) contests the decisions to (“removal decisions”):

- a. remove him from his position as “Programme Manager, Global Fund, [Tuberculosis] and Malaria Programme”;
- b. remove him from [REDACTED];
- c. “remove/disconnect” him from work and staff at UNICEF [REDACTED]; and
- d. place him on Special Leave With Full Pay (“SLWFP”) (“removal decisions”).

2. By a second application filed on 3 September 2018 and registered under Case No. UNDT/GVA/2018/096, the Applicant challenges the decision not to renew his appointment at the end of its term on 14 June 2018.

## **Procedural background**

*Case No. UNDT/GVA/2017/112*

3. On 7 December 2017, the Applicant filed a motion for extension of time to file an application challenging the removal decisions outlined in para. 1 above. This motion was granted by the Tribunal on 8 December 2017 and the Applicant filed his application within the deadline set forth by the Tribunal.

4. The Respondent filed his reply on 8 February 2018 and the Applicant filed a rejoinder on 21 March 2018 with leave from the Tribunal.

*Case No. UNDT/GVA/2018/096*

5. The Respondent filed his reply on 3 October 2018 and the Applicant filed a rejoinder on 21 December 2018 with leave from the Tribunal.

6. On 11 September 2019, the Tribunal held a case management discussion (“CMD”) in Cases No. UNDT/GVA/2017/112 and UNDT/GVA/2018/096. At the CMD, the Tribunal decided, *inter alia*, to join the cases. The Tribunal further decided to hold a hearing on the merits on 30 and 31 October 2019.

7. On 22 October 2019, the Respondent filed a motion, on an under-seal basis, in which he confirmed that he no longer contested the merits of the allegations as set out in the applications and submitted that a hearing on the merits was no longer necessary. He also requested the Tribunal to order that his motion and “all other records [of the] case” be kept under seal and that the judgment be redacted for security reasons.

8. By Order No. 85 (GVA/2019) of 24 October 2019, the Tribunal cancelled the hearing on the merits and ordered that the Respondent’s 22 October 2019 motion remain under seal.

9. On 30 October 2019, the Tribunal held a CMD whereby the parties were ordered, *inter alia*, to file closing submissions on the issue of remedies.

10. On 18 November 2019, the parties filed, *inter alia*, their respective closing submission on remedies.

11. By Order No. 119 (GVA/2019) dated 19 December 2019, the Tribunal decided to place under seal the full case record of the proceedings in Cases No. UNDT/GVA/2017/112 and UNDT/GVA/2018/096. The Tribunal also decided to redact the identities of UNICEF personnel involved in said cases in the public version of its judgment. In order to also protect the Applicant, the judgment is therefore anonymized.

## **Facts**

12. Since the Tribunal did not hold a hearing on the merits in the present case, the Tribunal limits the facts to those agreed upon by the parties.

13. The Applicant joined UNICEF on 11 August 2014 as a Programme Manager/Health Specialist at the P-4 level in [REDACTED], on a fixed-term appointment. His last appointment was from 1 January 2017 until 14 June 2018.

14. The Applicant worked within a framework agreement between UNICEF, as principal recipient, and the Global Fund to Fight Aids, Tuberculosis and Malaria (“Global Fund Programme”), including the World Health Organization (“WHO”), [REDACTED], as sub-recipient and the Ministry of Public Health, [REDACTED], as implementing partner.

15. In 2016 and 2017, there were disagreements between the Applicant and local management on both work-related matters and matters related to the Staff Association.

16. Between July 2016 and February 2017, the Applicant raised a number of compliance issues with the Global Fund Programme implementation and requested explanations and documentation on those matters from his superiors.

17. In January 2017, the Applicant initiated the terms of reference for the engagement of an external consultant to undertake a risk management review of the Global Fund Programme and insisted on what was, in his opinion, the value and relevance of an “external” review on 17 March, 11, 12 and 18 April 2017.

18. In a confidential email of 6 March 2017 to the UNICEF [REDACTED], the Applicant expressed his concerns on key Global Fund programmatic and operational risks, and alleged “known instances” of “diversions, misuses and abuses” committed within the Global Fund Programme implementation in the [REDACTED] and suggested mitigation measures.

19. In April 2017, the Applicant, who had completed his tour of duty in [REDACTED], which had started in August 2016, was included in the UNICEF 2017 Rotation Mobility Exercise.

20. On 26 April 2017, the Global Fund Programme concurred with the decision to select a firm for an external risk review.

21. On 30 May 2017, the Applicant submitted to local management a risk assessment and an Enterprise Risk Matrix of the Global Fund Programme in [REDACTED], elaborating his concerns about the operating risks in that country.

