



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/062

Judgment No.: UNDT/2020/166

Date: 10 September 2020

Original: English

**Before:** Judge Joelle Adda

**Registry:** New York

**Registrar:** Nerea Suero Fontecha

ABU AL ASAL

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

**ON REMEDIES**

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**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Nicole Wynn, ALD/OHR  
Nusrat Chagtai, ALD/OHR

## **Introduction**

1. By Judgment No. UNDT/2020/123 dated 20 July 2020, the Tribunal decided that the application is receivable and granted it on the merits. In light thereof, the Tribunal ordered the parties to file updated submissions on remedies in the following order of sequence: the Applicant (10 August 2020); the Respondent (17 August 2020); and, if any, the Applicant's final observations (21 August 2020). The Tribunal further indicated that unless otherwise ordered, it would thereafter proceed to determine the issue of remedies. The parties duly filed these submissions.

2. By Order No. 128 (NY/2020) dated 26 August 2020, the Tribunal stated that it agreed with the Respondent that the Applicant had failed to provide adequate information and/or documentation regarding her income loss in 2017. The Tribunal observed that before making any final determination on the issue of remedies, it would allow the Applicant to produce this information and/or documentation thereon, and in failure thereof, an adverse inference regarding the Applicant's income loss, as also argued by the Respondent, would need to be drawn.

3. The Tribunal therefore ordered the Applicant to submit the following by 2 September 2020 (and the Respondent to file his comments thereon two days later), also indicating that unless otherwise ordered, it would thereafter proceed to determine the issue of remedies.

a. Pay slips from the full-time job which she held prior to receiving an offer of employment with the African Union-United Nations Hybrid Operation in Darfur ("UNAMID") and which she claims that she resigned from in the expectancy of being recruited to the relevant UNAMID position as security officer;

b. All relevant tax records for 2016 and 2017;

c. Any other information and/or documentation that indicate: (i) what her net income actually was in 2017 and (ii) what her income would have been had she not resigned from her previous full-time job.

4. The Applicant never filed a submission in response to Order No. 128 (NY/2020).

## **Consideration**

### *The relevant legal framework*

5. The Appeals Tribunal has held that rescission of an impugned administrative decision in accordance with art. 10.5(a) of the Dispute Tribunal’s Statute is the appropriate, if not even mandatory, remedy when an applicant is unlawfully deprived of an employment opportunity with the United Nations, at least, in some situations (see, for instance, *Chhikara* 2020-UNAT-1014).

6. In the present case, the Tribunal, however, finds that it would make no logical sense to rescind the “the decision to withdraw the offer [the Applicant] received from [the United Nations-African Union Mission in Darfur (“UNAMID”)] for the post of Security Officer at the FS-4 level” because, as a matter of fact, the post no longer exist since it was abolished by 31 December 2017. It would therefore be impossible for UNAMID to employ the Applicant in the post now—in other words, the decision is no longer rescindable.

7. Article 10.5(b) of the Dispute Tribunal’s Statute, however, provides that, as appropriate, compensation can still be awarded to the Applicant for her damages, but such award must be supported by evidence:

5. As part of its judgement, the Dispute Tribunal may only order one or both of the following:

...

(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.

*Pecuniary damages*

The parties' submissions

8. The Applicant's contentions may be summarized as follows:
  - a. The Applicant "made real and consistent efforts to mitigate [her] loss" by applying "for more than 28 other jobs, including security jobs with UNAMID", but "only succeeded in a part-time and short-term job in the far east of Jordan next to Syrian/Iraqi borders" and has "not [been] able to find steady employment since [her] separation from Jordan Police";
  - b. The Applicant has "tried formal [and] informal resolution of [her] grievance" and followed up with "mission officials" and "the core management of [the United Nations]";
  - c. The unlawful withdrawal "did not give the possibility to organize [the Applicant's] private life in a more stable way; the unlawful decision effected on the quality of [her] life [and her] two kids lost the opportunity for proper education as [she] was not able to continue sending them to the same private school they used to attend before". The Applicant "lost [her] job and lost the opportunity to join the mission [and] sold [her] car to survive";
  - d. The UNAMID Spokesman on 22 October 2017 stated that "civilian post reductions" would "take place in two phases", where the "first phase [would] be completed by 31 December 2017 and will lead to the abolishment of 426 posts" and the "second phase [would] witness the reduction of 147 posts, by 30 June 2018";

