



...
... Ms. Obaid decided, as a preliminary measure, to change the [Appellant's]
reporting arrangements and functions. nd fu

... On 19 September 2007, the Secretary-General agreed to ... the suspension of the decision [not to renew the Appellant's appointment] until 31 October 2007.

...

... The Rebuttal Panel interviewed 16 witnesses before issuing a report on the [Appellant's] PAD evaluation for 2006. In its report of 30 October 2007, the Panel made the following findings:

- a. There were abundant examples that corroborated the ratings. There was a strong consensus that the final ratings given by the supervisor in all areas were substantiated and correct. The Panel therefore concurred with the supervisor's PAD ratings in all areas;
- b. There were significant irregularities in the [Appellant's] performance appraisal process: the PAD report was done *post facto*, thus defeating the purpose for which it was primarily intended and hampering online feedback; there was a risk that external factors could have influenced the ratings, thus decreasing their objectivity; work plan outputs and one competency rating were revised downwards by the supervisor after discussions with the staff member had been completed - although this was within the prerogative of the supervisor, it compromised transparency; [and]
- c. The [Appellant] was not notified of

6. The UNDT held an evidentiary hearing on 14-16 February 2012, taking testimony from witnesses for both parties.

7. On 30 March 2012, the UNDT issued Judgment No. UNDT/2012/043, concluding that UNFPA's decision not to renew Mr. Morsy's fixed-term contract because of poor performance was lawful despite the Agency's violation of Mr. Morsy's rights during the process.² The UNDT determined Mr. Morsy had suffered mental distress, humiliation and damage to his reputation resulting from the Agency's violations of his rights but that he had not suffered any pecuniary loss from these violations. The UNDT then awarded Mr. Morsy moral damages in the amount of USD 25,000 or approximately two to three months' salary.

Submissions

Mr. Morsy's Appeal

8. The UNDT erred in concluding that the non-renewal of his appointment was lawful and also erred in making some of its factual findings, which resulted in a manifestly unreasonable decision. The series of illegal actions by the Agency show a pattern of abuse of authority resulting in the decision of non-renewal allegedly based on the Appellant's poor performance; but his performance was not poor and the true justification for the non-renewal of his appointment was suspect. Rather, as the UNDT determined in paragraph 29 of the Judgment, the decision to end the Appellant's appointment was made long before there was a fair evaluation of his performance. Moreover, the non-renewal of his appointment was a consequence of the Agency's earlier illegal decisions to limit his functions and to place him on SLWFP, both of which

Appellant has not identified any defects in the Judgment and merely restates arguments submitted to the UNDT.

14. The Appellant has failed to establish any errors by the UNDT warranting a revision of the Judgment to increase the amount of compensation awarded to him. He did not suffer any pecuniary loss, as the UNDT correctly determined. Rather, the UNDT determined the Appellant suffered stress and humiliation as a result of the procedural irregularities and awarded him USD 25,000, approximately two to three months' salary. It is within the discretion of the trial court to determine the amount of moral damages, and the amount awarded by the UNDT is fully consistent with previous awards of compensation for procedural violations, which generally range from one to four months' net base salary. The jurisprudence cited by the Appellant to support his claim for an increase in the amount of moral damages is distinguishable because he was neither terminated nor otherwise improperly separated from service. Moreover, there is no evidence that he was placed on SLWFP status in the context of an investigation into possible misconduct. To the contrary, he was placed on SLWFP as an administrative matter pending his performance evaluation.

15. The UNDT did not err in failing to address the Appellant's claim that he should be reinstated because there was no basis to reinstate him when the non-renewal of his appointment was lawful.

Considerations

16. Mr. Morsy, in challenging the UNDT's conclusion that the non-renewal of his appointment was lawful, argues that the series of illegal actions taken by the Agency from 8 December 2006 through 11 April 2007 shows an ulterior motive other than his alleged poor performance as the basis for his separation from service. Similarly, Mr. Morsy contends that the series of illegal actions taken by the Agency amounted to his constructive dismissal as Director, and was the result of his refusal to offer his resignation to the Executive Director. These arguments were presented to the UNDT and do not warrant being raised on appeal without specification of error within the meaning of the Appeals Tribunal Statute.³

³ *Larkin .v Secretary-General of the United Nations*, Judgment No. 2011-UNAT-134; *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051.

17. It is well-established jurisprudence that a fixed-term appointment does not carry an expectation of renewal or conversion to another type of appointment.⁴ This jurisprudence is consistent with staff rule 104.12(b)(ii), which was in effect in 2006 and 2007, and which similarly provided that “[t]he fixed term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment”.

18. This Tribunal has concluded that “poor performance ... may [lawfully] be the basis for the non-renewal of [a] fixed-term appointment”.⁵

19. The Dispute Tribunal determined that the decision not to renew Mr. Morsy’s appointment was lawful and was based on his poor performance, stating:

This means that the reason for the non-renewal decision was verified through an independent process ... and was properly documented through the Rebuttal Panel’s report. The Rebuttal Panel carried out what appears to have been an objective assessment and interviewed a number of relevant witnesses. Although it found that the PAD process had irregularities, it nevertheless concluded that the assessments of the [Appellant’s] performance were correct. The procedural flaws identified by the Panel were insufficient to negate the entire final performance assessment. Based on the extensive examination by the Rebuttal Panel, the ratings given to the [Appellant] by his supervisors were confirmed.⁶