22. On 30 June 2017, UNICEF directed the Applicant to leave [REDACTED]. The Applicant's visa, which had been renewed that morning for another year until June 2018, was cancelled during his departure at the [REDACTED] airport in the afternoon of that same day.

23. On 3 July 2017, the Applicant was placed on SLWFP and was told that he would be contacted shortly as the Organization examined possible options for his reassignment. The Applicant's SLWFP was extended on multiple occasions until the expiration of his fixed-term appointment on 14 June 2018.

24. On 27 July 2017, the Applicant requested management evaluation of the removal decisions. On 8 September 2017, the [REDACTED] UNICEF, upheld the contested decisions.

25. On 9 January 2018, the Applicant was notified that no placement option had been identified for him in the 2017 Rotation Mobility Exercise.

26. By letter of 21 February 2018, the UNICEF [REDACTED] informed the Applicant that his fixed-term appointment would not be extended upon its expiration on 14 June 2018 due to "the current funding situation of the Global Fund TB/Malaria programme in [REDACTED], as well as [his] inability to re-enter [REDACTED]."

27. On 20 April 2018, the Applicant requested management evaluation of the decision not to renew his fixed-term appointment. On 4 June 2018, the [REDACTED] UNICEF, upheld the contested decision.

28. On 14 June 2018, the Applicant was separated from service.

## **Consideration**

### *Scope of judicial review*

29. The Tribunal is seized of two applications. One, Case No. UNDT/GVA/2017/112, relates to the Applicant's removal from his position in [REDACTED] and his subsequent placement on SLWFP. The other, Case No. UNDT/GVA/2018/096, relates to the non-renewal of the Applicant's fixed-term appointment with UNICEF, which expired on 14 June 2018.

30. In view of the Respondent's 22 October 2019 submission (see para. 7 above), whereby he no longer contests the merits of the allegations as set out in the applications, the Tribunal finds that the contested decisions, i.e., to remove the Applicant from his position in [REDACTED], to place him on SLWFP and not to renew his appointment beyond 14 June 2018 are unlawful. Therefore, the only legal issue that remains for adjudication before this Tribunal is that of remedies.

31. In Case No. UNDT/GVA/2017/112, the Applicant requests the Tribunal to order the following remedies:

- a. To declare the removal decisions "null and void" with retroactive effect;
- b. To award him compensation equivalent to 36 months of salary for loss of income and benefits;
- c. To award him compensation equivalent to 24 months of salary for moral damages;

d. To order UNICEF to pay him security evacuation allowances and entitlements and repatriation travel expenses;

e. To award him compensation for legal fees in an amount not less than USD10,000; and

f. To order UNICEF to issue a letter of reference indicating his achievements and an appreciation of his performance, together with assurances that he will not be retaliated against.

32. In Case No. UNDT/GVA/2018/096, the Applicant requests the Tribunal to order the following remedies:

a. To declare the contested decision “null and void” with retroactive effect;

b. To order UNICEF to reassign him to a post commensurate with his competencies on a fixed-term appointment for two years or to pay him compensation equivalent to two years of salary, including all related entitlements;

c. To award him compensation for moral damages equivalent to two years of salary;

d. To order UNICEF to pay him a termination indemnity for the abolition of his post without the requisite six-months notice;

e. To award him legal fees in an amount not less than USD20,000; and

f. To order UNICEF to issue a letter of reference indicating his achievements and an appreciation of his performance, together with assurances that he will not be retaliated against.

*Remedies*

33. Having found that the contested decisions were unlawful, the Tribunal must now examine the Applicant's claim for remedies, as stated above (see paras. 31 and 32) and in line with art. 10.5 of the Tribunal's Statute.

34. Art. 10.5 of the Tribunal's Statute provides that, as part of its judgement, the 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 also 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.

35. The Tribunal considers that the decision to remove the Applicant from his position in [REDACTED] is, in fact, subsumed in the ultimate decision not to renew his fixed-term appointment. Therefore, having found that both decisions are unlawful, the Tribunal orders the rescission of the decision not to renew the Applicant's appointment.

36. Furthermore, the Tribunal deems it appropriate to rescind the decision to place the Applicant on SLWFP, which was also found to be unlawful as it was triggered by the Applicant's removal from [REDACTED].

37. The Tribunal notes that while the contested decisions were taken separately, they are closely linked. However, an amount of compensation to be paid as an alternative to the rescission of the contested decision shall only be set in relation to the non-renewal decision since it concerns a matter of appointment, pursuant to art. 10.5(a) of the Tribunal's Statute.



38. Nonetheless, the Statute of this Tribunal provides no guidelines in relation to the elements that can be considered by it to determine the quantum of a fair, reasonable and adequate alternative compensation. Instead, it only limits the amount of compensation to two-years' net base salary save exceptional cases.

