



Before: Judge Francesco Buffa

Registry: Geneva

Registrar: René M. Vargas M.

EL-AWAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Omar Shehabi, OSLA

Counsel for Respondent:

Saidou N'Dow, UN-Habitat

Introduction

1. The Applicant, a former Senior Coordination Officer with the United Nations Human Settlements Programme (“UN-Habitat”), contests the decision not to renew his fixed-term appointment beyond 30 September 2018.

Factual and procedural background

2. In May 2008, the Applicant joined UN-Habitat as a Programme Manager for the Global Water Operators Partnerships Alliance (“GWOPA”), UN-Habitat, on a fixed-term appointment at the L-5 level. In 2015, the Applicant was appointed as Head, GWOPA Secretariat, at the P-5 level, following a competitive selection process. His fixed-term appointment was renewed multiple times on an annual basis. Until his transfer to Nairobi in November 2017, the funds for his post were allocated from the GWOPA funds.

3. By a memorandum dated 31 August 2017 from the Under-Secretary-General and Executive Director of UN-Habitat, the Applicant was informed that he was to be transferred to a post in the Urban Basic Services Branch (“UBSB”) at the UN-Habitat Headquarters in Nairobi, effective 1 October 2017. The transfer was implemented as a lateral move at the P-5 level, and the Applicant was given a one-year fixed term appointment.

4. The Applicant’s job in UBSB was, according to the 31 August 2017 memorandum, to support “the development and implementation of Urban Basic Services Programme activities, with a focus on Water and Sanitation, in collaboration with partners at various levels of engagement”. The Applicant was further to “promote and oversee projects and programmes in the expansion of sound urban basic services for the urban poor through the implementation of the approved work programme of the organization as well as support capacity development, tool development and facilitating networking with partners and programmes contributing to the enhancement of policy dialogues at UN-Habitat and globally”. Finally, the Applicant was to “provide strategic advice on the programmes on water and sanitation”. Nothing was stated regarding the funding source of the Applicant’s UBSB post.

5. On 6 September 2017, by email, the Applicant accepted the reassignment, indicating, *inter alia*, that he understood that his reassignment would “not have any implications on the nature of [his] Fixed Term renewable contract”. The Applicant thereafter took up the position.

6. By a memorandum dated 31 August 2018 from the Director of the Programme Division in UN-Habitat, the Applicant was notified that his fixed-term appointment would not be renewed beyond its expiry on 30 September. The Director explained that, “This decision is due to the fact that there are no resources available to fund your position even after efforts have been made to look for funding and suitable positions funded by other projects”.

7. On 29 November 2019, the Applicant lodged with this Tribunal the application mentioned in para. 1.

8. On 21 December 2019, the Respondent replied that the application was without merit, arguing, in essence, that the Applicant’s post was financed through a specific project and that no resources were any longer available for its funding.

9. By email of 6 May 2019, the Geneva Registry informed the parties that the case had been transferred from Nairobi to Geneva, indicating that:

To ensure judicial efficiency and the expeditious disposal of cases, the Tribunal conducted a review of its docket and concluded that it was necessary to rebalance its Registries’ case load. In this respect, the Judges decided that the Nairobi Registry should transfer a certain number of cases to the Geneva Registry for adjudication by the Tribunal in Geneva. Accordingly, please note that the above-referenced case was transferred to the Geneva Registry on 19 March 2019.

10. On 26 January 2021, the case was assigned to the undersigned judge.

11. By Order No. 53 (GVA/2021) on 17 February 2021 the Tribunal allowed the Respondent to file, as requested, any additional written evidence on the critical financial situation by the Programme Management Officer, who was in charge of the funds for all the projects in UBSB. The Tribunal expressed its view that the case was

ready to be adjudicated on papers and invited the parties to file, in a particular sequence, closing submissions.

12. On 3 March 2021, the Applicant filed a motion for a case management discussion (“CMD”), with the view to discuss the definition of issues of the case and the production of additional evidence, seeking the Tribunal to cancel its orders set out in Order No. 53 (GVA/2021).

13. On 5 March 2021, the Respondent filed, as additional written evidence, a written statement by the UBSB Programme Officer and appended two annexes.