20. Mr. Morsy contends that the 2006 PAD report, as affirmed by the Rebuttal Panel, did not warrant the non-renewal of his appointment on the grounds of poor performance, arguing that he was not rated “unsatisfactory” and his direct supervisor viewed the PAD report as a “positive” evaluation, although identifying room for improvement. This argument, however, ignores the nature of the position Mr. Morsy filled within the Division and Agency. He was recruited and hired because he had 30 years’ professional experience. His position as Director of the Division meant he was supposed to act as the leader of the Division. In light of Mr. Morsy’s high-level managerial position, the UNDT could properly determine that his poor performance was not acceptable and was sufficient grounds for the non-renewal of his appointment despite the fact that he was not rated “unsatisfactory” in the 2006 PAD report. It is fair to say that, for the

⁴ *Badawi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2012-UNAT-261; *Syed v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-061; *Balestrieri v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-041.

⁵ *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153.

⁶ Judgment No. UNDT/2012/043, para. 107.

Director of the Division to be considered performing satisfactorily, his work plan outputs and developmental outputs should have been rated higher than “partially achieved” and his core competencies should have been rated higher than “developing proficiencies”.

21. The International Civil Service Commission’s 2001 Standards of Conduct for the international civil service were adopted by the Secretary-General and annexed to ST/SGB/2002/13, entitled “Status, basic rights and duties of United Nations staff members”, of 1 November 2002. Paragraphs 15 and 16 of the 2001 Standards of Conduct provide:

15. Managers and supervisors are in positions of leadership and it is their responsibility to ensure a harmonious workplace based on mutual respect ... Managers are also responsible for guiding and motivating their staff ...

16. It is natural for managers to be seen as role models and they have therefore a special obligation to uphold the highest standards of conduct. ...

22. Staff members in high-level management positions, such as Mr. Morsy, are expected to be able to quickly step into their positions and to provide quality leadership. Within the first year of his appointment, it became clear to the Agency’s Executive Director that Mr. Morsy was not fulfilling his role as manager of the Division, and she took steps to limit his adverse impact on the Division’s functions and staff.

23. An administrative decision not to renew a fixed-term appointment -- even one not to renew based on poor performance -- can be challenged on the grounds the decision was arbitrary, procedurally deficient, or the result of prejudice or some other improper motivation.⁷ The staff member has the burden of proving such factors played a role in the administrative decision.⁸

24. The UNDT concluded that the non-renewal of Mr. Morsy’s appointment was lawful and not vitiated by procedural deficiencies during the performance evaluation process. Moreover, the UNDT concluded that the non-renewal decision was lawful despite noting that the final decision “was effectively an affirmation of the decision that had been made by the Executive Director” on 2 February 2007, when she advised Mr. Morsy by e-mail that she was considering either following “the established procedures for 3 months with SLWFP and then separation/transfer or

⁷ *Assad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-021; *Ahmed*.

⁸ *Badawi; Assad, ibid.*

... start[ing] the investigation process leading to the termination of [his] contract". Mr. Morsy points to this e-mail as showing that the Agency had an improper motive or basis for not renewing his contract. But that is not so. All along, the Executive Director was concerned about only one thing: Mr. Morsy's unsatisfactory managerial performance and style. Concern about a high level manager's poor performance is not an improper motive or basis for the Agency's (preliminary or ultimate) decision not to renew a fixed-term appointment.⁹

25. Generally, it is well within the discretion of the Dispute Tribunal to determine the amount of moral damages to award a staff member for procedural violations in light of the unique circumstances of each case.¹⁰ The amount of moral damages awarded by the Dispute Tribunal may vary from case to case, as it should, depending on the factors considered by the Tribunal. Mr. Morsy challenges the amount of compensation awarded him as moral damages, arguing his injury was quite substantial and the amount is not commensurate with awards in similar cases, including cases involving the misuse of SLWFP.

26. The Dispute Tribunal listed the factors it considered in setting the amount of moral damages to award Mr. Morsy, and determined that he should be awarded damages in the amount of two to three months' salary or USD 25,000. To support his contention that this amount is not sufficient, Mr. Morsy cites several judgments in which larger awards of damages were made by the Dispute Tribunal and/or by the Appeals Tribunal. This Tribunal, however, does not find the cases Mr. Morsy cites to be either applicable or persuasive because they involved either: (1) procedural violations in the context of the staff member's unlawful separation from service, and Mr. Morsy was lawfully separated from service; (2) damages as an alternative to reinstatement, and reinstatement was not a remedy ordered in the present case; or (3) the unlawful use of SLWFP for disciplinary purposes, and SLWFP was not employed for disciplinary purposes in the present case. Moreover, Mr. Morsy was partially responsible for the Agency's failure to timely evaluate his 2006 performance since he did not respond to requests to begin the PAD process, which was a necessary first step. For all these reasons, this Tribunal determines the UNDT did not err in awarding Mr. Morsy moral damages in the amount of USD 25,000.

⁹ *Ahmed*.

¹⁰ *Cieniewicz v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-232.

27. Mr. Morsy contends that the UNDT did not provide an adequate remedy for his procedural violations and should have addressed his request for reinstatement. This contention ignores the UNDT's ultimate conclusion that the Agency acted lawfully when it did not renew Mr. Morsy's fixed-term appointment and separated him from service. Reinstatement is a remedy that addresses a staff member's illegal separation from service. Thus, there is no merit to this claim.

Judgment

28. The UNDT Judgment is affirmed and the appeal is dismissed.

