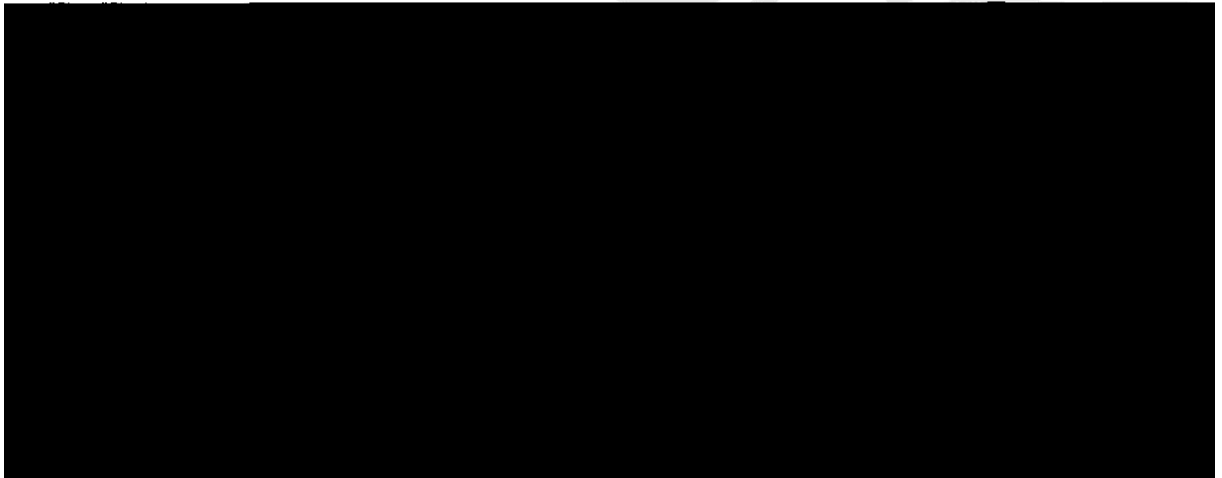


Judgment No. 2014-UNAT-421



JUDGE SOPHIA ADINYIRA , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/051, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in New York on 14 March 2013, in the case of *Das v. Secretary-General of the United Nations*. The Secretary-General appealed on 9 May 2013, and Ms. Malabika Das answered on 8 July 2013.

Facts and Procedure

2. The Dispute Tribunal made the following findings of fact, which are not contested by the parties:¹

... The Applicant was employed by [the United Nations Children’s Fund (UNICEF)] since 2004. In December 2007, she was offered a one-year fixed-term appointment as a Secretary, at the GS-4 level in the Kolkata Field Office of UNICEF. She accepted this offer on or about 31 December 2007.

... UNICEF ended the Applicant’s employment effective 31 July 2010. Although the Respondent maintains that this was a case of non-renewal based on poor performance, the decision to end the Applicant’s contract was presented and processed as a termination. The India Country Office sent it to the Central Review Body (“CRB”) for review, as required under UNICEF procedures for termination. On 7 June 2010, the CRB unanimously stated:

The CRB thoroughly reviewed the recommendation and all the relevant documents. The CRB acknowledged that the staff member was given ample opportunities including change of Supervisors and Sections so that she can improve her attitude and performance. It was evident from the last two [performance evaluations reports (PERs)] as well as other performance related documentation that despite having all best efforts and support by the Field Office, the staff member did not make any attempt to improve her performance. Given all the considerations and based on the documents which corroborate her consistent non-performance, the CRB unanimously agreed to terminate the [fixed-term] contract of [the Applicant] with immediate effect.

... On 14 June 2010, the Applicant filed with the Executive Director and the Office of Internal Audit, UNICEF, a complaint of harassment and abuse of authority against her supervisors. She requested, *inter alia*, that the entire case “be adjudged in the proper light”, that the PERs for 2008–2009 and January–June 2010 be revoked or quashed, and that she be compensated.

