



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/032  
Judgment No.: UNDT/2021/107  
Date: 20 September 2021  
Original: English

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**Before:** Judge Joelle Adda  
**Registry:** New York  
**Registrar:** Nerea Suero Fontecha

SONGA KILAURI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
Julia Kyung Ming Lee, OSLA

**Counsel for Respondent:**  
Federica Midiri, UNDP

## **Introduction**

1. On 28 July 2020, the Applicant, a former staff member of the United Nations Development Programme (“UNDP”), appealed the termination of his fixed-term appointment pursuant to staff regulation 9.3(v) regarding facts anterior to him being appointed.

2. On 28 August 2020, the Respondent replied that the application is not receivable in part and, in any event, without merit.

3. The case was originally filed in the Nairobi Registry and transferred to the New York Registry on 19 July 2021.

4. For the reasons provided below, the application is granted in part, the contested decision is rescinded, the amount for compensation *in lieu* of the rescission is established and the request for compensation for harm is denied.

## **Relevant facts**

5. On 14 September 2018, UNDP’s Office of Audit and Investigations (“OAI”) informed the Applicant, who, at the time, held a service contract with the Office of the High Commissioner for Human Rights, administered by UNDP, that he was placed under investigation for fraud.

6. On 24 December 2018, the Applicant applied for a fixed-term post with UNDP.

7. On 10 April 2019, the Applicant was notified that he had been selected for the fixed-term post with a starting date of 1 May 2019.

8. On 11 April 2019, the Applicant informed UNDP of his resignation from his service contract, effective 30 April 2019.

9. On 29 April 2019, UNDP notified the Applicant that his service contract was terminated for misconduct with immediate effect.

10. By letter dated 16 January 2020, UNDP notified the Applicant that, his fixed-term appointment was terminated pursuant to staff regulation 9.3(v). The notification stated that the termination was based on the fact that his service contract was terminated following an investigation into fraud allegations against him. UNDP further stated that, this fact, had it been known to the Organization in April 2019, would have barred his appointment to a fixed-term post.

### **Considerations**

11. The Applicant claims that the contested administrative decision is unlawful because (a) his right to a due process was violated because he was never afforded the opportunity to respond to OAI's findings; (b) UNDP knew of OAI's findings when it offered him the fixed term appointment; and (c) the Applicant had a legitimate expectation that no further action would be taken against him after his fixed-term appointment started in May 2019.

12. The Respondent replies that the actions taken while the Applicant was on a service contract are not reviewable and, therefore, not receivable *ratione materiae*. He concludes that terminating the Applicant's fixed-term appointment for facts anterior to his appointment, given that his service contract had been terminated for fraud, was reasonable.

13. The Respondent argues that the Applicant was not entitled to due process during the OAI investigation because he was not, at that time, a staff member.

14. Finally, the Respondent avers that, contrary to the Applicant's assertions, he was never led to believe that no action would be taken against him after he was selected for the fixed-term appointment.

15. Staff regulation 9.3(v) and staff rule 9.6(c)(v) provide that the Secretary-General may terminate a staff member's fixed-term appointment if facts anterior to the appointment and relevant to the staff member's suitability come to light, and had they been known at the time of his or her appointment, would, under the standards established in the Charter of the United Nations, have precluded the appointment.

16. The Respondent argues that the facts pertaining to the investigation into allegations of fraud by the Applicant and the subsequent termination of his service contract are not reviewable by the Tribunal because they occurred when the Applicant was not a staff member.

17. The Applicant contends in response that what is being contested in this case is UNDP's unlawfully reliance on facts that were not properly established to support its decision to terminate his appointment.

18. The Tribunal notes that it is undisputed that the Applicant was not afforded due process in the OAI's investigation into allegations that he committed fraud while he was on a service contract and that, as a non-staff member, he was not entitled to such due process.

19. The Tribunal further notes that UNDP terminated the Applicant's fixed-term appointment because his engagement in fraudulent conduct had led to the termination of his service contract prior to his fixed-term appointment. UNDP concluded that, had these facts been known in April 2019, they would have impeded his selection to a fixed-term appointment with the Organization.

20. Therefore, by its own admission, UNDP terminated the Applicant's fixed-term appointment based on facts which were not established pursuant to due process.

21. The Tribunal agrees with the Respondent that while on a service contract, the Applicant was not entitled to due process in the investigation into allegations of fraud. However, had he been a staff member, the Applicant would have been entitled to due process, transparency and fairness while on a fixed-term appointment.

22. The Appeals Tribunal's long-standing jurisprudence provides that while the Secretary-General enjoys a wide discretion in administrative matters, such discretion has limits. In the seminal judgment *Sanwidi* 2010-UNAT-084 (para. 40), the Appeals Tribunal stated that in reviewing the Administration's exercise of its discretion, the role of the Dispute Tribunal was to "determine[...] if the decision is legal, rational, procedurally correct, and proportionate".

23. More specifically, in *Michaud* 2017-UNAT-761 (para. 56), the Appeals Tribunal determined that before taking action against a staff member, the Administration was required to respect his or her right to due process, fairness and transparency by adequately apprising the staff member of any allegations against them and affording them a reasonable opportunity to make representations before the action was taken.