14. By Order No. 66 (GVA/2021) dated 10 March 2021, the Tribunal rejected the motion “[r]ecalling the distinction between the issues concerning the transfer of the Applicant and the non-renewal of his contract”. The Tribunal explained that “as to the facts directly linked to the non-renewal decision, the Applicant in the application did not offer specific evidence nor request any production of evidence”, and that “in the motion too, the Applicant did not ask for production of evidence on the mentioned issue, and solely asked for a CMD ‘in order to request production of, and introduce, evidence ... to decide the extent to which the circumstances of the transfer decisions are relevant to the non-renewal decision’”. The Tribunal reiterated that “the transfer in itself could not be examined and that the matter of the dispute was related only to the non-renewal of the contract”, and further confirmed that “the factual circumstances at the basis of the non-renewal decision were already fully briefed, and that they were even confirmed by the assertion of the Applicant in the motion that ‘he was deliberately transferred ... to a very dispensable position to facilitate his non-renewal’”.

15. By Order No. 68 (GVA/2021) dated 12 March 2021, the Tribunal granted the Applicant’s request to allow the parties to file closing statements of ten pages instead of five pages.

16. On 19 March and 2 April 2021, the Applicant and the Respondent duly filed their respective closing statements.

17. On 7 April 2021, the Applicant duly filed his final observations. With this submission, he also filed a motion for disclosure of documents, requesting the Respondent to file some written documentation related to the merits of the case.

Consideration

Procedural issues and case management

18. By motion filed by the Applicant on 7 April 2021, he seeks the disclosure of an extensive amount of additional documents, and the Tribunal notes that in Order No. 53 (GVA/2021), when the parties were instructed to file their closing statements, it was highlighted that “no new pleadings or evidence are allowed at this stage”. Accordingly, the Tribunal rejects the Applicant’s motion because it was filed after the end of the collection of evidence and after the submissions of closing statements. Moreover, the motion calls for the disclosure of a number of documents without proving the existence of them, their specific content, and the Applicant’s right to their disclosure. Consequently, the motion is rejected because it is a kind of “fishing expedition” (as it is referred to by the Appeals Tribunal in *Rangel* Order No. 256 (2016) and usually also called by specialists in civil procedural law), aimed to disclose—in a generic and unsubstantiated way—evidence of any kind grounded on undefined allegations.

Merit of the case

19. It is trite law that the Applicant must identify and define the administrative decision that s/he wishes to contest (see, for instance, the Appeals Tribunal in *Planas* 2010-UNAT-049 and *Farzin* 2019-UNAT-917). The Appeals Tribunal has, however, held that “the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review” (see para. 20 of *Fasanella* 2017-UNAT-765).

20. In the application, the Applicant defines the contested administrative decision as the non-renewal of his fixed-term appointment beyond 30 September 2018. In the grounds for contesting this decision, the Applicant, however, also appears to challenge the prior decision to transfer him from his post as Head of the Global Water Operators

Partnerships Alliance (“GWOPA”) in Barcelona to another post in the Urban Basic Services Branch (“UBSB”) in Nairobi. The latter post was the one the Applicant encumbered when it was decided not to renew his appointment.

21. It is noted that the transfer decision and the non-renewal decision are two entirely separate decisions that are governed by different legal frameworks and with distinctive sets of facts. A judicial review of the transfer decision therefore cannot be subsumed as part of the non-renewal decision even though it might form basis of the underlying relevant facts.

22. Accordingly, the only decision under judicial review in the present case is the non-renewal decision. In this regard, it is further noted that by the Applicant’s own submissions, he was notified of the transfer decision on 31 August 2017, but that his request for management evaluation of the contested decision was only filed on 20 September 2018. This is far beyond the 60-day deadline stipulated in staff rule 11.3(c), and an appeal against the transfer decision would therefore also be time-barred and not receivable.

23. In a motion dated 3 March 2021, the Applicant confirmed that he did not seek to challenge the decision reassigning him to UBSB in the present case. Accordingly, reaffirming the Tribunal’s Order No. 53 (GVA/2021) dated 17 February 2021, the issues of the present case can be defined as follows:

- a. Was the non-renewal of the Applicant’s fixed-term appointment lawful?
- b. In case the non-renewal was unlawful, what remedies is the Applicant entitled to under art. 10.5 of the Dispute Tribunal’s Statute?

The lawfulness of the non-renewal decision

The submissions of the parties

24. The Applicant, in essence, submits that the reason provided for the non-renewal decision, namely the lack of funding for the post he encumbered, was properly not founded on the facts and evidence on record.

