Judgment No. 2017-UNAT-721

[redacted]

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... In August 2011, the Applicant was rated as “partially meets expectations” [by Mr. Inganji who was given the task to complete Mr. Ncube’s e-PAS as FRO and Second Reporting Officer (SRO)] …. [Mr. Ncube] filed a rebuttal against that appraisal

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7. It is the Secretary-General's submission that the UNDT also erred in awarding moral damages. In his view, the award is not warranted because Mr. Ncube's due process rights were fully respected during the performance evaluation process. In addition, he states that the UNDT misapplied Article 10(5)(*b*) of its Statute by not taking into account the amendment introduced by General Assembly resolution 69/203 which requires the request for compensation to be "supported by evidence". The amendment restricts the UNDT's powers considering that the General Assembly has repeatedly stated that the UNDT and the Appeals Tribunal can only exercise the authority provided for in their respective Statutes. The UNDT holding relies upon the case of *Asariotis*[5] which was rendered before the amendment came into effect. In more recent cases such as *Maiga,*[6] the Appeals Tribunal reaffirmed the principle that an award of moral damages must be supported by evidence. Mr. Ncube, however, has not adduced any specific evidence to support his "bare assertion" that he had suffered moral harm.

8. Therefore, the Secretary-General respectfully requests the Appeals Tribunal to vacate the UNDT Judgment in its entirety.

Mr. Ncube's Answer

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10. According to Mr. Ncube's submission, the Administration undertook "superficial attempts at procedural compliance", namely the 2010-2011 performance evaluation which was rejected by a rebuttal panel for procedural errors, the 2011-2012 performance evaluation displaying a lack of communication on the part of Mr. Ncube's then FRO Ms. Bowers and the creation of an overall assessment conducted by Ms. Bowers including for a period whilst she admittedly had no knowledge of his activities. Such attempts demonstrate "the Administration's efforts to concoct a performance-related justification for non-renewal". Granting the appeal would thus "allow for separation on the basis of an alleged poor performance without providing adequate support or proper recording".

11. Regarding the award of in-lieu compensation, Mr. Ncube refers to the possible grounds for termination as contained in Staff Rule 9.6(c) and submits that in the context of this decision, his separation should be "viewed within the prism of termination" since his appointment "did not simply end – his separation was inextricably linked to the Administration's efforts to concoct a performance justification for … non-renewal" so that in fact, it constituted an improper termination.

12. With respect to the award of moral damages, Mr. Ncube argues that the UNDT correctly concluded that the abuse of his due process rights as a result of his being subjected to a flawed process "intended by the Administration to separate him regardless of the rules and regulations" warranted an award of moral damages. He refers to Appeals Tribunal's jurisprudence acknowledging the UNDT's authority to order compensation for the violation of a staff member's legal rights[7] and to determine its own method for assessing damages on a case-by-case basis.[8] Mr. Ncube invites the Appeals Tribunal to hold, based on the deference typically afforded to the UNDT, that the UNDT did not exercise its discretion in a "manifestly unreasonable" manner when reviewing the evidence and determining that the harm supported an award of damages.

13. Mr. Ncube respectfully requests the Appeals Tribunal to uphold the UNDT Judgment.

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[7] *Appleton v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-347, para. 20.

[8] *Faraj v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-587, para. 27.

18. To justify a decision based on poor performance, it is not sufficient to give informal feedback to the staff member. The Administration should usually follow ST/AI/2010/5 and produce an e-PAS.[13]

"does not meet expectations" was not arbitrary but, rather, objective, fair and well-grounded and Mr. Ncube's due process rights were fully respected within the evaluation process.

21. It is true that Mr. Ncube's 2012 e-PAS suffered from a procedural irregularity which mainly resulted from the fact that the Administration chose to evaluate the whole period of Mr. Ncube's appointment at OCHA Afghanistan (July 2010 until January 2012) although the flaws of the first 2011 e-PAS regarding the period between July 2010 and March 2011 could not be rectified, especially as it was not possible to reach the former Head of Office, Mr. Pitt. However, the 2012 e-PAS contains a performance evaluation for the period 10 March 2011 to