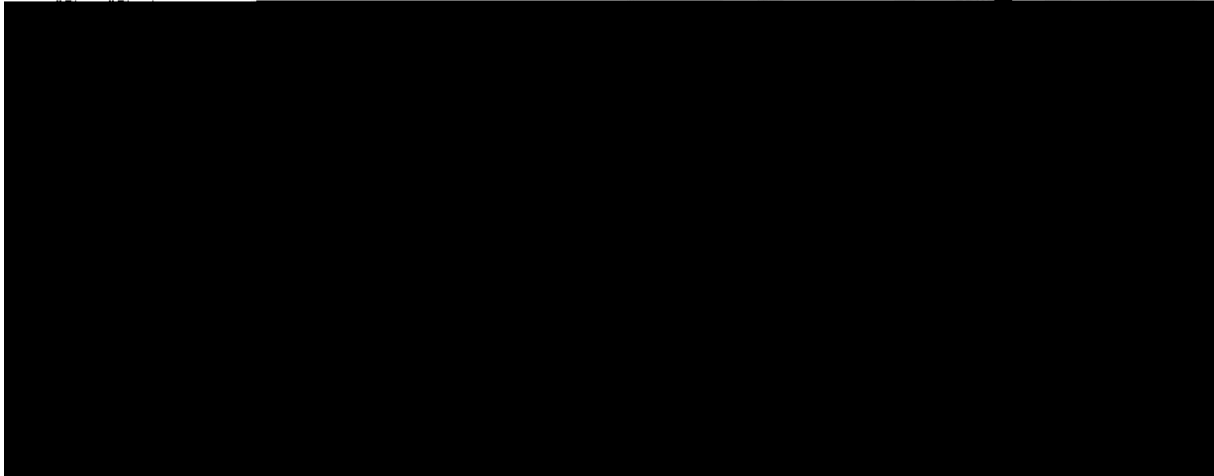




Judgment No. 2015-UNAT-534



Counsel for Mr. Assale:

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Counsel for Secretary-Ge

JUDGE ROSALYN CHAPMAN , PRESIDING .

1. On 25 March 2014, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi issued Judgment No. UNDT/2014/034, in the case of *Assale v. Secretary-General of the United Nations*. On 27 May 2014, the Secretary-General appealed the Judgment to the United Nations Appeals Tribunal (Appeals Tribunal), and on 18 June 2014, Mr. Philippe Tingbo Assale filed his answer.

Facts and Procedure

2. On 5 January 2010, Mr. Assale joined the United Nations Children's Fund (UNICEF or Agency) as Chief of the Child Protection Unit, Programme Section, at the P-4 level, with a duty station in N'Djamena, Chad. He had a fixed-term appointment of one year and 27 days, expiring on 31 January 2011.

3. While he was with UNICEF, Mr. Assale's first reporting officer (FRO) or immediate supervisor was the Chad Country Deputy Representative and his second reporting officer (SRO) was the Chad Country Representative. Mr. Assalereceived one Performance Evaluation Report (PER) covering 2010. It included Mr. Assale's work plan with goals and objectives, which was finalized on 23 May 2010; a Mid-Year Review, which was finalized on 23 September 2010; and the Year-End Review, which wasfinalized on 31 March 2011.

4. The Mid-Year Review rated Mr. Assale's performance in three categories: (1) progress vis-à-vis his work plan goals and objectives; (2) developmental outputs; and (3) competence. As to work plan output progress, Mr. Assale's supervisor commented "that he had [w]eak management skills [... and] [f]r[e]quent delays in delivery (donor reports, project agreements with partners, etc.)". Regarding competency, Mr. Assale's supervisor noted "weakness in leading and supervising staff [and a t]endency to keep alive conflicts instead of promoting harmonious work relations in his section". Mr. Assale commented that he considered he was "[p]rogressing as planned" with regards to the first and second categories, and noted he had "[n]o specific comments to report" regarding his ratings on competency.

5. On 27 October 2010, the Chad Country Deputy Representative sent a letter to the Chad Country Representative advising him that he would not recommend the renewal of Mr. Assale's appointment when it expired on 31 January 2011. In the letter, Mr. Assale's FRO

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13. As to the core competencies, Mr. Assale's FRO rated Mr. Assale as "Developing Proficiency" regarding the competency of "Drive for Results". He explained that "[Mr. Assale's] drive for results was weak. He was unable to improve the delivery and capitalize on the opportunities that had arisen [sic] during 2010."

14. Regarding the six functional competencies, Mr. Assale was rated as "Developing Proficiency" in all functional competencies other than "Relating and Networking", the sole competency for which he was rated as "Profi

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Executive Director of UNICEF for accountability , and requested to be informed “of the outcome of the process on accountability”.

Submissions

The Secretary-General's Appeal

20. The UNDT erred in concluding that the Chad Country Deputy Representative, Mr. Assale's FRO, was obligated to employ remedial measures to assist Mr. Assale in improving his performance before a decision would be taken to renew his appointment. In erring, the UNDT applied UNICEF's Administrative Instruction CF/AI/2011-001 on the Performance Appraisal and Rebuttal Process (2011 Administrative Instruction), which was not applicable to the decision since it did not come into effect until 17 January 2011 – after the contested decision was made. Further, under UNICEF's Administrative Instruction CF/AI/2010-001 on Separation from Service (2010 Administrative Instruction), there is no requirement to undertake remedial measures prior to deciding not to renew an appointment based on unsatisfactory performance.