25. The Respondent's submissions may be summarised as follows:

a. The non-renewal of the Applicant's appointment was "based on genuine lack of funds" as "supported by the documentary evidence provided by the Respondent" and a written statement of a Programme Management Officer of UBSB dated 4 March 2021, which "clearly indicates that there were insufficient funds to cover the Applicant's salary, and related expenses, at the expiry of his contract". This, "together with the critical financial state of UN-Habitat, is amply demonstrated by ... the relevant documentary evidence and, the Applicant has not proffered any countervailing factor to vitiate the decision". The "financial records show that the situation at [UBSB] was even worse", which is proven by "documentary evidence";

b. The documentary evidence provided by the Respondent were "genuine documents extracted from UMOJA data system ... the official audited financial data system of the [United Nations]Secretariat", and includes an annex that the Applicant has accepted as "a valid financial record" showing a balance of USD50,294.71. These funds were "insufficient to cover for the Applicant's salary and other expenses beyond the expiry date of his contract", because it would "include not only his salary but expense[s] such as education grant, annual leave and relocation grant which by the time of his separation, run to a total of USD68.894.54", and would have "necessitated the borrowing of additional funds from other projects to cover the Applicant's costs". Under these circumstances, "any further commitments would have been unlawful and contrary to the United Nations [F]inancial Rules and Regulations";

c. The documentary evidence provided by the Respondent "contained information extracted from UMOJA and did not in any way misrepresent the financial status of the project which funded the Applicant's salary". Rather, the information provided in the spreadsheet for the "Urban Basic Services Branch: Water and Sanitation Programme-2018 Active Project Portfolio" ("the 2018 portfolio spreadsheet") was a "genuine extract of financial information for the 2018 project portfolio of all the UBSB active projects under the Water and

Sanitation Programme”. This was submitted “to show the current sources of funding under the Water and Sanitation programme and the highlighted sections pointed to the specific grant under which the Applicant’s [post] was financed and, the commitments for the particular grant from September 2018”;

d. It is “agreed that [the 2018 portfolio spreadsheet] showed that the GWOPA programme had a negative balance of USD 74,387, yet still the staff paid under the GWOPA programme were subsequently extended”. It did not reflect “the foreign exchange gains and the funding which was subsequently obtained from other donors following active resource mobilisation by the relevant staff members for continuation of the GWOPA programme”. It was “these additional funds that were used to extend the contracts of GWOPA staff into 2019 and beyond”. This “clearly demonstrates that records and information provided were not a misrepresentation or ‘cherry-picked’, ‘selectively compiled and edited specifically for this litigation’ ... but represented the accurate and contemporaneous record of the various funds under the various UBSB projects”;

e. Also, “ the detailed chronology of events, the documents referred to in [the Respondent’s reply] on the state of the finances, the Written Statement of [the UBSB Programme Management Officer] and the attachments, provided sufficient compelling evidence to justify the non-renewal of the Applicant’s appointment”. The Applicant has “clearly not discharged the burden of proving that the decision was vitiated by improper motives or countervailing factors nor proffered any evidence to draw a reasonable inference that there were available funds to extend his appointment beyond its expiry”;

f. All “UN-Habitat projects contribute towards UN-Habitat’s strategic plan and have particular donors with specific activities and timelines”. Additionally, “each project has models of implementation which include personnel costs”. Funds to UBSB were “given to enhance resource mobilisation and to strengthen Water and Sanitation elements”. The “UBSB Central Project” (it is unclear from where this title derives, because in the Respondent’s three annexes to his 5 March 2021 submission, including the UBSB Program Management Officer’s

statement to the Tribunal, the project is instead referred to as “Urban Basic Services Programme Development”) was where “payments from projects were charged from, including the Applicant’s salary for the duration of his 12 months”. It is against United Nations “rules and policies to create pseudo projects which are just sitting as cash reserves and that this was clearly not the case in this instant”;

g. The foreign exchange (“forex”) gain was “attributed to a Euro based funding for the accumulated period of 2013-2017 when the Applicant was at GWOPA and [he] was fully aware of the forex gain which was contained in certified financial statements that [he] submitted to the donor on behalf of UN-Habitat during this period”. Funding for “the Applicant’s project” was in United States dollars while funds for GWOPA project was in Euros which is “why only GWOPA forex gain was reflected”;