... On 28 June 2010, the Applicant was informed by letter signed by the Officer-in-Charge, India Country Office, that the Country Representative had approved the recommendation of the CRB to terminate her appointment based on unsatisfactory performance for the period of "2007 to 2010". Accordingly, the Applicant was informed that her appointment would be terminated effective 31 July 2010. The letter stated:

We regret to inform you that the Representative has approved the recommendation of the Central Review Body that your appointment should be terminated. This decision has been taken after an extensive review of your performance which has been consistently unsatisfactory, as documented in your PERs from 2007 to 2010, as well as other supporting documents including attendance reports and performance improvement plan. In order to give you one month's notice period, as required, your current contract will be extended up to 31 July 2010 after which you will separate from the organization. In connection please find, attached, the administrative details relating to your entitlements, formalities and actions in respect of your separation from service.

... On 30 June 2010, the Applicant sent an email to the Office of Internal Audit, UNICEF, and addressed to the Executive Director, asking for cancellation or rescission of the decision to terminate her contract.

... On 16 August 2010, the Chief of the Policy and Administrative Law Section, Division of Human Resources, UNICEF, sent the Applicant a letter, requesting "clarifications as to [her] specific allegations and requests". The letter referred to the Applicant's emails of 14 June and 30 June 2010. The Applicant was asked to "clarify the scope and grounds of [her requests]". The letter further sought to "clarify" to the Applicant that hers was a case of non-renewal and not termination.

... By email of 5 October 2010, the Administrative Law Specialist, Policy and Administrative Law Section, Division of Human Resources, UNICEF, informed the Applicant that the Office of Internal Audit, UNICEF, had considered her allegations of harassment and abuse of authority "and, having found no grounds to proceed, the case was closed in June 2010", of which the Applicant was allegedly informed by email dated 7 July 2010. He further stated that since the basis of the Applicant's complaint "was precisely the alleged harassment and abuse of authority, which has been found unsubstantiated to [(u)226.7(22(d)-r(22(d4(4(o)5.9([(u)226ci22tehe d23)1767

administrative decision made was not to renew her fixed-term contract after its expiration. The letter stated that her contract was extended up to 31 July 2010 “to give [her] one month notice, even though there was no need to do that, since [her] fixed-term contract ... expire[d] automatically, without prior notice”. The letter further stated that “the decision not to renew [her] contract - however painful to [the Applicant] - can only be considered as a sound managerial decision, made with the best interest of the Organization in mind”.

not by email to conceal her supervisors' failure to issue them in line with the requirements of the performance improvement plan (i.e., with assessments "in the third week of each month so that reports can be finalized by the month end").

... On 3 and 4 May 2010, after receiving the performance improvement evaluations, the Applicant sent two emails to the Deputy Director of Operations and Chief, Human Resources, India Country Office. The Applicant stated that this was "the very first [performance improvement evaluations] for the current period ... and no discussion/evaluation happened prior to this throughout [her] current reporting period", although the performance improvement plan for January - June 2010 provided that such evaluations were supposed to be done each month. The Applicant stated that "none of the things mentioned in the [performance evaluation]" were correct and that it came "as a complete shock" to her. She stated that "she was absolutely unaware by whom and when" these performance improvement evaluations were prepared, particularly since one of her supervisors was away from the office. She stated that she was "upset and distressed (especially remembering the incidence during final PER 2009 which [she] shared ... earlier [i.e., by email of 21 December 2009]) to again go through the same gruelling session with [her second reporting officer]". The Applicant stated in her email of 3 May 2010, "I really do not want to go through the same kind of harassment once again. Please help". In her email of 4 May 2010, she stated. "I am lost and [am] unable to handle this kind of situation. Please I need your guidance".

... There is no record on file regarding any response to the Applicant's emails of 29 April and 3 - 4 May 2010. The Applicant however received an email on 27 May 2010 from the Chief of Human Resources, India Country Office, which is discussed further below.

