
UNITED NATIONS DISPUTE TRIBUNAL

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

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

SONGA KILAUURI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

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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,

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

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-329(a)4(n-.216431 12 Tf1 0 OW*nBT/F5 12 Tf1 as)27(-)-49(s)9

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

