



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2020/022

Judgment No.: UNDT/2021/068

Date: 10 June 2021

Original: English

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**Before:** Judge Joelle Adda

**Registry:** New York

**Registrar:** Nerea Suero Fontecha

VARONA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Marcos Zunino, OSLA

**Counsel for Respondent:**

Marcus Joyce, UN Women

Prue Smith, UN Women

## **Introduction**

1. On 8 June 2020, the Applicant, a former staff member with the United Nations Entity for Gender Equality and the Empowerment of Women (“UN Women”) in New York, filed an application contesting the non-renewal of her fixed-term appointment following completion of a secondment with the United Nations Development Programme (“UNDP”).

2. For the reasons stated below, the Tribunal finds the contested decision unlawful and grants the application.

## **Facts**

3. In December 2011, the Applicant joined UN Women as a Security Associate at the G-6 level on a fixed-term appointment.

4. In October 2015, the Applicant was notified that she was selected for a fixed-term position at the G-6 level with UNDP based in Mexico City.

5. By memorandum dated 3 November 2015, UN Women agreed to release the Applicant to UNDP on secondment for an initial one-year period in accordance with the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances (“Inter-Organization Agreement”).

6. On 5 November 2015, the Applicant signed a letter outlining the terms of her secondment to UNDP. In the letter, it was stated that UN Women agreed to the Applicant’s release on secondment in accordance with the Inter-Organization Agreement. Further, it was stated that “UN Women agrees to grant [the Applicant] return rights to UN Women without having any guarantee as to a particular position to which [the Applicant] may return nor as to the availability of other positions for which [the Applicant has] the required qualifications”.

7. On 14 December 2015, the Applicant began her secondment.
8. By memorandum dated 14 November 2016, UNDP notified the Applicant that her secondment would not be renewed beyond 14 December 2016.
9. On 15 December 2016, the Applicant returned to UN Women but was not placed on any post and instead was placed on annual leave for the purpose of exhausting her annual leave entitlements before her placement on special leave without pay (“SLWOP”).
10. From January and April 2017 and from September 2018 to March 2019, respectively, the Applicant was placed on temporary assignments. Except for these two periods, the Applicant was placed on SLWOP until her separation.
11. On 3 February 2020, the Applicant was notified that she would be separated upon the expiration of her fixed-term appointment.
12. On 13 February 2020, the Applicant submitted a request for management evaluation of the decision to separate her from UN Women.
13. On 13 March 2020, the Applicant was notified that, following the management evaluation, the contested decision was upheld.
14. On 30 March 2020, the Applicant was separated from UN Women.

## **Consideration**

### *Scope of the case*

15. The issue in this case is whether, under the applicable legal framework, UN Women's decision to separate the Applicant on the basis that she failed to successfully compete for a position upon her return from secondment is lawful.

### *Was the non-renewal decision lawful?*

16. UN Women argues that the Applicant agreed to clear terms and conditions of her secondment, which included the provision that she would have to successfully apply for a vacancy to return to UN Women. Therefore, UN Women lawfully separated the Applicant when she failed to succeed in securing a post upon her return from secondment.

17. The Applicant argues that she had the right to return to UN Women at the end of secondment according to the Inter-Organization Agreement and as interpreted by *Tran Nguyen* UNDT/2015/002. The Applicant argues that UN Women failed to reabsorb her at the end of her secondment, left her to her own devices to find another post, and only placed her on SLWOP to allow her to be considered as an internal candidate in selection processes, which is insufficient under the applicable law.

18. In light of the parties' submissions, the Tribunal will review the applicable law.

19. Staff rule 4.9(a) provides that "[i]nter-organization movements are defined in and shall be governed by an inter-organization agreement among the organizations applying the United Nations common system of salaries and allowances".

20. The Inter-Organization Agreement, at para. 1(b), provides that it “does not of itself give the staff member rights which are enforceable against an organization. It merely sets out what the organizations will normally do. The agreement can only be enforced to the extent that either the organizations have included appropriate provisions in their administrative rules or the parties have accepted to apply it in the individual case”.