e. “When UNAMID withdrew the offer of appointment on 27 July 2017, the conditions of the offer remained unfulfilled due to a mistake committed by a staff member who ordered to hide [her] approved valid visa that was issued on 19 December 2016”. “If the unlawful decision had not been made, as [the Applicant is a] female Arabic speaker and the only one in this category in the mission working for [the United Nations Department for Safety and Security, “UNDSS”], [her] FS4 step 6 contract would still be in place, running at least until end of second phase in the worst [case] scenario by 30 June 2018”;

f. “The Applicant’s case is totally different [from] that other colleagues whom posts were abolished under the same criteria[, and the] final decision was not [an] independent and separate administrative decision”. This follows from the recommendation “to abolish all vacant positions as well as positions on loan (1 FS) and positions at entry level (FS4) in the international category as well as positions located at closing team sites (6 international[s] and 9 national[s]) by 31 December 2017”. The Applicant should therefore be “entitled to at least 18 months fixed-term contract at FS4 Step 6 level: one for the period 2017-2018, and a second until the end of second phase by 30 June 2018”.

g. “Nyala Camp, which was supposed to be my duty station, was handed over to Sudan Government [in] November 2019” and “UNDSS staff usually [are] the last to leave [the United Nations] premises when close[d] or handed over”. “This would have increased [the Applicant’s] opportunities to have [her] contract to be extended to the date of [closure] of [her] assigned duty station as reflected in the signed offer”;

h. “According to job opening number (17-Security-UNAMID-85123-R-(M)), that was posted on 08 September 2017 - 22 September 2017”, a Security Officer was needed at the FS-5 level in Nyala, which indicates that if the Applicant had “joined the mission and [her] basic rights were not violated [she] would have been needed to continue serving the mission in Nyala”;

i. With reference to *Ashour* 2019-UNAT-899, *in lieu* compensation depends on the circumstances of the case and due deference shall be given to the trial judge in exercising discretion in a reasonable way following a principled approach;

j. The circumstances of the Applicant's case demonstrate a "serious violation [of] the core values of [the United Nations] by a staff member[, which] negatively affected [her] career and personal life". She lost not only a United Nations salary, but also "benefits such as the opportunity of housing, group insurance (health/dental, extended medical benefits to retired police officers and their families including children up to 18 years); skill trainings, retirement benefits and educational support up to the first level of university for my two kids".

k. Some "colleagues" of the Applicant, who served on the United Nations missions subsequently had "the opportunity to join [a] mission on quick turn" in the United Nations Peacekeeping Force in Cyprus as "female police officers were needed in [the United Nations] field missions to meet [the Secretary-General's] vision for gender parity";

l. The Applicant "provided the necessary documentation to prove [her pecuniary damages". Under "Income Tax Law No. (34) of 2014 Article (9) A-1", the Applicant's income 2017 "did not reach the stated amount [of "12,000 dinars"] so [she] did not file [a] tax return statement".

9. The Respondent's submissions may be summarized as follows:

a. "Had the Applicant reported for duty by 1 January 2017, her fixed-term appointment would have expired on 31 December 2017, when the post which would have financed her appointment was abolished";

b. “Any award of damages should be offset by the Applicant’s earnings in 2017, and any amount that she would have continued to earn, had she not resigned”, but she “has failed to produce the required information”. “The Applicant continued to work until at least 10 February 2017 but has produced no evidence of her income, such as tax returns, for 2017”, and the Dispute Tribunal “should draw an adverse inference from the Applicant’s failure to present any evidence of loss of earnings”;

c. The Applicant had “a duty to mitigate her alleged losses but failed to do so as she resigned from her job”, and the Organization “is not responsible for [her] loss of earnings attributable to [her] disregard of an instruction” in its offer of employment according to which she should not resign from her job at the time prior to receiving a confirmation of the offer and a valid visa. Regarding the Applicant’s decisions to sell her car and to change her children’s school, the offer letter similarly “instructed her to make no financial commitments, including with regards to schooling, prior to receiving confirmation of the offer”.

Has the Applicant proved by evidence that she suffered any compensable pecuniary damages?

10. The Appeals Tribunal in *Krioutchkov* 2017-UNAT-712 elaborated on pecuniary damages, such as income loss, confirming the general principle that “compensation must be set by [the Dispute Tribunal] following a principled approach and on a case by case basis” (see also *Ashour* 2019-UNAT-899). In this regard, the Appeals Tribunal has held that compensation for a failed appointment can only be awarded for the expected length of the employment contract (see, for instance, *Maiga* 2016-UNAT-638, para. 29). The Appeals Tribunal has also held that an applicant has a duty to mitigate her/his losses (see, for instance, *Dube* 2016-UNAT-674, para. 59). Other income, which an applicant actually earned, or could have earned, during the

compensable time period, shall additionally be offset in the compensation for lost income (see, for instance, *Belkhabbaz* 2018-UNAT-895, para. 38).