h. It is documented that “there were several Posts within UBSB which were not renewed or extended due to lack of funding” and in these instances, “the staff members were separated” and “the Applicant’s case was not an exception”. The “Post the Applicant encumbered and all other Posts in UBSB at the time have not been filled due to lack of funding”. The fact that the relevant document “does not identify the staff members by funding source was not deliberate and the information provided was sufficient to demonstrate that there was a genuine lack of funds and that the Applicant was not the only staff member affected by this type of decision”. The document “sufficiently shows the project title from where the source of funding could be discerned and there was no deliberate attempt on the part of the Respondent to withhold any part of [this document], or any evidence for that matter, submitted in respect of this case”; and

i. The project against which the Applicant’s Post was funded was “fully funded from various contributions under the delegated authority of the Executive Director”, and it “is immaterial whether it does not have a defined donor which makes it even more stable than the ones with a ‘defined donor’”. UN-Habitat’s “UBSB Central Project” was “a technical cooperation project which, by its nature

and setting, implements project activities with expected deliverables and contributes towards the attainment of water and sanitation expected accomplishments under Sub-programme 4 of the approved work programme of UN-Habitat". The project had "both earmarked and non-earmarked donor funds", and it is therefore incorrect to state that it had no "expected deliverable" and "no dedicated funding sources". The "UBSB Central Project" was not created for "foreign exchange gains and interests accrued under the UBS Trust Fund", because UN-Habitat "maintains a specific fund reserve account for foreign exchange gains and interests accrued which is separately managed by the [United Nations Administration]". It would be "contrary to the [United Nations] Financial Rules if UN-Habitat were to create the Central Project account specifically for the receipt of foreign exchange gains", and the Applicant's assertions to this end are "clearly borne out of a misunderstanding of how projects are funded, managed and administered in the [United Nations] system".

The relevant legal framework

26. The Tribunal is aware that a fixed-term appointment does not carry any expectancy of renewal and expires automatically without prior notice on the expiration date pursuant to staff regulation 4.5(c) and staff rules 4.13(c) and 9.4. The Administration is, nevertheless, required to provide a reason for such a non-renewal upon the relevant staff member's request, and this reason must be lawful and based on correct facts (in line herewith, see, for instance, the Appeals Tribunal in *Islam* 2011-UNAT-115 (paras. 29-32), *Pirnea* 2013-UNAT-311 (para. 34), *Obdeijn* 2012-UNAT-201 (paras. 33-39), *Matadi et al* 2015-UNAT-592 (para. 16) and *Jafari* 2019-UNAT-927 (para. 35)).

27. The Administration is provided with a margin of appreciation when deciding whether to renew a fixed-term appointment, but "an administrative decision not to [do so] can be challenged on the grounds that the Organization has not acted fairly, justly, or transparently with the staff member or was motivated by bias, prejudice or improper motive". The staff member has "at least an initial burden of establishing such factors played a role in the administrative decision" (see *Porras* 2020-UNAT-1068, para. 24). When "judging the validity of the Secretary-General's exercise of discretion in

administrative matters, as in the case of a non-renewal decision, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate” (*Porras*, para. 25). 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 amongst the various courses of action open to him[, n]or is it the role of the Dispute Tribunal to substitute its own decision for that of the Secretary-General” (*Porras*, para. 25).

28. The Appeals Tribunal has consistently held that lack of funding is a legitimate and valid reason for not extending a fixed-term, or a similarly time limited, appointment (see, for instance, *Nouinou* 2019-UNAT-902, *Abdeljalil* 2019-UNAT-960, *Abu Ouda* et al. 2020-UNAT-1018 and *El Najjar* 2020-UNAT-1028). The Appeals Tribunal, however, in *Loose* 2020-UNAT-1043, held that if all relevant documentation is in the Respondent’s custody, the Applicant only needs to make a plausible claim; thereafter, the onus of proof shifts to the Respondent to demonstrate the alleged lack of funding:

41. The circumstances of this case illustrate the impracticability, if not the impossibility, and therefore the injustice, of putting a blanket onus (or burden as it was termed) of proof on a staff member in such circumstances. Rather, we consider that the more nuanced application of a shifting onus of proof is appropriate for such cases. By that we mean that there is an initial onus on a staff member such as Ms. Loose to establish a sufficient or apparent case of adequacy of resources to support a renewal or extension or other relevant grounds for not discontinuing the employment. When that initial onus has been discharged by the staff member, the onus of justifying in law the decision not to renew where that is justiciable (such as in cases of legitimate expectation of renewal) moves to the Administration. It will then be able (and indeed in practice be required) to adduce the evidence that only it has to support its decision whichever of not to extend or renew an [fixed-term appointment] or convert it to a continuing engagement in circumstances in which that would otherwise be expected to occur.