Final performance evaluation for [January to June] 2010

... The Applicant's PER for January to June 2010 was finalized in late May 2010. In the final PER, the Applicant's supervisors rated her performance with respect to "technical knowledge"; "planning [and quality of work]"; "drive for results (quantity of work)" as "1 (met few expectations)". With respect to "team work" and "communication", she received "2 (met most expectations, however, there is room for improvement)". The Applicant's first reporting officer added critical comments regarding the Applicant's performance, including that she "still required additional support and orientation" and that "some of the core competencies such as technical knowledge, planning and setting standards and self-monitoring remained a concern". The first reporting officer commented that the Applicant "was given enough opportunity to perform and deliver the assigned tasks, however, over the years it has been observed/recorded that [the Applicant] could not perform to the desired expectations".

... In part 7 of the PER, the second reporting officer expressed her agreement with the first reporting officer's ratings and comments. She added that the Applicant's

“ratings have been consistent under five different supervisors since ... 2007”. The second reporting officer stated:

Contrary to [the Applicant’s] contention that no discussion took place during the reporting period, performance discussions including coaching and feedback by supervisors took place on 27 [January 2010] and 26 [February 2010]. On 29 [March 2010] Operations Officer discussed with [the Applicant] and, as agreed, daily monitoring has continued thereafter. April’s evaluation was ready for discussion on 23 [April 2010] but meeting was postponed due to [the Applicant’s] expressed reluctance to discuss without the presence of one supervisor who was away on emergency leave. Discussion took place on 3 [May 2010]. The final PER discussion was held on 20 [May 2010].

I observe that [the Applicant] has difficulty to accept feedback on her performance. Each performance discussion becomes a long drawn-out argument between her and whoever is the supervisor. I have personally witnessed such interactions.

... The Applicant marked in part 6 of the PER that she did not agree with the ratings and assessment of her performance. She stated that the performance evaluation process was not properly followed and that “no discussion/evaluation took place through my current reporting period despite clear guidance from the Deputy Director”. The Applicant further stated that her supervisors failed to provide her with monthly performance improvement evaluations, as was required by the performance improvement plan. She stated that the monthly performance improvement evaluations were provided to her only in early May 2010, in hard copy and not by email, to “conceal the actual dates” when they were issued. She added that, in her final PER for 2010, “[b]iased, concocted and non-measurable statements were made [by her supervisors] which [she] completely disagree[d] with”.

Applicant’s attempt to launch a formal rebuttal of the PER for 2010

... The Applicant’s PER contained part 8.2, which stated that staff members have a right to rebut the PER “only for the reasons listed in administrative instruction CF/AI/1994-002, paragraph 2.38”[UNICEF Administrative Instruction entitled “UNICEF’s Revised Performance Appraisal System]. This provision of CF/AI/1994-002 apparently sets out the grounds on which the PER can be rebutted (the Respondent did not provide a copy of the administrative instruction to the [Dispute] Tribunal).

... Prior to the signing of her PER for 2010, the Applicant sent an email on 26 May 2010 to the Deputy Director of Operations as well as the Chief, Human Resources, India Country Office, with the subject line “Request for relevant Administrative instruction for formal rebuttal”. The Applicant stated in her email, “I would like to go to formal rebuttal, but before I sign, I wanted to understand

CF/AI/1994-002, paragraph 2.38 (as mentioned in the PER)". She stated that she could not locate the administrative instruction on the Intranet (UNICEF's internal system) and requested that it be shared and explained to her.

... The Chief of the Human Resources, India Country Office, replied to the Applicant on 27 May 2010. Instead of providing her with a copy of the requested administrative instruction to enable the Applicant to exercise her right of rebuttal, the

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Ms. Das. On the contrary, it resulted in a material benefit to her over what her position would have been in a non-renewal context, in the form of an additional month of service.