24. The Tribunal finds that the *Michaud* test applies *mutatis mutandis* to this case where the Administration also took an action (the termination of a fixed-term appointment) against a staff member.

25. The Tribunal is further persuaded by *Kamugisha* UNDT/2017/021, in which the Dispute Tribunal delineated the scope of its review of in a case of termination of appointment for facts anterior to the appointment.

26. In *Kamugisha*, the Dispute Tribunal found that it was not required to carry out its own investigation of an applicant's guilt or innocence of the facts relied upon by the Administration to terminate the staff member's contract for facts anterior to his/her appointment. Yet, the Tribunal concluded that three cumulative conditions must be met for the Tribunal to satisfy itself that the Administration had acted as a reasonable decision-maker: (a) was the applicant afforded due process; (b) was there sufficient evidence to support a factual finding that the applicant had engaged in the alleged conduct and (c) were these facts directly relevant to an assessment of the applicant's suitability under the standards established in the Charter of the United Nations and was

it reasonable to conclude that, had these facts been known at the time of the appointment, they should have precluded the appointment.

27. With respect to the due process tier of the review, the Dispute Tribunal found in *Kamugisha* that the alleged facts anterior had resulted from an investigation that was deficient and, accordingly, could not be relied upon. In particular, the Tribunal pointed out that the applicant had not been given the opportunity to rebut the allegations or point to exculpatory evidence.

28. The current case raises identical concerns. The Applicant was found to have committed fraud based on an investigation report on which he was not allowed to comment. While he was interviewed by the investigators, there is no evidence nor does the Respondent purport that he was permitted to identify exculpatory evidence or rebut any of the evidence relied upon by the investigation.

29. Therefore, the facts resulting from this investigation were not established to a sufficient standard that would permit the Administration to later rely on them to act against the Applicant once he became a staff member.

30. As stated above, the Tribunal agrees with the Respondent that no due process requirements applied to the Applicant as a holder of a service and that the manner in which the investigation into the allegations of fraud against him is not within the purview of this case. However, once the Applicant was under a fixed-term appointment, the Administration ought to have granted him the opportunity to respond to any facts relied upon to act against him. For instance, the Administration could have granted the Applicant a right of response to the investigation report before deciding to terminate his contract. However, there is no evidence on record that this was done.

31. As the facts were not properly established, the Tribunal cannot, by way of consequence, be satisfied that the other two tiers of the *Kamugisha* test were met.

32. Accordingly, the Tribunal is not satisfied that Administration acted as a reasonable decision maker in deciding to terminate the Applicant's fixed-term appointment and finds the contested decision unlawful and decides to rescind it.

### **Remedies**

33. As remedies, the Applicant requests the rescission of the contested decision or, in the alternative, the payment of "two years' net base salary, together with the appropriate level of compensation for moral and material damages for the harm as a result of the [contested decision]".

34. In *Laasri* 2021-UNAT-1122 (para. 63), the Appeals Tribunal recalled its settled jurisprudence that the very purpose of *in lieu* compensation is to place the staff member in the same position in which he or she would have been, had the Organization complied with its contractual obligations. The award for compensation *in lieu* shall be an appropriate substitution for rescission or specific performance in a given and concrete situation.

35. The record shows that the Applicant signed a one-year fixed-term appointment effective 1 May 2019. The termination of his appointment was notified on 17 January 2020, had immediate effect, and the Applicant was awarded the payment of one-month salary *in lieu* of notice plus a termination indemnity.

36. In light of these facts, and in application of the guidance provided in the jurisprudence, the Tribunal finds that the Applicant's request for two-years' net base salary is unwarranted in this case as it would largely exceed the emoluments to which the Applicant would have been entitled absent the unlawful termination.

37. The Tribunal finds that under art. 10.5(a) of its Statute, the Respondent may elect to pay the Applicant compensation *in lieu* of the rescission of the unlawful decision in the amount of the net-based salary for the remainder of his fixed-term

appointment, minus the one-month salary and the termination indemnity already paid to the Applicant.

38. The Tribunal notes that the Applicant, who is represented by professional counsel, failed to identify any harm suffered as a consequence of the unlawful decision or submit evidence in support of his claim for compensation for such harm.

39. Article 10.5(b) of the Dispute Tribunal's Statute requires the submission of evidence in support of claims for compensation for harm. In the absence of such evidence, the Tribunal is therefore unable to award compensation in this respect.

### **Conclusion**

40. The application is granted in part;

41. The contested decision is rescinded;

42. The Respondent may elect to pay the Applicant compensation in the amount of the net-based salary for the remainder of his fixed-term appointment, minus the one-month salary and the termination indemnity already paid to the Applicant in lieu of the rescission;

43. 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 US Prime Rate from the date of expiry of the 60-day period to the date of payment;



44. The request for compensation for harm is rejected.

*(Signed)*

Judge Joelle Adda

Dated this 20<sup>th</sup> day of September 2021

Entered in the Register on this 20<sup>th</sup> day of September 2021

*(Signed)*

Nerea Suero Fontecha, Registrar, New York