42. In cases such as this, also, [the Dispute Tribunal] should ensure that it has sufficient relevant information (documentary and oral evidence) to be able to ascertain for itself whether the decision not to renew was justified in circumstances where it might otherwise have

been expected that there would be a renewal. In doing so, [the Dispute Tribunal] will avoid potentially inequitable practi[c]es of requiring one party to prove everything in issue whilst allowing the other to put that first party to the proof of those issues and not assist the Tribunal by providing it with relevant evidence.

...

46. Once [the Dispute Tribunal] assesses all relevant facts established before it, including, in getting to that position, by applying the onus and burden of proof of contentious facts, it must apply the law to those facts to reach an outcome to the case. In that latter exercise, it is not a question of either party being required to establish a more convincing case by application of an onus or burden, but rather of the Tribunal's assessment of where the justice of the case lies in respect of those established facts and the applicable law.

The reason provided for the Applicant's non-renewal

29. By memorandum dated 31 August 2018, the Director of the Programme Division of UN-Habitat informed the Applicant that his fixed-term appointment would not be extended beyond its expiry on 30 September 2018, indicating that no resources were available to fund the post even though efforts had been made to look for such funding and other suitable positions. Reference in this memorandum was also made to email correspondences between the Coordinator of USBS and the Applicant, and in an email dated 30 July 2018, the Coordinator informed the Applicant about the possibility of his post not being renewed as follows:

This is to keep you informed as a project funded staff member.

As you are already aware, the organization has been facing major budgetary constraints. More specifically the water and sanitation project portfolio in UBSB is facing a very tight financial situation in 2018. I note with concern that to date no new projects earmarked towards water and sanitation have been raised, with the exception of one small project earmarked towards the Mekong Region facilitated by [first name of a person redacted]. Over the last seven years the water and sanitation project portfolio of UBSB has shrunk and as a consequence we have not been able to replace project funded colleagues who retired and in some cases have not been able to extend contracts when projects expired.

I am therefore informing you of this situation and that we may not be able to renew your appointment if it continues.

30. In order to understand whether the funding for the Applicant's post had, as a matter of fact, run out as reasoned by the Respondent, the Tribunal will (a) first examine what the underlying funding source(s) was/were for his post, and (b) then what funding, if any, was available at the time of his separation from UN-Habitat.

The funding source(s) for the Post

31. According to the reassignment memorandum from the Under-Secretary-General and Executive Director of UN-Habitat dated 31 August 2017, the Applicant's role in UBSB was to work on a number of different projects and programme activities regarding water and sanitation. It was not limited to one single project.

32. In an email of 10 November 2017 from the Coordinator of USBS to the Applicant, it was confirmed that the Applicant was to work on project proposals for water and sanitation in UBSB, also meaning not just one single project:

The main focus of your work should be on preparing *project proposals* [emphasis added] for water and sanitation. Your first assignment was the development and submission of a project proposal to Innovation Norway. Please meet with [various people, including the Coordinator] for consultation and then please develop your plan with milestones for preparing and submitting project proposals on water and sanitation.

33. That the Applicant, in his post, was not limited to working on one single project in UBSB is further affirmed in the 30 July 2018 email from the UBSB Coordinator, in which he informed the Applicant about the possibility of the non-renewal of his Post (see quotation above), as reference is explicitly made to funding problems regarding "the water and sanitation project *portfolio* in UBSB" (emphasis added) and not just one project.

34. When defining the goals in the Applicant's workplan for 2018-2019 in an email of 17 August 2018, the UBSB Coordinator also confirmed that the Applicant's job was to cover various projects and programmes in UBSB, in addition for him to undertake some other tasks of more general and crosscutting character. The Applicant's goals, as per said email, read as follows:

1. Managing resource mobilization for water and sanitation projects
2. Managing quality assurance of water and sanitation projects being implemented by ROs [assumedly meaning regional offices] and other Branches
3. Leading on development of norms and policies for water and sanitation
4. Supporting the ED's [assumedly the Executive Director of UN-Habitat] reform process

35. Consequently, it is evident that the Applicant's job was related to more than just one of the projects on water and sanitation in USBS and rather concerned the entire portfolio (as presented in the 2018 portfolio spreadsheet). In addition, he also undertook other and more general tasks and functions relevant to UN-Habitat.