21. In this case, staff rule 4.9(a) provides that inter-organization movements shall be governed by an inter-organization agreement. Further, as memorandum addressed to UNDP dated 3 November 2015 and one addressed to the Applicant dated 5 November 2015 show, UN Women agreed to release the Applicant to UNDP on secondment in accordance with the Inter-Organization Agreement. Therefore, the terms and conditions of the Inter-Organization Agreement apply in this case.

22. Paragraph 2(d) of the Inter-Organization Agreement defines “secondment” as follows:

“Secondment” is the movement of a staff member from one organization to another for a fixed period, normally not exceeding two years, during which the staff member will normally be paid by and, except as otherwise provided hereafter, be subject to the staff regulations and rules of the receiving organization, but will retain his or her rights of employment in the releasing organization. The period of secondment may be extended for a further fixed period by agreement among all the parties concerned.

23. Paragraph 9(a) provides that a seconded staff member’s contractual relationship with the releasing organization will be suspended until the expiry of the agreed period of secondment.

24. In *Tran Nguyen* UNDT/2015/002, the Dispute Tribunal stated that “the plain meaning of the term ‘rights of employment’ generally indicates that the seconded staff member will be reabsorbed” (para. 42). The Dispute Tribunal further stated that a contractual relationship exists between the releasing organization and a seconded staff member, though suspended for the duration of the secondment, and “since the essence

of any employer-employee relationship is precisely that the staff member has the right and the obligation to work at the service of the employing organization, it appears only natural that a staff member resume service with his/her releasing organization at the end of the temporary suspension of said contractual relationship, namely at the expiration of the secondment period” (para. 45).

25. The Dispute Tribunal continued that “making the return of a seconded staff member dependent on his/her success in competing for a vacancy comes down to treating him virtually as a nonstaff member, since he has to undergo the same selection procedure and has no more guaranteed rights than any external postulant; this is so even if the seconded staff member might enjoy a limited preference or advantage. As such, this course of action effectively renders the secondment nugatory” (para. 48).

26. The Tribunal agrees with the Dispute Tribunal’s interpretation of “rights of employment” in *Tran Nguyen*. The Applicant’s contractual relationship with UN Women was only suspended during her secondment with UNDP, and at the expiration of the secondment period, the Applicant therefore became an employee of UN Women again, who should have fully paid her salary and allowances in accordance with the Applicant’s letter of appointment. Instead, she was forced to exhaust her annual leave balance and then placed on SLWOP during which she had to compete for posts. This course of action does not satisfy the Applicant’s rights of employment under the Inter-Organization Agreement.

27. However, the Respondent argues that the contested decision is lawful on the basis that the Applicant agreed to clear terms and conditions of her secondment, which included the provision that she would have to successfully apply for a vacancy to return to UN Women.

28. Under the “terms and conditions governing Inter-Organization Secondment From UN Women to UNDP”, which was attached to the letter outlining the terms of the Applicant’s secondment to UNDP that was signed by her on 5 November 2015, it is provided as follows:

The terms that apply for your return to UNWOMEN at the end of your Secondment or any future extension(s) are as follows:

Your return to UNWOMEN is subject to availability of a suitable post and your successful competition for a position. Suitable posts are considered posts at your current level, or one level above and below. In line with the [Inter-Organization Agreement], during the period of your Secondment, you will retain a general lien on UNWOMEN, but not to a specific position.

Please note that staff returning from inter-agency Secondment are required to begin their search at least three (ideally six) months before the end of assignment, irrespective of the time they have been away from UNWOMEN. Vacancy postings are regularly updated in the UNWOMEN website under Jobs/Employment. You should keep the Human Resources Centre of UN Women fully informed of your search efforts, and provide an updated CV and/or P11.

If you do not successfully compete for a placement in UNWOMEN or UN System despite 3 months search, you would have to be separated under the conditions of the separation policies applicable to your type of appointment then in effect.

Should the receiving organization wish to keep you beyond the end of the interorganization exchange, we would assist you to make a full transfer to the receiving organization.

29. It is undisputed that the Applicant signed the letter containing the above terms and conditions of her secondment. The question is whether the above terms and conditions are valid.

30. The Tribunal first notes that the above terms and conditions contain ambiguity. On the one hand, it is stated that the Applicant would have to be separated if she fails to successfully compete for a post upon her return from secondment. On the other hand, it says that she would retain a “general lien” on UN Women, but not to a specific post. The latter provision implies that she is entitled to employment with UN Women,

although she may not be entitled to be placed on a post she encumbered. This appears to contradict the former provision which requires her successful application for a post for her continued employment with UN Women.

