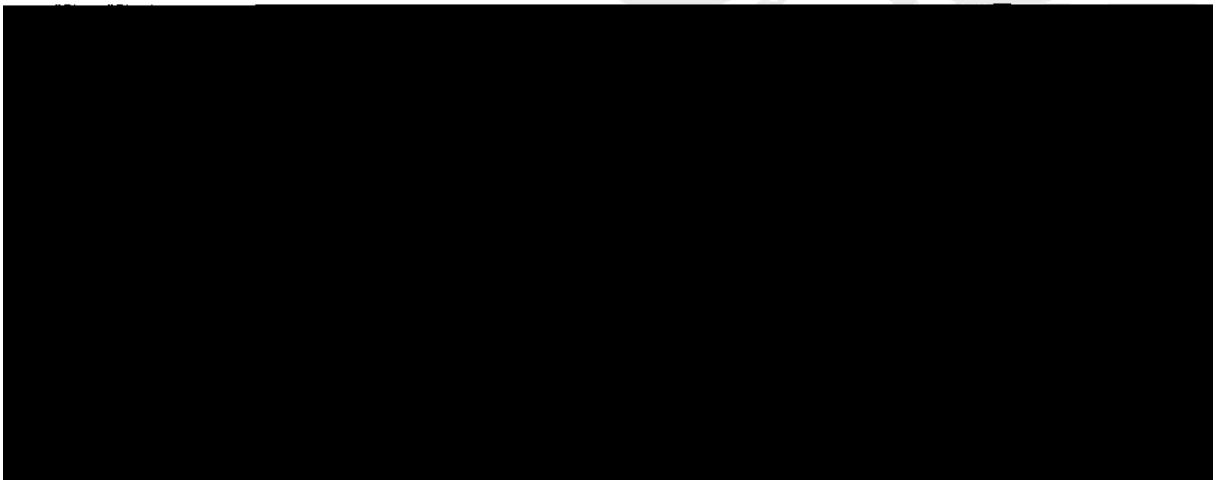


Judgment No. 2014-UNAT-400



JUDGE LUIS MARÍA SIMÓN, 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/2013/032, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 26 February 2013 in the case of *Tadonki v. Secretary-General of the United Nations*. The Secretary-General appealed on 29 April 2013 and Mr. Georges Tadonki answered on 28 June 2013.

Facts and Procedure

2. Mr. Tadonki joined the Organization in 1999 with the United Nations Office for Project Services. He later joined the Office for the Coordination of Humanitarian Affairs (OCHA) as a Senior Regional Advisor for the Southern Africa Humanitarian Information Management Network in Johannesburg.

3. On 24 March 2008, Mr. Tadonki assumed the functions of Head of Office for the Zimbabwe Office of OCHA.

4. By e-mail dated 27 January 2009, the Assistant Secretary-General of OCHA informed Mr. Tadonki that his contract would not be renewed after its expiry on 23 March 2009 and that he was going to be moved to the OCHA Regional Office in Johannesburg to take up the position of Senior Humanitarian Affairs Officer until the expiry of his contract. The decision was based on OCHA's determination that "many of [its] primary interlocutors do not have adequate confidence in [his] leadership to maintain an effective OCHA operation" as well as "concerns related to management of staff [and] OCHA's partnership building".

5. Also on 27 January 2009, Mr. Tadonki filed a complaint with the Panel on Discrimination and Other Grievances (PDOG) against the United Nations Resident Coordinator and Humanitarian Coordinator (RC/HC) and senior management. On 30 June 2009, the PDOG adopted its report, concluding, *inter alia*, that Mr. Tadonki had suffered workplace harassment by the RC/HC and that he had been treated unfairly by OCHA.

Applicant's response. The Respondent submitted evidence to show that the Applicant's appointment with UNOPS was effective 16 February 2010 ...

... On 26 October 2010, the Respondent filed a Motion to Re-open the hearing and recall the Applicant for further cross-examination. ...

... On 1 November 2010, the Applicant filed his response to the Respondent's Motion to Re-open the hearing and recall the Applicant for further cross examination... The Applicant provided a letter from the Regional Director of UNOPS as evidence confirming that he did not start work with UNOPS until 15 April 2010.

...

... The interim measures granted the Applicant in Order 052 (NBI/2010) were not reversed, and the Respondent's motion to recall the Applicant was denied. The Tribunal rejected that motion on the ground that Respondent had ample opportunity to test all of these issues during the testimony of the Applicant and other witnesses. The Tribunal finds that these two motions constitute an abuse of process of the court.

Respondent's motion to recall a witness

... After RC/HC Zacarias had completed his testimony, Counsel for the Respondent made a motion to have him recalled for further examination on the grounds that, as the Tribunal understood it, RC/HC Zacarias was dismayed, disturbed, surprised and allegedly takBT /TT8 1ed and allegt .0586 Tw [(er fr34)6(e)-1.f the-1nrd-.04.3(t. ...)Tj -12.24 .2()

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15. Under the terms of reference in the vacancy announcement for his post, Mr. Tadonki was responsible for managing the OCHA Office to provide coordination support to the humanitarian community in Zimbabwe; and to maintain communication among humanitarian agencies and Inter-Agency Standing Committee partners, the international community, the HC, Heads of United Nations Agencies and Programmes, NGO heads of mission, the government, the donor community and the local donor community. The Secretary-General submits that there is considerable evidence that all of these groups encountered sustained difficulties in their interactions with Mr. Tadonki and their concerns about his management style undermined their confidence in OCHA as an effective and collaborative partner.

