
UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1265



Faraj El-Awar
(Appellant /Respondent)

v.

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

JUDGMENT

Before: Judge Sabine Knierim, Presiding
Judge John Raymond Murphy
Judge Dimitrios Raikos

Case No: 2021-1586 & 2021-1587

Date of Decision: 1 July 2022

Date of Publication: 19 August 2022

Registrar: Weicheng Lin

Counsel for Appellant/Respondent: Omar Yousef Shehabi, OSLA
Counsel for Respondent/Appellant : Noam Wiener

JUDGE SABINE KNIERIM , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal or UNAT) has before it two appeals against Judgment No. UNDT/2021/060 (Impugned Judgment) issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) on 26 May 2021 . The UNDT found that Mr. El-Awar's non-renewal was unlawful as the proffered reason that there was lack of funds for Mr. El-Awar's post was not matched by the facts. It awarded Mr. El-Awar three months' net-base salary as in lieu compensation to rescission of the non-renewal decision and three months' net-base salary as pecuniary damages. The Secretary-General appeals on merits. Mr. El-Awar appeals solely on the compensation. For the reasons set out below, we grant the Secretary-General's appeal in part; Mr. El-Awar's appeal is dismissed.

Facts and Procedure

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organization as well as support capacity development, tool development and facilitating

however, UN-Habitat did not disclose the terms of reference of that project, its budget and structure, and Mr. El-Awar's specific role and contribution to the alleged project.

9. To support his claim that the proffered reason for the contested decision was not supported by evidence, Mr. El-Awar presented a screenshot from Umoja (the official Enterprise Resource Planning system of the United Nations Secretariat) showing that he was one of six staff members assigned to the UN Trust Fund cost centre and yet he was the only staff whose contract was not renewed. As remedies, Mr. El-Awar requested the rescission of the contested decision and reinstatement, or, as alternative, the award of two years' net-base salary as "compensation for the harm suffered".

10. On 17 February 2021, the UNDT issued Order No. 53 (GVA/2021). In the Order, the UNDT defined the issues of the case as follows: (a) whether the non-renewal decision was lawful; (b) In case the non-renewal was unlawful, what remedies Mr. El-Awar would be entitled to under the UNDT's Statute. The UNDT then ordered the Secretary-General to file additional evidence supporting its claim that the contested decision was due to lack of funds and instructed the parties to file closing submissions.

11. On 3 March 2021, Mr. El-Awar filed a motion to request a case management discussion (CMD) and to seek production of

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2022-UNAT

19. Further, the UNDT noted that even if it accepted UN-Habitat's argument that funding for other projects could not be used for Mr. El-Awar's post, USD 50,294.71 was available at the relevant time for the "Uy (a)0.7Mination >>BDC BT /TT2 1 v4cce2.2 (ec8 (3 Tc 032M3U)1.3 (m7) u)3.6D2

prejudice, bias or improper motive, the UNDT failed to determine the “nature of the irregularity” affecting the contested judgment, as the UNAT’s jurisprudence requires in setting in-lieu compensation. Secondly, the UNDT erred in concluding that it would be too speculative to extend the compensable period beyond Mr. El-Awar’s first one-year renewal, where the evidence shows that all UN-Habitat staff on the same funding source at the time of non-renewal either remain with UN -Habitat today or have left voluntarily. Even then, the UNDT inexplicably awarded only three months’ net-base salary, i.e., one-fourth of the compensable period. Thirdly, given that UN -Habitat based the non-renewal decision exclusively on a lack of funding, the UNDT erred by considering that Mr. El-Awar might “legitimately” have been separated on other grounds, in reference to

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w. 224.0 Tj. (h) 3.69 B. (t) (B) (m) 5-6

32. As evidence of ulterior motives, Mr. El-Awar thus directed the UNDT to the sworn declaration by senior UN-Habitat managers submitted in Case No. UNDT/GVA/2017/035, including Dr. C (who made the transfer decision), Mr. B (who made the transfer decision), and Mr. A (who made the transfer decision).