31. More importantly, the question remains whether UN Women can impose terms and conditions of employment through an individual letter presented to a staff member.

32. Staff rule 4.1 provides that “[t]he letter of appointment issued to every staff member contains expressly or by reference all the terms and conditions of employment. All contractual entitlements of staff members are strictly limited to those contained expressly or by reference in their letters of appointment”.

33. Referring to staff rule 4.1, the Appeals Tribunal held in *Slade* 2014-UNAT-463, para. 26, that “[t]he terms and conditions of the employment contract of a staff member are set forth in the letter of appointment and its express incorporation by reference of the Organization’s Regulations and Rules and all pertinent administrative issuances”. In this regard, “the employment contract of a staff member subject to the internal laws of the United Nations is not the same as a contract between private parties”.

34. In the letter of appointment signed by the Applicant in December 2011, the Applicant accepted the appointment “subject to the conditions therein specified and to those laid down in the Staff Regulations and Staff Rules and UN Women policies”. The Tribunal notes that no terms and conditions of secondment specific to UN Women were expressly set forth in the letter of appointment and that there is no UN Women policy governing inter-organization movement including secondment.

35. Therefore, the terms imposed by the individual memorandum signed on 5 November 2015 have no legal basis in that they breach the definition of secondment as set in para. 2(d) of the Inter-Organization Agreement, which states that a staff member “will retain his or her rights of employment in the releasing organization” and having



not been included expressly in the letter of appointment nor by reference to any promulgated rules or policies.

36. Therefore, the Tribunal finds that the decision not to renew the Applicant's fixed-term appointment in accordance with the terms and conditions of secondment imposed in the individual memorandum signed on 5 November 2015, which the Tribunal found to be unlawful, is unlawful.

### *Remedies*

37. Having found that the contested decision is unlawful, the Tribunal will consider the remedies the Applicant requested in this case. The Applicant requests that the contested decision be rescinded and she be awarded an appointment at the G-6 level in New York.

38. Article 10.5 of the Dispute Tribunal's Statute provides that the Tribunal may only order one or both of the following in its judgment:

(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.

39. Having concluded that the contested decision is unlawful, the Tribunal orders the rescission of the contested decision and the reinstatement in accordance with art. 10.5(a) of its Statute. Since the contested decision concerns the "appointment, promotion or termination", the Tribunal is obligated, pursuant to art. 10.5(a) of its

Statute, to set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested decision.

40. As the Appeals Tribunal has stated, *in-lieu* compensation, an alternative to rescission, “should be as equivalent as possible to what the person concerned would have received, had the illegality not occurred”. The Appeals Tribunal further held that “the amount of *in-lieu* compensation will essentially depend on the circumstances of the case” and “due deference shall be given to the trial judge in exercising his or her discretion in a reasonable way following a principled approach” (see *Ashour* 2019-UNAT-899, paras. 20-21).

41. Considering that the Applicant joined the Organization on an one-year fixed-term appointment in December 2011 and her appointment had been renewed several times, the Tribunal considers that the Applicant’s fixed-term appointment would have been renewed and she would have received the salary and allowances that she was entitled to upon her return from secondment had the illegality not occurred. Therefore, the Tribunal finds adequate to set the amount of *in lieu* compensation at one year’s net-base salary at the time of her separation.

## **Conclusion**

42. In light of the foregoing, the Tribunal DECIDES:

- a. The decision not to renew the Applicant’s fixed-term appointment is rescinded and the reinstatement is ordered;
- b. Should the Respondent elect to pay *in lieu* compensation, the Applicant shall be paid, as an alternative, a sum equivalent to one year of the Applicant’s net-base salary at the time of her separation;
- c. If payment of the above amount is not made within 60 days of the date at which this judgment becomes executable, five per cent shall be added to the United States Prime Rate from the date of expiry of the 60-day period to the

date of payment. 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 Joelle Adda

Dated this 10<sup>th</sup> day of June 2021

Entered in the Register on this 10<sup>th</sup> day of June 2021

*(Signed)*

Nerea Suero Fontecha, Registrar, New York