21. The UNDT erred in concluding Mr. Assale's unsatisfactory performance was not a valid reason for the decision not to renew ce befobJ -15s.ssal

harassment or of a hostile work environment, as such claims were not raised in Mr. Assale's request for management evaluation and had not been addressed before the filing of the UNDT application; thus, the UNDT exceeded its competence in considering *de novo* Mr. Assale's harassment claims. Finally, in light of the reprimand issued by UNICEF to the Chad Country Representative, issues regarding his conduct were moot before the UNDT.

23. The UNDT made an error of law by awarding compensation to Mr. Assale when he did not challenge the final assessment of his performance as unsatisfactory, and there is no requirement in the regulations or rules that an appointment must be continued pending an investigation into a staff member's harassment complaint. To hold otherwise would provide an incentive for a staff member whose appointment has not been renewed to file a frivolous harassment complaint in order to secure an extension of his or her appointment.

24. The Secretary-General seeks to vacate the ~~the~~ Judgment and to affirm that the non-renewal of Mr. Assale's appointment was valid.

Mr. Assale's Answer

25. The UNDT correctly concluded that under the 2010 Administrative Instruction the standards for determining "unsatisfactory performance" for the purposes of the non-renewal of an appointment and the termination of an appointment are the same. Thus, UNICEF had a duty to implement remedial measures to assist Mr. Assale in improving. Moreover, UNICEF also had a duty to implement remedial measures to assist Mr. Assale in improving under the 2011 Administrative Instruction, which was in effect and applicable on 28 February 2011, the date Mr. Assale's appointment ended. Finally, under principles of international administrative law, remedial measures must be taken.

26. The UNDT correctly found that the impugned decision was not a lawful exercise of UNICEF's discretion. As early as 26 April 2010, the Chad Country Deputy Representative and Representative expressed displeasure with Mr. Assale's performance and wanted to end his appointment. This was before any appraisal had even been undertaken. Moreover, the Chad Country Representative made the impugned decision before the Year-End Review was finalized; without that Review, the decision was arbitrary. The Year-End Review was only finalized one month *after* Mr. Assale's appointment ended. This is inconsistent with

the Appeals Tribunal's decision in *Tadonki*.¹ Since Mr. Assale's PER did not rate his performance as unsatisfactory, there were no grounds not to renew his appointment.

27. The Appeals Tribunal cannot consider the Secretary-General's claim that the UNDT erred in referring the Chad Country Deputy Representative and Representative for accountability because it is merely a recommendation.

28. The UNDT did not make an error of law in awarding compensation to Mr. Assale. He was unable to rebut the Year-End Review since he was separated from service at the time it was finalized. In any event, as the UNDT found that he had been separated for reasons *unrelated* to his performance, his failure to rebut his PER was immaterial. Moreover, since the UNDT correctly found that Mr. Assale's appointment was improperly not extended, the compensation put him in the situation he would have been in if UNICEF had not acted unlawfully.

29. Mr. Assale requests that the Appeals Tribunal affirm the Judgment and dismiss the appeal in its entirety.

Considerations

Did the UNDT err in concluding the non-renewal decision was unlawful?

30. Poor or unsatisfactory performance may properly be the basis for the non-renewal of a fixed-term appointment.² As the Appeals Tribunal recently stated in *Said*:³

... There is no need for the Appeals Tribunal to define the term "poor performance." This Tribunal has already determined that a PER does not need to rate a staff member as "unsatisfactory" in order to support an agency's decision not to renew an appointment for poor performance. We have also held that a staff member whose performance was rated as "partially meeting performance expectations" had no legitimate expectancy of renewal of his contract and the non-renewal of another staff member with a similar performance rating was lawful.

¹ *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-400.

² *Said v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-500, para. 34, citing *Morsy v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-298, and *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153.

³ *Said, ibid*, para. 41, and cites therein.

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applied the 2011 Administrative Instruction since the administrative instruction was in effect on the last day of his appointment, which is the date the impugned decision was implemented.

34. We agree with the Secretary-General and determine that the UNDT made an error of law when it applied the 2011 Administrative Instruction to review the non-renewal decision. In *Hunt-Matthes*, “we restated the well-known principle of law against retrospective application of laws, noting: ‘The Appeals Tribunal recalls the general principle of law against retrospective effect/application of laws and hold that since the incident in question occurred before [the administrative issuance] was promulgated it is not applicable in this case.’”⁶ In the context of

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Did the UNDT err in referring Mr. Assale's supervisors for accountability?

43. Article 10(8) of the UNDT Statute provides that the UNDT "may refer appropriate cases

Judgment

47. The Secretary-General's appeal is granted and Judgment No. UNDT/2014/034 is vacated.

Original and Authoritative Version: English

Dated this 2nd day of July 2015 in Geneva, Switzerland.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Thomas-Felix

Entered in the Register on this 20th