36. This conclusion is also consistent with the fact that the Applicant was reassigned to new tasks upon his lateral move to a post in Nairobi, without any change in his work relationship with UN-Habitat (except for the length of the assignment, which was stated with reference to a period of time and not a single project to perform).

37. In line herewith, no mention is anywhere in the documentary evidence that the funding source for the Post would be limited to only one of the water and sanitation projects and programmes on USBS' portfolio. In this regard, the written statement provided by the USBS Program Manager Officer, where this Officer indicated otherwise, has no probative evidentiary value as it was specifically tailored for the present litigation. The facts therefore do not show that, as the Respondent otherwise submits and the USBS Programme Manager Officer alleges, funding for the Applicant's post was limited to a particular grant provided to USBS for a single project, namely that which is referred to as "Urban Basic Services Programme Development".

38. When accepting the reassignment in an email of 6 September 2017, the Applicant, however, stated that he understood that his reassignment would "not have any implications on the *nature* of [his] Fixed Term renewable contract" (emphasis added). This could be interpreted as that the Applicant made his acceptance of the

reassignment conditioned upon that the funding of source(s) for his post would continue as it was on the post he encumbered before his reassignment to UBSB.

39. In the case of the Applicant, it does not follow from the case record that UN-Habitat ever as much as contemplated the Applicant's statement regarding his understanding of the "nature" of his fixed-term appointment. Rather, it appears that UN-Habitat simply proceeded with the reassignment and, by doing so, it silently accepted the Applicant's condition. If so, this would reasonably also mean that the funding source(s) of the Applicant's fixed-term appointment as such never changed despite him being reassigned to UBSB.

40. The Applicant has, however, not made this contention to the Tribunal and the issue will not be further examined. The stipulation in his 6 September 2017 acceptance email, nevertheless, demonstrates that he Applicant never accepted, or was even informed of, that the funding source(s) for his UBSB post was/were to be limited to one single project in UBSB's portfolio of water and sanitation projects and programmes. As the Dispute Tribunal held in *Teo* UNDT/2018/044 and *Teo* UNDT/2018/107 (as affirmed by the Appeals Tribunal in para. 42 of *Chemingui* 2019-UNAT-930), a staff member cannot, at least against her/his will, be transferred to a post with a less secure financial funding.

41. Consequently, as no limitations were stated anywhere in the documentary evidence regarding the Applicant's tasks and functions being limited to the "Urban Basic Services Programme Development" project or otherwise indicating that the funding source was limited to this one single project, the Tribunal finds that, with reference to *Loose*, the Applicant's post was to be funded through the entire portfolio of projects and programmes on water and sanitation in UBSB.

The available funding

42. The Tribunal notes that pursuant to the 2018 portfolio spreadsheet, the total estimated fund balance was USD717,121 at the relevant time, also taking in account future commitments. In comparison, the Respondent submits that the cost of extending the Applicant's appointment for a year would have amounted to USD68,894.54, including salary and other benefits and entitlements. While the Tribunal finds that this

amount is likely set too low in light of the relevant salary scale, a one-year extension could, nevertheless, easily have been covered by the available funds under the portfolio of water and sanitation projects and programmes in UBSB's in accordance with the 2018 portfolio spreadsheet.

43. The Respondent submits that the funding of some of the other projects on the portfolio were specifically earmarked for other activities than the Applicant's post and therefore not available under the Financial Rules and Regulations for its funding. The Respondent, however, provides no evidence or further submissions thereon and; with reference to *Loose*, the Tribunal cannot but reject this argument.

44. Even if the Respondent's submission is accepted and no funds were to be used from any other UBSB project to finance the Applicant's post than those related to the project of "Urban Basic Services Programme Development", it follows from the Respondent's own figures that USD50,294.71 were available at the relevant time, which is also reflected in the 2018 portfolio spreadsheet. Although this would not have been enough for an extension of a full year, it would, at least, as also argued by the Applicant, have been enough for some months.