16. Further, the UNDT erred in fact and procedure by relying on the testimony of the UNHCR Director which reflected the UNHCR Director's own perspective, rather than representing perceptions of a broader segment of the humanitarian community.

The UNDT erred in law, fact and procedure and exceeded its competence in concluding that the non-renewal of Mr. Tadonki's appointment was motivated by extraneous factors or improper motive.

17. The UNDT erred in law by stipulating a new burden of proving improper motivation and by failing to even apply that standard. The UNDT simply relied on Mr. Tadonki's own allegations of improper motives, citing his fraught relationships with the RC/HC and Deputy Head of the OCHA Office, without any evidence to support a *prima facie* case, and then required the Secretary-General to prove that the contested decision was not prompted by extraneous or improper motives. The factual conclusions on this issue are therefore equally flawed.

18. Further, the reason for the decision not to renew Mr. Tadonki's contract was not based upon his problems with the RC/HC or the Deputy Head but on Mr. Tadonki's failure to develop and maintain effective relationships with the donor community and the local donor community.

odds with the two facts established by the record: Firstly, that the RC/HC was a UNDP staff member and OCHA had no authority to remove him from Zimbabwe; and secondly, that at the time OCHA senior management decided not to renew Mr. Tadonki's appointment, they were aware that the RC/HC did not intend to stay in Zimbabwe much longer.

The UNDT erred in concluding that Mr. Tadonki's non-renewal was unlawful.

20. The Secretary-General acknowledges that the manner in which Mr. Tadonki's performance evaluation was undertaken was not in accordance with ST/AI/2002/3, but asserts that the lack of a proper performance appraisal alone cannot automatically render a non-renewal decision based on performance unlawful, when the Administration is able to provide independent evidence demonstrating a reasonable basis for it to conclude that a staff member's performance was unsatisfactory in the particular circumstances.

The UNDT erred in fact and law in its award of economic and moral damages.

21. The UNDT erred in awarding economic damages in the amount of three and a half years' salary. The non-renewal decision was lawful and accordingly, there was no basis on which to order compensation in lieu of reinstatement. Moreover, by setting the compensation in lieu of reinstatement at two years' net base salary, the UNDT acted in clear contravention of the Appeals Tribunal's holding in *Mwamsaku*,² which confirmed that the two-year limit imposed by the UNDT Statute constitutes a maximum and cannot be the average "in lieu of compensation". Furthermore, while the last appointment held by Mr. Tadonki was only for the duration of one year, the UNDT awarded economic damages totaling over three and a half years' salary which is excessive, especially in view of the fact that Mr. Tadonki's appointment was further extended until 29 April 2010.

22. Moreover, the UNDT failed to take into account the fact that Mr. Tadonki's appointment was extended from 23 March 2009 to 29 April 2010 and that he accepted an appointment with UNOPS before the expiration of his appointment at OCHA. Since there was no gap between the two appointments, Mr. Tadonki did not suffer any economic damages as a result of his non-renewal.

² *Mwamsaku v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-246.

23. Turning to the award of moral damages, the Secretary-General submits that the non-renewal decision was lawful and, accordingly, it is legally unsustainable to award moral damages on this ground. To the extent that the UNDT based its award on the behaviour of specific OCHA officials and the RC/HC, the award is likewise flawed as a result of the UNDT's errors. Should the Appeals Tribunal find it appropriate to award moral damages for non-compliance with the performance appraisal process, the Secretary-General submits that the award of USD 50,000 is excessive.

24. Finally, the Secretary-General submits that the combined economic and moral damages awarded by the UNDT total four years' salary, more than double the general two-year cap on damages set out in Article 10(5)(b) of the UNDT Statute. The UNDT failed to identify the exceptional factors which justified doubling the two-year cap.

The UNDT erred in awarding costs against the Secretary-General.

25. The Secretary-General submits that the UNDT erred in fact and procedure in concluding that the Secretary-General's conduct during the UNDT proceedings amounted to a "manifest abuse of proceedings" justifying the award of costs against him.

26. The UNDT misconstrued "allegations of sexual harassment" on the part of Mr. Tadonki which, it concluded, served no relevance to the case and were merely introduced to discredit Mr. Tadonki. The Secretary-General did not seek to introduce such evidence; the issue arose during the testimony of the focal point for sexual harassment who considered that the fact that Mr. Tadonki inquired whether a particular staff member had complained about him, constituted an abuse of power.

27. Furthermore, the UNDT erred in law by concluding that his good faith submissions to admit into evidence a written statement by the RC/HC and to recall Mr. Tadonki for cross-examination constituted an abuse of process.

The UNDT erred in issuing two remedial orders.