39. In *Mushema* 2012-UNAT-247 (para. 28), the Appeal's Tribunal provided some guidance in relation to the elements that can be considered by this Tribunal to determine the amount of an alternative compensation, as follows:

[T]he 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, chances of renewal, etc. It must also be taken into account that the two-year limit imposed by the Statute of the Dispute Tribunal constitutes a maximum, as a general rule with exceptions. As such, it cannot be the average "in lieu compensation" established by the court.

40. Furthermore, since the assessment of compensation must be done on a case-by-case basis, it carries a certain degree of empiricism.

41. In the case at hand, the Applicant was a P-4 Programme Manager/Health Specialist working in [REDACTED], on a fixed-term appointment since August 2014. His last fixed-term appointment covered the period from 1 January 2017 until 14 June 2018.

42. On 30 June 2017, the Applicant was directed to leave [REDACTED] and on 3 July 2017, he was placed on SLWFP until the expiry of his appointment on 14 June 2018.

43. In *Warren* 2010-UNAT-059, the Appeals Tribunal affirmed that the purpose of compensation is to place a staff member in the same position he or she would have been in had the Organization complied with its contractual obligations.

44. Considering the particular circumstances of the present case and the fact that the Applicant lost the chance to have his appointment renewed for another year due to the unlawful decision to remove him from his position in [REDACTED], the Tribunal

finds adequate, fair and reasonable to award compensation in lieu of rescission in an amount equal to one-year's net base salary, based on the pay that the Applicant was drawing on the date of the non-renewal of his fixed-term appointment, i.e. 14 June 2018.

45. Concerning the decision to place the Applicant on SLWFP, the sequence of facts shows that from the time the Applicant was directed to leave his duty station in June 2017 until the expiry of his contract in June 2018, he was paid his salary and related entitlements. Therefore, even if the decision to place him on SLWFP was unlawful, he did not suffer any loss. Consequently, no compensation is awarded in this regard.

46. The Tribunal will now address the Applicant's additional requests for compensation.

Security evacuation allowance, repatriation grant and travel expenses

47. In Case No. UNDT/GVA/2017/112, the Applicant claims the payment of a security evacuation allowance, repatriation grant and travel expenses.

48. The Tribunal has found that the decision to remove the Applicant from his position in ██████████ was unlawful. However, the Tribunal is not in a position to determine whether or not the Applicant's move from ██████████ to ██████████ amounted to a security evacuation for which the Applicant may have been entitled to a security evacuation allowance.

49. Indeed, the decision to evacuate personnel is the prerogative of the Organization based on its own assessment of the security risk of personnel at a given time in accordance with the legal framework provided in the United Nations Security Policy Manual. The Tribunal cannot substitute its own assessment of the situation for that of the Organization in this regard.

50. In the present case, the record shows that the modality used to remove the Applicant from ██████████ was to send him on advanced rest and recuperation.

51. In the given circumstances, the Applicant's request to be paid security evacuation allowances is rejected.

52. Concerning the Applicant's claim to be paid repatriation and travel expenses, by Order No. 87 (GVA/2019), the Tribunal requested clarifications from the Respondent in this regard.

53. According to the Respondent, following the Applicant's separation from service, the Organization paid him the corresponding amounts for relocation grant, repatriation grant and accrued annual leave.

54. In his submission on remedies, the Respondent admitted that the Applicant is entitled to return travel expenses under CF/AI/2014-002 Amend.1. The Respondent also indicated that even if under Section 10.10 of CF/AI/2014-002, the lump sum option requested by the Applicant is only available if requested before the actual travel takes place, the Organization has made an exception to this rule in the instant matter and "expects the lump sum request to [be] paid shortly".

55. The Tribunal does not have updated information on whether the Applicant's return travel expenses have been paid. However, the Tribunal orders the Respondent to honour its commitment and pay the Applicant his return travel expenses, which are long overdue.

56. Considering that the Applicant has already been paid his repatriation grant and that the Respondent has committed to pay his return travel expenses, the Tribunal finds that the Applicant's requests in this regard have become moot.

#### Termination indemnity

57. In Case No. UNDT/GVA/2018/096, the Applicant claims the payment of a termination indemnity as a result of the abolition of his post. He also requests compensation for the failure to notify him timely of said decision.

58. Staff rule 9.6 defines termination as follows:

(a) A termination within the meaning of the Staff Regulations and Rules is a separation from service initiated by the Secretary-General.

(b) Separation as a result of resignation, abandonment of post, expiration of appointment, retirement or death shall not be regarded as a termination within the meaning of the Staff Rules.

59. 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”.