45. The Respondent contends that commitments for USD33,986 had already been made of the available USD50,294.71, which is also indicated in the 2018 portfolio spreadsheet. The Tribunal is, however, unconvinced about this figure as no such commitments are reflected in the contemporaneous UMOJA records (dated 19 October 2018), which has also been provided by the Respondent. In comparison, the 2018 portfolio spreadsheet was specially prepared by the UBSB Program Manager Officer for the present litigation and therefore of less, if any, probative value.

46. Accordingly, when the UN-Habitat Director of the Programme Division informed the Applicant that his fixed-term appointment would not be extended beyond its expiry on 30 September 2018, indicating that this was "due to the fact that there [were] no resources available to fund [his] position even after efforts [had been made to look for funding and suitable positions funded by other projects]", this was—in any event—wrong and not based on correct facts.

47. In conclusion, with reference to the jurisprudence of the Appeals Tribunal cited above, the Tribunal finds that the contested non-renewal decision was unlawful because the provided reason for it, namely lack of funding, was not based on correct facts. It is therefore not necessary for the Tribunal to examine whether the decision was tainted by ulterior motives, as also argued by the Applicant.

Remedies

Claim for compensation

48. In his application, the Applicant seeks rescission of the contested decision and his reinstatement. Alternatively, should the Respondent elect not to do so, the Applicant claims two years of net base salary in compensation for the harm he suffered. The Applicant provides no further submissions on the question and the Respondent did not respond to the Applicant's claims on relief in any of his pleadings.

49. The Tribunal notes that in accordance with Order No. 53 (GVA/2021), when the parties were directed to provide closing statements, they were evidently also expected to present their submissions on relief, since the question of remedies was explicitly outlined as one out of two issues of the present case in para. 9(b) of that Order. As both parties, nevertheless, entirely failed to do so, the Tribunal will proceed based on the other pleadings and documents on record. In this regard, the Tribunal notes that in Order No. 53 (GVA/2021), the parties were informed that the Tribunal would proceed to adjudication after them submitting their respective closing statement as it was indicated that “[u]nless otherwise ordered, on receipt of the latest of the aforementioned [closing] statements or at the expiration of the provided time limits, the Tribunal will adjudicate on the matter and deliver judgment based on the papers filed on record”.

General legal framework on remedies

50. The remedies that the Dispute Tribunal may award are outlined in art. 10.5 of its Statute as follows:

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

Rescission of the contested non-renewal decision

51. As funds still existed to finance the Applicant's post at the time of his separation and no information is before the Tribunal about these having subsequently been depleted, the Tribunal finds that the most appropriate remedy for the Applicant is rescission of the unlawful decision not to renew his fixed-term appointment and his reinstatement in the same position he encumbered (see, for similar rescission in case of non-renewal of fixed-term appointment, *Applicant* UNDT/2020/16, *Loose* UNDT/2020/38, *Maslei* UNDT/2015/41 and *Quatrini* UNDT/2020/053).

Determination of the compensation *in lieu*

52. A non-renewal decision concerns an "appointment" pursuant to art. 10.5 of the Dispute Tribunal's Statute, and the Tribunal must therefore set an amount that the Respondent can choose to pay as an alternative to the rescission of the contested administrative decision and the reinstatement of the Applicant.

53. It clearly results from art. 10.5(a) of the Dispute Tribunal's Statute, as consistently interpreted by the Appeals Tribunal, that compensation *in lieu* is not compensatory damages based on economic loss, but only the amount the administration may decide to pay as an alternative to rescinding the challenged decision or execution of the ordered performance (see, for instance, *Eissa* 2014-UNAT-469).

54. As compensation *in lieu* is just a mandatory alternative for the Administration if it prefers not to rescind the challenged decision and does not concern the economic loss suffered by a staff member, the Applicant does not have to demonstrate to have mitigated his loss. Indeed, the Appeals Tribunal found in *Eissa* 2014-UNAT-469, para. 27, that “[*in lieu*] compensation is not compensatory damages based on economic loss. Thus, there is no reason to reduce this award by the amount of the termination indemnity” (same principle was affirmed in, for instance, *Zachariah* 2017-UNAT-764, para. 36, and *Fasanella* 2017-UNAT-765, para. 34).

55. As to the amount of the compensation *in lieu*, the above recalled article of the Dispute Tribunal’s Statute sets a general framework for its determination, stating that, apart from exceptional circumstances, it “shall normally not exceed the equivalent of two years’ net base salary of the applicant”.