6. The Secretary-General also submits that the Dispute Tribunal erred in holding that the non-renewal of Ms. Das' appointment was unlawful because her unsatisfactory performance had not been established. He notes that Ms. Das' PERs for 2008, 2009 and January to June 2010 had been duly completed and they documented her unsatisfactory performance. These PERs were not rebutted by Ms. Das, and they provided a sufficient basis for a conclusion of unsatisfactory performance for the 2010 performance period. The Secretary-General submits, in the alternative, that even if the 2010 PER could not be relied upon, the remaining records of unsatisfactory performance for the two consecutive years of 2008 and 2009 provide a sufficient basis to justify the non-renewal of her fixed-term appointment.

7. The Secretary-General further submits that the UNDT erred in fact and in law in concluding that the investigation into Ms. Das' complaint of harassment and abuse of authority was inadequate. Contrary to the UNDT's finding that the investigation had been concluded "in a matter of days if not hours", the Secretary-General notes that it was some three weeks after she had lodged a complaint that she was advised of the outcome of the investigation. The Secretary-General also notes that while the Administration decided to close the investigation, it offered Ms. Das an administrative avenue to pursue the substance of her complaint, namely, through the rebuttal process. In response to the UNDT's criticism that the Administration had failed to provide it with the investigation report, the Secretary-General clarifies that Ms. Das had not contested the adequacy of the investigation as an independent matter in her UNDT application and that the Administration would have provided the investigation report in question had the UNDT so requested or directed.

8. Regarding the remedies awarded, the Secretary-General submits that the Dispute Tribunal exceeded its competence and erred in law in ordering the rescission of Ms. Das' PER for 2010 and its removal from her personnel records. He also submits that the UNDT erred in its award of compensation for loss of employment opportunities and emotional distress, and in the totality of compensation awarded. The Secretary-General is of the view that the UNDT's award of economic damages paid insufficient regard to the Appeals Tribunal's guidance in the context of damages following non-renewal decisions. Even in cases where a non-renewal decision has been determined to be unlawful, the Appeals Tribunal has not calculated economic damages based on the duration of the staff member's last appointment.

Considerations

14. In the first instance, the issue for determination by the Appeals Tribunal is whether the Administration can correct an erroneous decision by changing the separation of Ms. Das from termination to non-renewal, after having completed the termination process.

15. Undoubtedly, in situations where the Administration finds that it has made an unlawful decision or an illegal commitment, it is entitled to remedy that situation;³ but it must be timely done.⁴

16. In *Cranfield* at paragraph 36, this Tribunal held that:

The interests of justice require that the Secretary-General should retain the discretion to correct erroneous decisions, as to deny such an entitlement would be contrary to both the interests of staff members and the Administration. How the Secretary-General's discretion should be exercised will necessarily depend on the circumstances of any given case. When responsibility lies with the Administration for the unlawful decision, it must take upon itself the responsibility therefor and act with due expedition once alerted to the unlawful act.

17. The Secretary-General concedes that the decision to separate Ms. Das was initially described as termination and her separation was processed as such. However, he submits that UNICEF corrected the error in August 2010.

18. In this particular case, the UNDT was of the view that:

Non-renewal and termination are two distinct procedures resulting in different implications and consequences for the affected staff member, including consequences relating to future employment. Once UNICEF put into effect, applied, and completed the termination procedures, including obtaining a CRB recommendation for termination, it was inappropriate and impermissible to attempt to reverse the course of action *ex post facto*, after the Applicant had left UNICEF

19. We find no reason to disturb this finding, as at the time UNICEF sought to make the correction Ms. Das was already separated from service and it was, therefore, too late to reverse the decision.

³ *Cranfield v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-367, para. 36

⁴ *Diara v. Secretary-General of the United Nations*, Judgment No UNDT/2011/062, para. 25.

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24. This same argument was urged on the UNDT and was rejected. We affirm the finding of the Dispute Tribunal that Ms. Das' separation from UNICEF was a termination on the grounds of alleged unsatisfactory performance.

25. Here, the Administration's decision to reverse was untimely and therefore ineffective.

Did the UNDT err in concluding that the termination of Ms. Das' appointment was unlawful because her unsatisfactory performance was not established?