60. First, the Tribunal clarifies that the alleged abolition of the Applicant’s post, if it ever occurred, is not the contested decision in the present case and consequently, the Tribunal will not address this matter.

61. Second, the Tribunal finds that the Applicant’s appointment was not terminated. Instead, he was separated from service upon the expiration of his fixed-term appointment. Pursuant to staff rule 9.6(b), separation as a result of the expiration of an appointment shall not be regarded as a termination.

62. Therefore, the Applicant’s request to be paid a termination indemnity is rejected.

#### Moral damages

63. In relation to moral damages, the Tribunal notes that the threshold of evidence required from the Applicant following the amendment of art. 10.5(b) of the Tribunal’s Statute has become more restrictive.

64. Art.10.5(b) now stipulates that the Dispute Tribunal may award compensation for harm if such harm is “supported by evidence”. This is the current law on compensation for harm and it is the law that this Tribunal must apply when contemplating such a finding. This is in line with the jurisprudence of the Appeals Tribunal on compensation for harm (see *Kebede* 2018-UNAT-874; *Kallon* 2017-UNAT-742).

65. The Applicant claims that the contested decisions have caused him harm to his reputation, career and health. He argues *inter alia* that he has suffered “irreparable sickness, distress, trauma and humiliation”.

66. Noting the Applicant’s claim for moral damages, the Tribunal expressly requested evidence from the Applicant in this respect.

67. The Tribunal recalls that during the CMD held on 11 September 2019, the Applicant was invited to submit evidence in relation to his claim for moral damages. On 23 September 2019, the Applicant sought leave from the Tribunal to file medical evidence on an *ex parte* basis. The Tribunal considered the Applicant’s request and by Order No. 70 (GVA/2019), he was instructed to file medical evidence on an under-seal basis.

68. However, by email dated 1 October 2019, the Applicant’s former Counsel informed the Tribunal that the Applicant “had elected to not submit any personal medical information to the Tribunal, even under [-] seal [basis] and [would] rely on the evidence already before the Tribunal”.

69. Since the Applicant has not produced any evidence to support his claim for moral damages despite the Tribunal’s directions in this regard, the Tribunal cannot grant him any compensation under art. 10.5(b) of its Statute.

#### Legal fees

70. The Applicant has requested the Tribunal to grant him the payment of legal fees of no less than USD20,000.

71. Art. 10(6) of the Tribunal’s Statute states that “[w]here the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party”.

72. The Appeals Tribunal has ruled that the “basic principle applicable in international courts on the question of costs is that each party shall bear its own costs”. Indeed, this Tribunal can only award costs to a party if there is evidence of a “manifest abuse of proceedings”, i.e., some degree of intention to act frivolously (see *Bi Bea* 2013-UNAT-370).

73. The Tribunal’s power to award costs is thus restricted by its Statute to cases in which it determines that a party has manifestly abused the proceedings before it. In the absence of such determination, the Tribunal cannot grant said request.

74. Since in this case there is no evidence of a “manifest abuse of proceedings”, the Applicant’s request in this regard is rejected.

#### Letter of Reference

75. Finally, the Applicant requests the Tribunal to order the Organization to provide him with a letter of reference indicating “his achievements and the performance of work, as well as, a letter of assurance of non-retaliation at work in the future”.

76. In relation to a certification of service, staff rule 9.12 provides the following:

Any staff member who so requests shall, on leaving the service of the United Nations, be given a statement relating to the nature of his or her duties and the length of service, On the staff member’s written request, the statement shall also refer to the quality of his or her work and his or her official conduct.

77. Pursuant to staff rule 9.12, the Applicant is entitled to a certification of service. However, his request in relation to “assurances of non-retaliation at work in the future” goes beyond the scope of staff rule 9.12 and it is without merit because the Applicant is no longer employed by the Organization.

## Conclusion

78. In view of the foregoing, the Tribunal DECIDES:

- a. The decisions to remove the Applicant from his position in the [REDACTED] to place him on SLWFP and not to renew his appointment are unlawful and, consequently, they are rescinded;
- b. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision not to renew the Applicant's appointment, he shall pay the Applicant an amount equivalent to one year's net base salary, being the gross salary less staff assessment, at the time of the Applicant's non-renewal;
- c. The aforementioned compensation in lieu of rescission shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States of America prime rate 60 days from the date this Judgment becomes executable;
- d. UNICEF shall provide the Applicant with a certification of service;
- e. The Respondent shall honour his commitment to pay the Applicant's return travel expenses; and
- f. All other claims are rejected.

*(Signed)*

Judge Teresa Bravo

Dated this 31<sup>st</sup> day of January 2020

Entered in the Register on this 31<sup>st</sup> day of January 2020

*(Signed)*

René M. Vargas M., Registrar, Geneva