56. The Appeals Tribunal in *Ashour* 2019-UNAT-899 found that “the amount of *in lieu* compensation will essentially depend on the circumstances of the case” and that “due deference shall be given to the trial judge in exercising his or her discretion in a reasonable way following a principled approach” (see para. 21).

57. This Tribunal finds that the determination of the compensation *in lieu* between the minimum and the maximum provided in its Statute must take into account—so graduating the amount accordingly—the specific circumstances of the case, and in particular the type and duration of the contract held by the staff member, the length of his/her service, and the issues at the base of the dispute. The compensation *in lieu* is not related at all to the economic loss suffered by and to the salary of the staff member, the latter being the parameter of the outcome of the decision on compensation and not also the precondition of the compensation (so we can have compensation *in lieu* also in cases where no economic damage has been suffered). More specifically, it seems reasonable—for instance—to grant the largest compensation in cases of termination of permanent appointments of senior staff members, and to limit the compensation in cases of non-renewal of fixed-term appointments for recently appointed staff members (where there is not security of tenure but only a chance of renewal).

58. In the present case, having in mind the above-mentioned criteria and applying them to the specific case at hand (and so having considered the seniority of the Applicant, the type of contract held, and the chance of renewal of the contract in a position still required by the Administration), the Tribunal sets the amount of the compensation *in lieu* at 3 months' net-base salary at the P-5 level as per the salary scale in effect at the time of the Applicant's separation from service (in line herewith, see the Dispute Tribunal in *Quatrini*, which was not appealed to the Appeals Tribunal).

Compensation for harm

59. In addition to and irrespectively of the so-called compensation *in lieu*, compensation under art. 10.5(b) of the Dispute Tribunal's Statute may be awarded for (a) pecuniary damages, such as income loss, and (b) non-pecuniary damages, such as stress, anxiety, and reputational harm.

Pecuniary damages

60. The Tribunal notes that the Appeals Tribunal held in a non-renewal case that the compensable period is typically the same as the last appointment (see, for instance, *Gakumba* 2013-UNAT-387, para. 16, *Kasmani* 2013-UNAT-305, para. 36, and *Belkhabbaz* 2018-UNAT-895, para. 38).

61. In the present case, the Applicant's last fixed-term appointment was for one year. The Tribunal considers that there is too much uncertainty as to whether the Applicant would have been offered an additional fixed-term appointment after the first renewal, and that it would be too speculative under the Appeals Tribunal's jurisprudence to extend the compensable period any further than that one year as of the date of separation and at the P-5 level. The Tribunal notes that it could legitimately have been decided to not renew the Applicant's appointment for other legitimate grounds than budgetary reasons.

62. The Appeals Tribunal has consistently held that the staff member has to demonstrate to have done efforts to mitigate the economic loss arising from an administrative decision impacting on his employment (see, for instance, *Gakumba, Kasmani* and *Belkhabbaz*, as well as *Zachariah* and *Fasanella*). None of the parties, however, have made any submissions on this point. As the onus of proof rests on the Applicant, and also taking into account his successful career with UN-Habitat, which should give him a good chance of finding new employment, and considering that the Applicant has not even alleged to have applied for other jobs and that he did not show his revenues' declaration for the relevant year, the Tribunal will therefore grant a compensation for his income loss in the amount of 3 months of net-base salary.

Non-pecuniary (moral) damages

63. The Applicant has not made any specific claim for non-pecuniary (moral) damages or provided any evidence for any such harm. Consequently, the Tribunal cannot award him any compensation in this respect.

Conclusion

64. In light of the foregoing, the Tribunal DECIDES that:

- a. The decision to not renew the Applicant's fixed-term appointment is rescinded and the reinstatement of the Applicant is ordered;
- b. As compensation in lieu under art. 10.5(a) of the Dispute Tribunal's Statute, the Respondent is to pay the Applicant 3 months' net-base salary at the P-5 level and step that he had at the time of his separation from service as per the relevant salary scale;
- c. As compensation for pecuniary damage under art. 10.5(b) of the Dispute Tribunal's Statute, the Respondent is to pay to the Applicant 3 months of net -base salary at the P-5 level and step that he had at the time of his separation from service as per the relevant salary scale; and

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d. The aforementioned compensations shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensations. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Francesco Buffa

Dated this 26th day of May 2021

Entered in the Register on this 26th day of May 2021

(Signed)

René M. Vargas M., Registrar, Geneva