



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2023/008
Order No.: 128 (NY/2023)
Date: 13 November 2023
Original: English

Before: Judge Rachel Sophie Sikwese

Registry: New York

Registrar: Isaac Endeley

FUSCO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER
ON CASE MANAGEMENT**

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Alister Cumming, UNICEF

Introduction

1. Via Order No. 122 (NY/2023) dated 2 November 2023, the Tribunal instructed the Respondent to disclose documentation covering the period from 1 July 2019 to 30 September 2022, specifically:

(a) Communications between the UNICEF Human Resources Office and Hiring Managers regarding priority consideration for the Applicant who was facing termination; and

(b) Communications regarding the Applicant's participation in the Senior Staff Rotation and Reassignment Exercise ("SSRRE").

2. On 10 November 2023, the Respondent complied with the instruction and provided information relating to 11 positions for which the Applicant had applied for / expressed an interest in during the relevant period.

Motion to Seek Clarification on Remedies, Adduce Further Evidence, and Request Disclosure

3. By the same submission, the Respondent filed a motion to seek clarification on remedies, adduce further evidence and request disclosure. Specifically, the Respondent submits that on 6 November 2023, he "became aware that the Applicant has been employed as Executive Director, Société de La Chapelle Italienne, since April 2023". As the Applicant requests rescission of the contested decision and reinstatement to UNICEF, the Respondent seeks leave to adduce the Applicant's LinkedIn profile page showing his current employment status.

4. Further, because the Applicant now appears to be in alternative employment, the Respondent requests the Tribunal to order the Applicant to clarify the form of relief he seeks, since rescission and reinstatement may no longer be an option. Moreover, since the Applicant requests to be awarded compensation as an alternative remedy to the rescission of the contested decision, the Respondent requests the Tribunal to "order the Applicant to disclose his income from [...] April 2023 to the present date, so that any amount ordered of alternative compensation can be properly assessed".

Considerations

5. Pursuant to art. 19 of the Dispute Tribunal’s Rules of Procedure, on case management, the Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

6. The Tribunal recalls that, under art. 10.5(a) of the Dispute Tribunal’s Statute, it may “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”.

7. As the Appeals Tribunal has stated, “[i]t is 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...” (*Laasri* 2021-UNAT-1122, para. 63; *Kilauri* 2022-UNAT-1304, para. 25).

8. Further, not every alleged violation of a staff member’s rights will necessarily lead to an award of compensation. Where the staff member is unable to show that the contested decision or procedural defect had any impact on him, his circumstances or his entitlements, and that he suffered no adverse consequences or harm from the procedural defect, compensation should not be awarded. (*Coleman* 2022-UNAT-1228, para. 37).

9. Accordingly, the Respondent’s motion, that the Applicant should disclose any income he has earned since the date of his separation from the Organization, or any other steps he has taken to mitigate the impact of the contested decision, is meritorious for a fair and expeditious disposal of the case.

10. In light of the foregoing,

IT IS ORDERED THAT:

11. The Respondent's motion to seek clarification on remedies, adduce further evidence and request disclosure is granted.

12. **By 4:00 p.m. on Monday, 20 November 2023**, the Applicant shall file:

- (a) a response to the Respondent's submissions of 10 November 2023 regarding the Applicant's current employment status;
- (b) all relevant information relating to any income he has earned since the date of his separation from the Organization; and
- (c) a clarification of the form of relief he is seeking.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 13th day of November 2023

Entered in the Register on this 13th day of November 2023

(Signed)

Isaac Endeley, Registrar, New York