28. The UNDT erred in ordering the nullification of Mr. Tadonki's 2008-2009 performance appraisal and the purging of all "adverse material" relating to this appraisal from his personnel file. Similarly, the UNDT erred in ordering the implementation of specific recommendations of

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accurate assessment of damages. The UNDT is not bound by the limitation in Article 10(5)(b) of the UNDT Statute as the UNDT outlines concrete reasons to qualify this as an exceptional case.

40. Mr. Tadonki's performance was recognized as satisfactory in his PAS and by the UNDT. The non-renewal decision based on non-performance is therefore unlawful. His non-renewal resulted in economic loss and the UNDT properly compensated him.

41. The award of USD 50,000 for non-compliance with the performance appraisal process is appropriate. It accounts for due process violations related to performance, abuse of process and associated stress. The Appeals Tribunal should give deference to the UNDT on this point.

The UNDT did not err in awarding costs against the Secretary-General.

42. It was within the UNDT's competence to award costs based on its findings that the Secretary-General unjustifiably introduced accusations of sexual harassment against Mr. Tadonki; and that in introducing its motion for reconsideration of Order No. 052, he filed submissions that were solely intended to undermine Mr. Tadonki's credibility and caused him needless distress.

The UNDT did not err in issuing the two remedial orders.

43. Purging a flawed PAS from a staff member's personnel file is not prohibited by ST/AI/2002/3 and the UNDT's determination and order on this issue are reasonable and lawful.

44. Contrary to the Secretary-General's contention, the UNDT did not order the implementation of the PDOG's recommendations, but merely stated that these recommendations *should* be implemented.

The UNDT properly referred the staff members to the Secretary-General for accountability.

45. The Secretary-General mischaracterizes the threshold for "appropriate cases" by linking Article 10(8) of the UNDT Statute to Staff Rule 10.1. Article 10(8) is disjunctive. Contrary to the Secretary-General's contention, the UNDT may refer cases surrounding disciplinary proceedings or financial measures. The UNDT applied the correct threshold and extensively reviewed the evidence before making its finding of fact that the Secretary-General's conduct rose to the level of "misconduct" and met the applicable threshold.

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individually or collectively, become immaterial for the purpose of remedying the non-compliance with the performance procedure and its outcome, which constitutes the main basis for the UNDT's conclusion.

58. Once determined that the non-renewal was unlawful, the next grounds of appeal to be considered are the ones related to the consequences of that administrative wrongdoing: *i.e.* damages and compensation.

59. With respect to compensation for material damages, the Appeals Tribunal will vacate the first instance judgment because there was no relevant interruption between the staff member's end of service with OCHA and the commencement of his new appointment with UNOPS and he has not established that he in fact suffered loss of earnings.

60. Turning to moral damages, apart from the breach of duty towards the staff member, the Judgment under appeal listed evidence related to the emotional harm suffered by Mr. Tadonki.

61. Notwithstanding the fact that the proffered evidence and the circumstances of the case support the conclusion of a resulting moral injury and the need to compensate it, the Appeals Tribunal considers that the nature of the non-renewed position, the context in which it was taken and the fact that the staff member got a new position, indicate a non-permanent damage whose relevance must not be seen out of proportion. Thus, this Court will reduce the excessive sum awarded by the UNDT for non-pecuniary damages to USD 10,000.

62. The Appeals Tribunal will grant the ground of appeal related to the award of costs against the Administration, since the impugned Judgment erred on a question of law by qualifying as abuse the simple introduction of motions, irrespective of whether or not these were subsequently granted.

63. This Court will also vacate the order of specific performance contained in sub-paragraph 346(vi) of the Judgment under appeal.⁴ An adjudication of these i2s

64. The illegality of the e-PAS for the year 2008-2009 and related statements in the personnel file is established by the UNDT and affirmed by this Tribunal. Therefore, there is no need to purge it from the staff member's file, but what is required is to include, at the same time, the administrative illegal act and the judicial pronouncement that so declares, which makes perfectly understandable why the former is null and only the latter prevails, vindicating the adequate performance evaluation and reputation of the staff member.

65. With regard to the referral of certain staff members or former staff members to the Secretary-General for accountability purposes (sub-paragraph 346(vii) of the Judgment under appeal) it must be pointed out that Article 10(8) of the UNDT Statute provides the UNDT with discretionary power in this regard. Given that despite the partial vacation of the Judgment, the finding of an illegal non-renewal stands, this Court finds no reason to interfere with the exercise of that discretion. Such an exercise of discretion cannot constitute a ground for appeal in the present case, since the referral only implies a communication from the UNDT to the Secretary-General, and the Secretary-General is vested with the discretionary power to determine a course of action to adopt or not to adopt as sequel to the referral. Naturally, this solution does not imply that the Appeals Tribunal exercised its own discretionary power to refer, because the Appeals Tribunal did not consider it opportune to exercise its discretion in the present case.

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66. The Judgment under appeal is vacated, with the exception of sub-paragraph (iv), under which heading the compensation is reduced herewith to USD 10,000, and sub-paragraph (vii).

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