



UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D 'APPEL DES NATIONS UNIES

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Said

(Respondent/Appellant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

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Before:	Judge Rosalyn Chapman, Presiding Judge Mary Faherty Judge Deborah Thomas-Felix
Case Nos.:	2014-569 & 2014-572
Date:	26 February 2015
Registrar:	Weicheng Lin

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JUDGE ROSALYN CHAPMAN , PRESIDING .

1. On 29 November 2013, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi issued Judgment No. UNDT/2013/150, in the case of *Said v. Secretary-General of the United Nations*. On 27 January 2014, the Secretary-General appealed the Judgment to the United Nations Appeals Tribunal (Appeals Tribunal), and on 31 March 2014, Mr. Ahmed Said filed his answer. On 28 January 2014, Mr. Said filed his own appeal of the Judgment, and on 31 March 2014, the Secretary-General filed his answer to Mr. Said's appeal.

#### Facts and Procedure

2. Mr. Said applied for a post with the United Nations Children's Fund (UNICEF or Agency) at the National Officer C (NOC) level as a Water and Environmental Sanitation (WASH) specialist in Nouakchott, Mauritania.

3. The selection process was competitive. However, the Agency did not find a candidate with the credentials and experience it was looking for, and it offered Mr. Said, being the least unsuccessful candidate, the same post at a lower National Officer B (NOB) level.0.19andida4699 -1.73D -.0169-.016

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would not be extended in light of his poor performance after months of meetings with his supervisor, second line supervisor and the operations officer.

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regular meetings over several months between Mr. Said and his supervisors to discuss his performance. If he disagreed with his performance evaluation, he could have submitted an explanation or a formal rebuttal; however, he did not. The Manual does not require the Agency to undertake remedial measures to improve a staff member's performance before deciding not to renew an appointment; that is only required in cases concerning termination of an appointment.

19. The UNDT made an error of law by concluding that Mr. Said's unsatisfactory performance was not a lawful ground for deciding not to renew his appointment. The Administration has broad discretion regarding internal management, including the non-renewal of appointments, and poor performance is a lawful basis for the non-renewal of a fixed-term appointment. UNICEF's rating system had five competencies that could be rated from 1 (low) to 5 (high). Mr. Said received a rating of "3" on three of the competencies and "2" on two of the competencies. Mr. Said had been employed by the Agency for less than one year and his performance was not satisfactory. To apply a standard of "hopeless employee" would give the Administration little discretion and would conflict with the goals of the Charter of the United Nations and United Nations Staff Regulations and Rules, which require the highest standards of efficiency, competence and integrity.

20. The UNDT erred on a question of law by applying the requirements for the termination of an appointment for unsatisfactory performance to the non-renewal of Mr. Said's contract. Under Section 10.2 of Administrative Instruction CF/AI/2010-001 entitled "Separation from Service",<sup>4</sup> the requirement that the Agency provide the staff member an opportunity to improve applied only to the termination of an appointment for unsatisfactory performance; it did not apply to the non-renewal of an appointment.

21. The UNDT made an error of law by awarding compensation to Mr. Said when there was no violation of his procedural or due process rights. Thus, the award of compensation should be vacated.

22. The Secretary-General seeks to vacate the entire Judgment and to affirm that the non-renewal of Mr. Said's appointment was valid.

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<sup>4</sup> This administrative instruction was replaced with Administrative Instruction CF/AI/2010-001 Amd. 1 on 26 June 2014.

Mr. Said's Answer

23. The UNDT correctly concluded that the Agency's reliance on the PER to show unsatisfactory performance was not valid. Administrative Instruction CF /AI/2010-001 set forth the same definition of unsatisfactory performance for the non-renewal of an appointment and the termination of an appointment, although it offered an additional procedural protection of review by a Central Review Body in the case of termination. Thus, the Agency was required to afford him an opportunity to improve.

24. Mr. Said's performance was satisfactory within the meaning of Section 10.2 of Administrative Instruction CF/AI /2010-001, which defined unsatisfactory performance to mean "half or more PER ratings of "1" [...] in a given reporting cycle; or half or more PER ratings below "3" [...] over two consecutive reporting cycles". Since Mr. Said's performance was above this threshold, it was satisfactory. Further, in the PER, the Agency advised Mr. Said that he could address performance shortcomings in his second year with UNICEF. Thus, he did not seek to rebut his evaluation.

25. The UNDT correctly found that performance appraisal rules were not followed by the Agency. Since Mr. Said's PER was not rated unsatisfactory, there were no grounds not to renew his appointment.

*Mr. Said's Appeal of the Amount of Damages Awarded*

Mr. Said's Appeal

26. The UNDT made an error of law in not awarding economic or pecuniary compensation to Mr. Said, to put him in the situation he would have been in if UNICEF had not acted unlawfully, i.e., an award of 12 months' net base salary. The UNDT's award of three months' net base salary has no legal basis.