26. Given that Ms. Das' performance was the reason for the decision to terminate her appointment, the Administration was required to provide a performance-related justification for its decision.⁵

27. Section 10 of CF/AI/2010-001 entitled

28. The administrative instruction on termination of appointments gives the Administration the discretion in cases where the paper-based PER is relied upon to either use the ratings in a given cycle or over two consecutive reporting cycles.

29. The decision to terminate Ms. Das' appointment was "taken after an extensive review of [her] performance which has been consistently unsatisfactory, as documented in [her] PERs from 2007 to 2010". So in Ms. Das' case the Administration used the ratings in three reporting cycles.

30. The UNDT, in examining the PER of 2010, held that Ms. Das was not provided with meaningful access to an effective rebuttal mechanism with respect to her PER for 2010. We observe that the UNDT based this finding on Ms. Das' e-mail of 26 May 2010 requesting a copy of CF/AI/1994-002 and an explanation of the administrative instruction to enable her to rebut her PER. The Chief of Human Resource of UNICEF's India Country Office merely asked Ms. Das to sign the PER to acknowledge receipt, without attaching the administrative instruction.

31. On this issue, the Secretary-General submits that:

Even if the actual 2010 performance record document itself could not [be] taken into consideration in respect of [Ms. Das'] separation (which [the Secretary-General] rejects), [the Secretary-General] submits that the record shows sufficient other indicia upon which the Administration – and in turn the UNDT – could conclude that performance concerns had been appropriately advanced with [Ms. Das] in the course of 2010. The [Appeals Tribunal's] jurisprudence has accepted in this respect that performance-related concerns can be established absent a formal evaluation under limited circumstances where, "at the very least, the staff member had been given extensive notice of any performance concerns and the opportunity to provide written comments on those concerns". The [Appeals Tribunal] accepted in

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38. In the present case, the two consecutive reporting cycles are the 2009 and 2010 PERs. Since the 2010 PER cannot be relied on, we affirm the UNDT's finding that the termination of Ms. Das' appointment was unlawful because her unsatisfactory performance has not been established.

Did the UNDT err in concluding that the investigation into the allegation of harassment and abuse of authority was inadequate?

39. We take note that Ms. Das' complaints of harassment and abuse of authority were in relation to her PERs. The complaints going to the appropriateness of the performance records were allegations of procedural lapses or deficiencies which are routinely considered in rebuttal proceedings and which could be addressed in that forum. The UNDT appreciated this fact when it pointed out that an effective investigation could have been carried out in the context of an effective rebuttal process.

40. As previously held, Ms. Das was effectively deprived of a meaningful opportunity to rebut her PER for 2010. In the circumstances we confirm the UNDT's conclusion that no proper investigation into her complaints took place.

Appeal against Damages

41. We find no error in fact or law in the UNDT's decision that the circumstances of the present case merited a compensatory award. We therefore affirm the award of the sum of USD 10,000 for unlawful termination of contract and for the emotional distress she suffered as a result.

42. We, however, do not see the complaint of harassment as a separate circumstance or claim. The UNDT therefore erred in awarding USD 10,000 for emotional distress as a result of the Administration's failure to properly consider and investigate her complaint of harassment and abuse of authority. We will allow the appeal on this ground, and set aside the award.

Rescission and Removal of 2010 PER from Personnel Record

43. The Secretary-General draws our attention to Section 2.38(a) and (b) of CF/AI/1994-02, which are to the effect that performance records are to be placed on a staff member's official status file whether or not they are subject to a rebuttal process.

44. In the absence of any provision for the rescission or removal of a PER in the Staff Regulations and Rules, the UNDT cannot order the removal of the 2010 PER from Ms. Das' official status file. The best remedy in these circumstances is to order that this Judgment be placed on her personnel file.

45.

Original and Authoritative Version: English

Dated this 2nd day of April 2014 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Faherty

(Signed)

Judge Chapman

Entered in the Register on this 13th day of May 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar