



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/003

Judgment No.: UNDT/2013/051

Date: 14 March 2013

Original: English

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**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Hafida Lahiouel

DAS

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

## **Introduction**

1. The Applicant contests the decision to end her employment with the United Nations Children's Fund ("UNICEF").

2. The Applicant submits, *inter alia*, that the Administration's reliance on her performance evaluation reports ("PERs") in ending her employment was improper as she had been "subjected to workplace harassment and abuse of authority and [her] PERs [were] intentionally precipitated in a concocted and illegal manner". The Applicant also submits that the Administration failed to follow proper procedures in managing her performance and to properly address her complaints of harassment and abuse of authority against her supervisors. She states that she suffered "ignominious loss and damage" as well as "tremendous agony and harassment" as a result of the loss of her employment. She seeks compensation in the sum of 24 lakh rupees (or 2,400,000 rupees, or approximately USD44,000 at current rate), or other relief as deemed fit by the Tribunal.

3. The Respondent submits, *inter alia*, that the Administration's decision to end the Applicant's employment was a legitimate exercise of its discretionary power in line with the best interest of the Organization and the Applicant's properly documented poor performance, which was not rebutted by her. The Respondent submits that, although the Applicant received a notice of termination, this was due to an administrative error on the part of the UNICEF India Country Office, from which error the Applicant in fact benefited with a one-month notice, which the Respondent was not obliged to provide following expiry of her fixed-term contract.

4. By Order No. 118 (NY/2012), the Tribunal directed the parties to attempt to resolve the matter informally, failing which they were to, *inter alia*, file a joint submission stating whether they agreed to the case being decided on the papers and whether they wished to file any further submissions. The parties were unable to come to an amicable settlement despite a further extension of time, and subsequently



8. 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.

9. 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.

10. 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



there is room for improvement)". However, with respect to "drive for results (quantity of work)" the Applicant received the rating of "1 (met few expectations)".

20. Prior to the finalization of the PER for April to December 2009, the Applicant and her supervisors prepared a mid-year performance evaluation report. It was signed by the Applicant and her supervisors on 3 September 2009. Whilst containing some criticisms, it also stated that there was a “noteworthy improvement from the past”, “significant improvement in filing of Office Chrono programme”, and that “[a]ll logistic support was very well done”.

21. The Applicant’s PER for the period of April to December 2009 was finalized approximately three months after the mid-year review. In fact, it was prepared and signed by the Applicant and her supervisors twice—on 7 December and 8 December 2009.

22. In the first version of the PER, signed by the Applicant on 7 December 2009, her supervisors rated her performance for each of the values and competencies—“technical knowledge”; “planning [and quality of work]”; “drive for results (quantity of work)”; “team work”; “communication”—with the rating of “2 (met most expectations, however, there is room for improvement)”. The Applicant’s first reporting officer (her immediate supervisor) acknowledged that she had made efforts to improve her performance, but noted that “she need[ed] to improve her core competencies essential for secretarial assistance”. The first reporting officer also commented that “her performance related discussions were frequent and documented every quarter”. The second reporting officer stated that she “fully agree[d] with the supervisor’s comments and ratings” and that the Applicant, “in her 5 years of being a UNICEF staff member, has improved minimally in her performance and does not meet the expectations of an Operations Assistant (her current post)”.

23. The Applicant stated in her comments in part 6 of the first version of her PER for April–December 2009 that she agreed with the ratings and assessment only “to some extent”. She included detailed comments disagreeing with the assessment of her performance with respect to different competencies. She stated that “[i]n the current reporting period, [she] performed ‘better than [her] best’”. The Applicant

further stated that she was not provided with clear feedback and instructions from her supervisors during the reporting period. She stated that she “was denied the opportunity to improve her performance in the smart approach, in absence of any substantial guidelines or measurable quantitative performance evaluation tool”.

24. On 8 December 2009, the Applicant and her supervisors had a meeting, as a result of which a second version of the PER was produced. The Applicant alleges in her application that “in a closed-door meeting with her supervisors” she was “grilled and forced to delete all [her] comments from the PER [for April to December 2009]”. She alleges that she was told to “destroy [her] copy of the PER and made to prepare and sign a new PER on 8 December 2009”. The Applicant’s version of the events is corroborated by her email to the Deputy Director of Operations, UNICEF, of 21 December 2009, discussed below, and has not been denied or rebutted by the Respondent.

25. In the second version of the PER for April–December 2009, signed on 8 December 2009, the ratings given for all competencies remained the same (rating of “2 (met most expectations, however, there is room for improvement)”). However, the Applicant’s comments disagreeing with her supervisors were removed.

#### Applicant’s complaint of 21 December 2009

26. On 21 December 2009, the Applicant sent an email to the Deputy Director of Operations, UNICEF, stating that after she had submitted her signed PER on 7 December 2009, she was asked to return the signed copy and then had a meeting with her supervisors on 8 December 2009, in which they asked her to make changes to her PER as they felt that she “exaggerated her performance” and “took [credit for a] bigger share of the team performance” than she apparently deserved. She stated that “despite being assured ... that [her] performance would be evaluated on a quarterly basis, in practice, [she] was evaluated only once during September 2009



prior to this final PER, where [she] had received encouraging and assertive feedback from her supervisors”. The Applicant also described the distress that she suffered:

After about 2 hours of discussions with them I was made to delete and/modify the issues raised by me in the submitted PER, that ultimately resulted in the destruction of my PER. The entire process was extremely stressful, harassing and unethical.

27. The Applicant requested in her email of 21 December 2009 the Deputy Director of Operations to “look into the matter with appropriate consideration and take proper/necessary action so that [her] prolonged association with UNICEF is retained and continued”.

28. The Deputy Director of Operations replied on 25 January 2010, stating that a review of her claims was initiated; that his office was working with the management in the Kolkata Office to ensure that she was provided with a performance improvement plan related to the extension of her contract for six months, starting January 2010; and that he was working to ensure that her performance was evaluated and forwarded to his office by 25 May 2010. He stated that he “personally reviewed [her] file and [is] concerned with the documented poor performance which is not related to [her] ‘leaves’ but which has been reflected in [her] performance since as far back as 2007”. The Deputy Director noted that those performance evaluations were completed by three different supervisors. He concluded by stating:

I must therefore insist that your performance over the remaining months be up to a satisfactory level. All staff in UNICEF are expected to perform their functions in a satisfactory manner and any consistent failure will be treated in accordance with the rules and regulations of the organization.

29. On 1 January 2010, the Applicant was offered a six-month extension of her fixed-term appointment, now with the functional title of Administrative Assistant, starting on 1 January 2010 and expiring on 30 June 2010.



in hard copy and 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").

33. 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 (specially 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".

34. 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 June to January 2010

35. 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".

36. 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

argument between her and whoever is the supervisor. I have personally witnessed such interactions.

37. 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

40. 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 Chief stated that she should “proceed with signing the current PER to acknowledge that [she] received it”. The Chief of the Human Resources also commented on the substance of the Applicant’s complaint of harassment. Specifically, the email stated:

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well as her “previous filing of a harassment complaint against [her] supervisors”.  
The letter of 11 October 2010 further stated that UNICEF had determined that

unsuitability or incompatibility), are treated differently since the culpability of the staff member is different. The former may be a disciplinary issue whilst the latter may require evaluation and remedial treatment including counseling, retraining and a reasonable opportunity to improve before any action is finally taken. If the poor work performance is attributable to misconduct—for example dereliction of duty or wilful negligence—the staff member may then be subject to disciplinary measures, including termination, depending on the severity or degree of misconduct (see also former United Nations Administrative Tribunal Judgment No. 926, *Al Ansari* (1999)).

46. 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 (also see *Eggesfield* UNDT/2013/006 for a related discussion on the doctrine of estoppel).

47. It is clear from the written record th



given notice according to the letter of appointment, or paid salary in lieu of serving the notice period, at the discretion of the Executive Director”.

48. The Tribunal therefore finds that the Applicant’s contract was terminated on the grounds of alleged unsatisfactory performance.

*The Applicant’s PER for January–June 2010*

49. The Applicant’s PER for January to June 2010 stated in part 8.2 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”.

50. By email of 26 May 2010, the Applicant requested a copy of CF/AI/1994-002 in order to understand the rules concerning the right of rebuttal. ~~PER Section 5 (redou) Per 76.990 TD.0002 Tc.0~~

view of several complaints that the Applicant sent to the Chief of Human Resources and to the Deputy Director of Operations. The Tribunal finds that the Applicant's interpretation of the Chief's email as "necessarily implying that there neither should be nor could be any rebuttal" (see para. 19 of her application) was reasonable. By withholding a copy of the administrative instruction, which apparently sets out the grounds for rebuttal; by failing to explain the administrative instruction to the Applicant despite her explicit request; by making findings on the Applicant's performance and harassment claims; and by instructing the Applicant to sign the PER as it was, the Chief effectively dissuaded the Applicant from pursuing formal rebuttal and substantiating her claims of harassment.

53. The Tribunal finds that, even if a copy of the administrative instruction were subsequently provided to the Applicant, the tone and content of the Chief's email were such that the only reasonable conclusion that the Applicant could have reached is that any rebuttal would be futile and that management's view of her performance was made up and was not subject to change regardless of any rebuttals.

54. The Tribunal finds that an effective rebuttal mechanism is an integral part of the performance evaluation process (*Jennings* UNDT/2010/213, affirmed in *Jennings*

remaining months be up to a satisfactory level”, and, secondly, that the actual termination decision referred to the Applicant’s performance in the period of “2007 to 2010”.

56. The Tribunal finds that, as a result of the Applicant being effectively deprived of a meaningful opportunity to rebut her PER for 2010, the Tribunal cannot place any reliance on it.

*Was the reason correct as a matter of law and was it correctly based on facts?*

57. The principal administrative instruction governing the termination of the Applicant’s fixed-term contract is CF/AI/2010-001, of which sec. 10 provides as follows:

**Section 10**

**Termination of appointment for unsatisfactory performance**

10.1 The principal tool for assessing performance is the paper-

59. Reasons for ending a fixed-term contract must be justified by the facts (*Gauthier* UNDT/2013/039). Although the Tribunal is not to substitute the Applicant's supervisors' appraisal of her performance, the question before the Tribunal is whether the documents before it properly corroborate the reason provided by UNICEF for the ending of her contract.

60. As a result of the Tribunal's findings that the PER for 2010 cannot be relied upon, the criteria under sec. 10.2(a)(i) of CF/AI/2010-001, requiring the Applicant to have "half or more PER ratings of "1" ("met few expectations") in a *given* reporting cycle" (emphasis added), is not satisfied. The "given reporting cycle" at the time of the decision was that of January to June 2010. The PER for 2010 was clearly taken into account when the decision was made to end the Applicant's employment: for example, the letter of 28 June 2010 stated that the decision was "taken after an extensive review of [her] performance which has been consistently unsatisfactory, as documented in your PERs from 2007 to 2010".

61. The Tribunal also finds that the alternative condition for termination under sec. 10.2 of CF/AI/2010-001 was also not satisfied. Section sec. 10.2(a)(ii) of CF/AI/2010-001 requires as a condition of termination that the staff member have "half or more PER ratings below '3' ('fully met expectations') over two consecutive reporting cycles". The Tribunal finds that, given that the PER for 2010 was relied on in arriving at the contested decision, the two most recent PERs to be counted were the PERs for 2009 and 2010. As no reliance can be placed on the PER for 2010, the requirement of sec. 10.2(a)(ii) CF/AI/2010-001 was not satisfied.

62. Therefore, the Tribunal finds that the termination of the Applicant's contract on the basis of poor performance was unlawful. It should be noted that even if the Applicant's contract had not been renewed on grounds of "unsatisfactory performance" rather than terminated, the Respondent could not have justified the Applicant's non-renewal premised on a PER that she was effectively not able to rebut. Therefore, the outcome of the case would have been the same as the standard

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“expedite the handling of her case”, “clarifications as to [her] specific allegations and requests” and “the scope and grounds of her request”. It is unclear, in view of the letter of 16 August 2010, how UNICEF could have possibly finished any proper investigation “in June 2010”, before even clarifying the nature, scope, and grounds for the Applicant’s allegations and claims. The Tribunal can only conclude that no proper investigation took place.

67. In any event, the Tribunal finds that, in the particular circumstances of this case, no effective investigation could have been carried out in the absence of an effective rebuttal process with regard to the PER for 2010. From the documents

69. The Tribunal further finds that the one-month notice given to the Applicant need not be taken into account in setting the amount of compensation, as this was her lawful entitlement under the applicable administrative instruction.

#### Emotional distress

70. As the United Nations Appeals Tribunal stated in *Antaki* 2010-UNAT-095, not every violation will necessarily lead to an award of compensation; compensation may only be awarded if it has been established that the staff member actually suffered harm.

71. The Tribunal finds that contemporaneous records, including the Applicant's emails, demonstrate that she was distressed by the unlawful termination and the stigma attached to it, as well as by UNICEF's failure to properly address her complaints and requests. The Respondent in his reply did not seek to introduce evidence in rebuttal of the Applicant's claims of emotional distress. The Tribunal further finds that the treatment such as that which the Applicant was subjected to caused her distress and anxiety.

72. The Tribunal finds that the Applicant shall be compensated in the amount of USD10,000 for the emotional distress caused by the Administration's actions with respect to her unlawful termination and failure to properly consider and investigate her complaint of harassment and abuse of authority. As this compensation concerns non-pecuniary harm, the Tribunal finds it appropriate to express the award as a lump sum rather than in net base salary (*Applicant* UNDT/2010/148, *Santos* UNDT/2013/038).

#### Other relief

73. It is unclear whether any termination benefits and entitlements were withheld from the Applicant as a result of the Administration's subsequent decision to treat the en-pr

orders, below, to ensure that any termination benefits that the Applicant was entitled to but did not receive are paid to her. As these outstanding benefits and entitlements, if any, would have been made available to the Applicant in August 2010, it follows that they should be subject to retroactive interest, which shall be ordered in accordance with the established case law (see *Warren* 2010-UNAT-059, *Fayek* UNDT/2010/194).

74. In view of the findings above, the Applicant's PER for the period of January to June 2010 is rescinded and shall be removed from her personnel records.

### **Observations**

#### *Delegation of authority*

75. Although this was not raised by the parties, it is unclear whether the author of the decision to terminate the Applicant's contract, communicated on 28 June 2010, had the proper delegated authority to make that decision. The letter dated 28 June 2010 was authored by the Officer-in-Charge, India Country Office, and referred to the Country Representative's approval of the recommendation of the CRB to terminate the Applicant's appointment based on unsatisfactory performance. However, sec. 8.2 of CF/AI/2010-001 specifically provides that "[t]he sole authority to terminate the appointment of any staff member rests with the Executive Director, who, providing reasons for the action, may exercise this authority in accordance with the terms of a staff member's appointment". There are no contemporaneous records in this case demonstrating that, at the time, the contested decision was made by a decision-maker with the proper delegation of authority.

76. Further, even if the authority to terminate was delegated by the Execu45rity.0011 Tcdtega01 7



“the [Country] Representative ha[d] approved the recommendation of the [CRB]”,  
there is no actual termination decision on file signed by the Country Representative.

81. The Applicant shall be paid USD20,000, which sum is to be paid within 60 days from the date the Judgment becomes executable, during which period interest at the US Prime Rate applicable as at that date shall apply. If this sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

82. The Applicant shall be paid any remaining termination benefits and entitlements, plus interest at the applicable US Prime Rate from 1 August 2010 until the date of payment. If payment is not made within 60 days of the date this Judgment becomes executable, an additional five per cent shall be added to the US Prime Rate until the date of payment.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 14<sup>th</sup> day of March 2013

Entered in the Register on this 14<sup>th</sup> day of March 2013

*(Signed)*

Hafida Lahiouel, Registrar, New York