11. In the present case, the Tribunal observes that it was directly stated in the offer of employment dated 30 November 2016 that the Applicant's appointment was to be a one-year fixed-term appointment. With reference to *Maiga*, the Applicant could therefore not have been expected to be offered an appointment beyond 31 December 2017, and the compensable time period is therefore, at maximum, from 1 January to 31 December 2017.

12. Regarding mitigation of damages, in the above-mentioned offer of employment, it was further explicitly stated, "**Please do not resign from your current employment, or engage in any financial commitments related to employment at the United Nations, including schooling or housing, prior to receiving confirmation of the offer and a valid visa, if applicable**" (emphasis in the original).

13. As UNAMID never confirmed the offer or a valid visa, any loss that the Applicant incurred due to the resigning from her employment at the time and financial commitments related to her failed employment with UNAMID was therefore at her own risk.

14. Consequently, the Applicant's claims regarding pecuniary compensation for benefits related to employment with the United Nations, the schooling of her children and the sale of her car are rejected.

15. The question is therefore how much to offset in the compensable salary as a Security Officer at the FS-4 level for the period from 1 January to 31 December 2017. In this regard, it is for the Applicant to demonstrate how much she actually earned or could have earned had she not resigned from her employment at the time. In this regard, the Applicant holds the onus of proof under art. 10.5(b) of the Dispute Tribunal's Statute, and in the present case, she also is the only one in possession of this information as neither the Respondent nor the Tribunal have any basis for second-guessing it. The



Tribunal therefore explicitly instructed the Applicant to provide this information with relevant documentation by Order No. 128 (NY/2020), warning her that if she did not do so, the Tribunal would need to draw an adverse inference therefrom.

16. The Applicant, however, never responded to Order No. 128 (NY/2020). In lack of any reliable information and/or documentation for the Applicant's potential income had she not resigned from her previous full-time employment, or what she actually earned in 2017, the adverse inference that Tribunal must draw is that the Applicant actually earned, or would have earned in her previous employment, as much or more in 2017 than she would have if she had been employed as a Security Officer at the FS-4 level with UNAMID during 2017.

17. Accordingly, the Applicant's claim for pecuniary damages for any income loss is rejected.

*Non-pecuniary (moral) damages*

The parties' submissions

18. The Applicant's contends that she suffered from "stress, depression and anxiety ... related to the cancellation of her appointment".

19. The Respondent, in essence, submits that the Applicant has produced no "reliable evidence" for her "moral damages".

Did the Applicant provide adequate evidence of her non-pecuniary damages?

20. Regarding the evidence to provide for non-pecuniary damages, the Appeals Tribunal has held that, "Our jurisprudence holds that, generally speaking, a staff member's testimony alone is not sufficient as evidence of harm warranting compensation under Article 10(5)(b) of [the Dispute Tribunal's] Statute [reference to footnote omitted]. The testimony of an applicant in such circumstances needs the corroboration of independent evidence (expert or otherwise) to support the contention

that non-pecuniary harm has occurred [reference to footnote omitted]. Much will depend on the circumstances of the situation at hand, as the existence of moral damages shall be assessed on a case-by-case basis”.

21. In the present case, the Applicant intends to prove her non-pecuniary damages with a “Medical Report” from the “Royal Medical Services” dated 26 July 2020. According to this report, the Applicant suffered from “various symptoms” during the period from 2017 to 2018 “as result of what was mentioned to us by her family and the loss of her job, family, material and moral problems”.

22. Considering the date of the report, the Tribunal notes that it has evidently been produced for the sole purpose of the present proceedings. Also, the author appears to simply repeat what the Applicant and her family has said to her/him, and no firsthand assessment is made of her mental state of mind at the relevant time of her possible compensable injuries. The report therefore has the character of *post facto* hearsay evidence and has no genuine evidentiary value in this context.

23. Although the Tribunal understands that the Applicant might indeed have felt very frustrated with UNAMID’s handling of her onboarding process, in the lack of any objective and contemporary evidence of her non-pecuniary damages, the Tribunal rejects her claim therefor.

**Conclusion**

24. In light of the foregoing, the Tribunal DECIDES that the Applicant's claims for relief are rejected.

*(Signed)*

Judge Joelle Adda

Dated this 10<sup>th</sup> day of September 2020

Entered in the Register on this 10<sup>th</sup> day of September 2020

*(Signed)*

Nerea Suero Fontecha, Registrar, New York