The Secretary-General's Answer

37. The Secretary-General respectfully requests that the UNAT dismiss the Appeal. Alternatively, should the UNAT not be persuaded by the appeal submitted by the Secretary-General on 26 July 2021, he requests that the case be remanded, as also requested by Mr. El-Awar. The Secretary-General requests, however, that in such eventuality the remand be made for a *de novo* trial on the merits before a new judge.

38. The UNDT correctly found Mr. El-Awar failed to meet its burden and did not demonstrate that the non-renewal decision was motivated by bias or improper motives.

39. Mr. El-Awar claims that the decision by UN-Habitat's senior management to limit his authority when he served as the head of GWOPA and his transfer from the role of head of GWOPA in Barcelona to the position of Senior Coordination Officer in Nairobi are evidence that should have prompted the UNDT to hold that the non-renewal decision was motivated by prejudice and bias. Mr. El-Awar's argument is misplaced. Contrary to the misleading presentation in his Appeal, the question of whether the decision to withdraw the authority previously delegated to Mr. El-Awar was lawful was not just submitted for review with the UNDT on 1 June 2017. Rather, it was the subject of UNDT Judgment No. UNDT/2018/116 (El-Awar) issued on 23 November 2018, which held that the decision was lawful. It was also the subject of UNAT Judgment No. 2019-UNAT-931 (El-Awar), issued on 28 June 2019, which upheld the UNDT judgment and held that "the decisions to subject [Mr. El-Awar] to stricter supervision were, moreover, tailored proportionally to the desired outcome of.2 ()-0.6 (E)-0.

been retained in employment and claimed that this was proof that the decision not to renew his fixed-term appointment could not have been brought about by lack of funding.

44. The UNDT erred in law and fact in finding that Mr. El-Awar's fixed-term appointment was not discontinued due to a lack of funding. The UNDT found that the evidence provided by Mr. El-Awar was insufficient to prove that UN-Habitat had acted lawfully when it determined it did not have sufficient funding to renew Mr. El-Awar's fixed-term appointment and held that, therefore, the contested decision was "wrong and not based on correct facts". This finding was erroneous. The Secretary-General provided ample evidence to support the factual basis underlying the contested decision in the form of a declaration by the UBSB Program Management Officer (Declaration); a printout from Umoja of the 31 August 2018 Balance of the Urban Basic Services Programme Development project, the project from which Mr. El-Awar's post was programmed (31 August 2018 Project Balance); and a chart produced by the UBSB Program Management Officer providing an accounting of the funds dedicated to the various projects financed by the Urban Basic Services Fund (Chart).

45. The UNDT erred when it found that Mr. El-Awar's salary could have been paid from other projects financed by the Urban Basic Services Fund. The UNDT found that at the time the contested decision was taken, USD717,121 remained in Urban Basic Services Fund and that Mr. El-Awar's ongoing salary could have been paid from these moneys. This finding is erroneous, as it is inconsistent with the Financial Regulations and Rules of the United Nations. According to Financial Regulations 3.12 and 3.13, voluntary contributions may be accepted by the Secretary-General for specific purposes and treated as trust funds under Financial Regulations 4.13 and 4.14. A trust fund can include amounts contributed by various donors for various projects. In the present case, in accordance with the Financial Regulations and Rules, the Urban Basic Services Fund contained moneys contributed by various donors that were already earmarked for specific projects. The moneys donated for each project, though kept in one trust fund, could only be used for the project for which they were donated and were not available to pay the ongoing salary of Mr. El-Awar.

46. The Chart presented the eight different projects that were financed by the Urban Basic Services Fund. However, contrary to the UNDT's findings, the fact that all eight projects were financed from the same trust fund did not mean that the moneys contri 2 (s do)-2 (nw.8 (us)-

for a sanitation project in Lake Victoria. These moneys, which were deposited in the Urban Basic Services Fund, could only be used to finance the materials required for and the salaries staff members assigned to that sanitation project. They could not be diverted to fund Mr. El-Awar's salary on a completely different project. In view of the foregoing, the UNDT's finding that "no mention is anywhere in the documentary evidence that the funding source of [Mr. El-Awar's position] would be limited to only one of the water and sanitation projects and programmes on [UBSB's] portfolio" demonstrates a fundamental error with respect to the financial operations of the Organization. Positions are programmed to be financed from a specific programme or project, not from any moneys in a given trust fund. As expressly stated by the Secretary-General in his Reply, Mr. El-Awar's position was financed from the Urban Basic Programme Development project. Mr. El-Awar's position could not be financed by moneys earmarked by donors and maintained in the trust fund for other projects. There was no "mention" of this in the documentary evidence because it is part of the basic operations of finances of the United Nations—positions are not funded by "slush" funds but according to programme budgets.