27. The UNDT made an error of law in not awarding moral or non-pecuniary damages to Mr. Said in an amount that reflects the fundamental breach of his procedural or substantive contractual rights in not renewing his appointment. An award of three months' net base salary is grossly inadequate for the serious breach of his rights; rather, six months' net base salary is within the range of past awards by the UNDT and the Appeals Tribunal.

28. The UNDT erred in law when it failed to provide reasons supporting its award of three months' net base salary, as required by Article 11(1) of the UNDT Statute. Without understanding the UNDT's rationale for its award, meaningful judicial review of the award is not possible. One means of curing this defect is for the Appeals Tribunal to determine *de novo* the appropriate remedy for Mr. Said. Another means would be to remand the matter to the UNDT for proper consideration.

29. Mr. Said seeks a variation of the relief granted from three months' net base salary to 18 months' net base salary, plus interest in accordance with the *Warren* case. In the alternative, he requests that the Appeals Tribunal remand the case to a different judge of the UNDT for redetermination of the issue of compensation alone.

#### The Secretary-General's Answer

30. The UNDT's failure to provide adequate reasons for its award of compensation, as required by Article 11(1) of the UNDT Statute, mandates that the award of compensation be vacated. The Appeals Tribunal is not the proper forum to conduct a *de novo* hearing. Under Article 2(4)(b) and 2(5) of the Appeals Tribunal Statute, a remand to the UNDT is proper only in limited circumstances, which do not extend to an award of compensation.

31. The UNDT erred in awarding compensation to Mr. Said. First, Mr. Said provided no evidence of pecuniary damages. Not only is there no expectancy that a fixed-term appointment will be renewed, but Mr. Said has not shown that any future appointment would have been for 12 months; to the contrary, his past appointments had been for two months, three months and six months. Moreover, Mr. Said did not have the requisite skills and competence for the post he encumbered; thus, there cannot be any basis for him to have a legitimate expectation that his appointment would be renewed for one year. Second, Mr. Said has not established that an award of moral damages is warranted. The Agency fully complied with the requirements of the Manual for assessing his performance; no fundamental right was breached. Additionally, Mr. Said did not present evidence of actual harm, and pleading harm is insufficient. Finally, the UNDT cases relied upon by Mr. Said to support his claim for moral damages are distinguishable.

Considerations

*The Secretary-General's Appeal of the Judgment*

32. It is not the function of the Dispute Tribunal to substitute its own decision for that of the Administration.<sup>5</sup> As we stated in the seminal case of *Sanwid*:<sup>6</sup>

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses



staff member or was motivated by bias, prejudice or improper motive against the staff member.<sup>9</sup> The staff member has the burden of proving such factors played a role in the administrative decision.<sup>10</sup>

35. In 2010, Administrative Instruction CF/AI /2010-001 governed the separation from service of UNICEF staff members, as stated in Section 1.1. Section 2.1 defined separation from service to encompass six circumstances: resignation, abandonment of post, expiration of a temporary or fixed-term appointment, retirement, termination of appointment and death. Section 5.1 addressed separation from service due to the “expiration of a temporary or fixed-term appointment”:

A temporary or fixed-term appointment expires automatically, without prior notice [...]. As specified in th[e] letter [of appointment],[<sup>11</sup>] a temporary or fixed-term appointment does not carry any expectancy of renewal or conversion, irrespective of the length of service. *Separation upon expiration of appointment is not regarded as a termination.* (footnote inserted; emphasis added)

36. Section 10 of Administrative Instruction CF/AI/2010-001 addressed *termination* of an appointment based on unsatisfactory performance. Section 10.1 provided that “[m]anagers must use the PER/e-PAS to record unsatisfactory performance, and to bring it to the attention of the staff member in a timely manner, in order to offer the staff member an opportunity to improve his or her performance”. Section 10.2(a) further provided that when a paper-based PER was used, the performance of the staff member would be considered unsatisfactory if he or she received: “(i) half or more PER ratings of “1” (“met few expectations”) in a given reporting cycle; or (ii) half or more PER ratings below “3” (“fully met expectations”) over two consecutive reporting cycles[.]” Additionally, Section 19 of CF/AI/2010-001 provided that a staff member who was terminated for unsatisfactory performance was entitled to a termination indemnity, as well as other entitlements outlined at Section 15, if eligible or applicable.

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<sup>9</sup> *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153; *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201.

<sup>10</sup> *Asaad v. Commissioner-General of the United Nations Relief Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-021, para. 10.

<sup>11</sup> Mr. Said’s letter of appointment provided that his fixed-term appointment “does not carry any expectancy of renewal or conversion to any other type of appointment with UNICEF”. Separately, the letter also stated that his appointment could be “terminated [...] prior to its expiration date,” in which case an indemnity would be paid.

37. In 2009-2010, the PER evaluation scheme for UNICEF staff members was set forth in Chapter 7 of the Manual.<sup>12</sup>