47. The UNDT erred in finding that evidence prepared by the Secretary-General for presentation to the UNDT had no probative value. The UNDT found that the Chart prepared by the UBSB Programme Management Officer had little probative value because it was produced "for the present litigation" and included information that was not reflected in the Umoja 31 August 2018 Project Balance. This finding is erroneous.

48. Pursuant to the evidence submitted by the Secretary-General to the UNDT, Mr. El-Awar's posi81 Tc 0-4.8 (0)64 -2.82Un3.12 0 Td (-)Tj7 (428 0 Td [(t)-1.3 ((i)0.9 (d-Tw 0.3725

purposes). Thus, the UNDT erred in finding that the evidence prepared by the Secretary-General for presentation to the UNDT had no probative value.

49. The UNDT erred in failing to distinguish the facts in *Loose*² from the facts in the present case. The UNDT refers to the UNAT's holding in *Loose*³ on two separate occasions as a basis for finding that in the instant case the Secretary-General did not adequately demonstrate that there were insufficient funds to renew Mr. El-Awar's appointment. The UNDT erred in making these references. The facts in *Loose*⁴ are significantly different from those in the instant case. In *Loose*,⁵ a position was financed through the contributions of Member States of the Convention on Certain Conventional Weapons. The Member States were in arrears in paying their dues to the Convention, and therefore no funds were available to pay Ms. Loose's salary. Consequently, the Administration informed Ms. Loose that her appointment would not be renewed. The UNAT found, however, that after the decision was made not to renew Ms. Loose's appointment, some of the Member States who were previously in arrears paid their dues, thereby enabling the renewal of Ms. Loose's appointment. In the instant case, there were no additional funds that could finance Mr. El-Awar's position. The facts of the instant case, therefore, are different than those in *Loose*,⁶ because in the instant case the Secretary-General provided evidence of the financial situation of the Urban Basic Services Programme Development project not only when the contested decision was made but also right up to the time of Mr. El-Awar's separation from service. Unlike in *Loose*,⁷ in the instant case there was no later infusion of funds into the Urban Basic Services Programme Development project's budget that could have enabled the renewal of Mr. El-Awar's fixed-term appointment. Thus, the UNDT erred in failing to distinguish the facts in *Loose*⁸ from the facts in the present case.

50. The UNDT erred in law when it awarded Mr. El-Awar compensation for pecuniary damages. The Statute of the UNDT provides in Article 10(5)(b) that the UNDT may award "compensation for harm, supported by evidence..." The UNAT has consistently held that "not

² *Hine-Wai Kapiti Loose v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1043.

³ *ibid.*

⁴ *ibid.*

⁵ *ibid.*

⁶ *ibid.*

⁷ *ibid.*

⁸ *ibid.*

every administrative wrongdoing will necessarily lead to an award of compensation under Article 10(5)(b) of the UNDT Statute,” and that “Article 10(5)(b) of the UNDT Statute only provides for an award of compensation for harm when supported by evidence”. In the instant case, although Mr. El-Awar neither sought compensation for damages, nor provided any proof of such damages, the UNDT nonetheless awarded him compensation for pecuniary damages at the rate of three months’ net-base salary. Accordingly, the UNDT erred in its award of pecuniary damages to Mr. El-Awar. In both his application and his closing arguments, Mr. El-Awar sought solely “rescission of the contested decision and reinstatement” or compensation in lieu of such reinstatement. Mr. El-Awar never requested compensation for damages. Mr. El-Awar also failed to present any proof that he sustained any damages. Indeed, the UNDT noted in the impugned Judgment that Mr. El -Awar had the onus of proving that he had sustained damages, and that he had not done so. Consequently, the UNDT had no grounds on which to determine Mr. El -Awar sustained any damages, and its award of pecuniary damages was not based on any evidence in the record. This is inconsistent with Article 10(5) of the UNDT Statute and the UNAT’s jurisprudence regarding the award of compensation for harm.

Mr. El Awar’s Answer

51. Mr. El-Awar urges the UNAT to dismiss the Secretary-General’s Appeal in its entirety, affirm the contested Judgment as it pertains to the merits, and grant Mr. El-Awar’s Appeal as it pertains to damages.

52. The UNDT properly applied the UNAT’s judgment in *Loose*.⁹ First, the Secretary-General claims that the UNDT erred in fact and law in applying the burden-shifting framework in cases of non-renewal for lack of funding that the UNAT inaugurated in *Loose*.¹⁰ He claims that this misapplication impermissibly shifted the burden of proof to him to justify the non-renewal decision and contravened the presumption of regularity. Relatedly, the Secretary-General claims that the UNDT erred by failing to distinguish the present case from *Loose*¹¹ on its facts. The general rule in cases of nonrenewal (for any reason) has long been that the applicant must prove, by a preponderance of the evidence, that the non-renewal of

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ *ibid.*

USD 50,295 in the relevant fund at the same time it managed to renew five GWOPA staff with USD 54,343

57. The UNDT properly concluded that resources for renewal were available even if Mr. El-Awar's position were confined to a single project and funding source.

Considerations

58. As both the Secretary-General and Mr. El-Awar have appealed the UNDT judgment, the Appeals Tribunal

65. However, the UNDT continued as follows:

44. Even if the [Secretary-General]'s submission is accepted and no funds were to be used for any other purpose, the UNDT is not required to award interest on the amount of the award. The UNDT is not required to award interest on the amount of the award.

72. Mr. El-Awar complains that the UNDT should also have taken into account the nature of the irregularity of the administrative decision and reviewed the evidence of prejudice, bias or improper motive. We do not agree.

73. In-lieu compensation under Article 10(5)(a) of the UNDT Statute shall be an economic equivalent for the loss of rescission or specific performance the Tribunal has ordered in favor of the staff member. When the Secretary-General chooses not to accept this order, he must pay compensation as an alternative to replace (in-lieu) such rescission or specific performance. Hence, the most important factor to consider in this context is the pecuniary value of such rescission or specific performance for the staff member in question. In case of rescission of a nonrenewal decision, it is reasonable for the UNDT to focus on the seniority and type of appointment held by the staff member, and particularly the chance of renewal of this appointment.

74. The nature and degree of the irregularities committed by the Administration, on the other hand, are of no legal relevance for the pecuniary value of the ordered rescission or specific performance. On the contrary, as the UNDT may not award punitive damages according to Article 10(7) of the UNDT Statute, we find the UNDT is not allowed to consider these factors when deciding on the amount of in-lieu compensation.

75. Given the seniority and type of Mr. El-Awar's appointment, and his chance of renewal, the amount of in-lieu compensation of three months set by the UNDT is free of error. Particularly considering the evidence presented by the Secretary-General with regard to the financial situation of UN-Habitat, it is unlikely to assume that Mr. El-Awar's appointment could have been renewed for more than three months.

76. Consequently, Mr. El-Awar's appeal fails.

Compensation for pecuniary harm

77. In Mr. El-Awar's case, the UNDT granted compensation "for his income loss in the amount of 3 months of net-base salary". It considered that Mr. El-Awar's last fixed-term appointment was for one year and that there is too much uncertainty as to whether he would have been offered an additional fixed-term appointment after the first renewal, and that it would be too speculative to extend the compensable period any further than that one year as of the date of separation and at the P5 level. The UNDT further noted that a staff member has to

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84. Consequently, in this respect, the Secretary-General's appeal succeeds, and Mr. ElAwar's appeal fails.

Judgment

85. The Secretary-General's appeal is granted in part, and Mr. El-Awar's appeal is dismissed. The UNDT Judgment No. UNDT/2021 /062 is modified, and its order on compensation for pecuniary damage is vacated.

Original and Authoritative Version: English

Decision dated this 1st day of July 2022.

(Signed)

Judge Knierim , Presiding
Hamburg, Germany

(Signed)

Judge Murphy
New York, United States

(Signed)

Judge Raikos
New York, United States

Judgment published and entered into the Register on this 19th day of August 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar