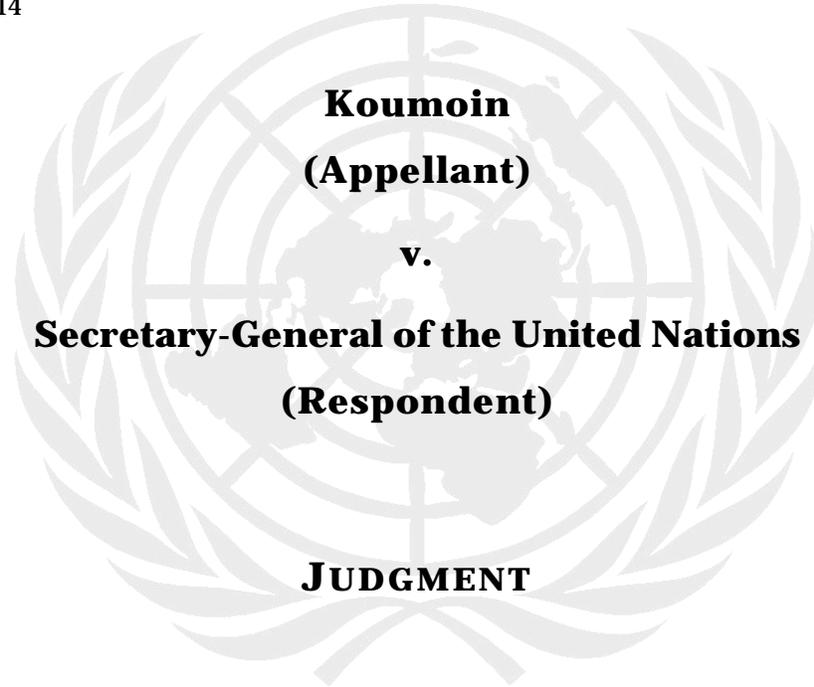




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-114



Before: Judge Kamaljit Singh Garewal, Presiding
Judge Sophia Adinyira
Judge Inés Weinberg de Roca

Judgment No.: 2011-UNAT-119

Date: 11 March 2011

Registrar: Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: Melanie Shannon

JUDGE KAMALJIT SINGH GAREWAL, Presiding.

Synopsis

1. Mathieu-Crédo Koumoin (Koumoin) was on a 200-series contract and was separated from service on 31 December 2006 based on a performance rating of “partially met expectations” for 2005.
2. Koumoin claimed that the performance rating and the decision to separate him from service were retaliatory because he had refused to act unethically on behalf of his superiors. This made him a whistle-blower and a victim of retaliation and led to a poor performance rating and the non-renewal of his contract.
3. In this case, there was nothing on the record to establish that Koumoin was a genuine whistle-blower. This was not a case of retaliation following a report of possible misconduct, but instead a disagreement regarding work matters which was properly addressed in the context of the performance assessment process.
4. Furthermore, the non-renewal of Koumoin’s contract was not retaliatory but was based on his poor performance rating which had been reviewed and confirmed after the rebuttal process.
5. The appeal is dismissed.

Facts and Procedure

6. In January 2003, Koumoin commenced a one-year 200-series project appointment (L-5 level) with the United Nations Office for Project Services (UNOPS) as a Regional Coordinator in Dakar, Senegal. In 2004, this appointment was renewed for a year. In February 2005, it was extended until 30 June 2005. After Koumoin’s position was transferred to the United Nations Development Programme (UNDP), Bureau of Development Policy (BDP), Global Environmental Facility (GEF), his appointment was extended until 30 June 2006. The appointment continued through a series of sequential extensions until 31 December 2006 to allow completion of the review of Koumoin’s rebuttal of his Results and Competency Assessment (RCA) rating for 2005.

7. On 9 March 2006, Koumoin and his immediate supervisor signed Koumoin's RCA for the year 2005. He received a rating of "partially met expectations". According to the RCA Guidelines, the staff member initiates the RCA process by completing a self-assessment and the staff member's supervisor conducts an assessment. Following such review and assessment, the supervisor recommends a performance rating to the UNDP Career Review Group (CRG), consisting of "one or more groups of managers in each office/unit who are responsible for the way staff are managed". The staff member's performance during the relevant period is reviewed by the CRG, taking into account the staff member's comments and any circumstances beyond the staff member's control which may impact on his/her performance. The staff member's performance is also compared to the performance of others at comparable posts and grades. Ultimately, the CRG makes a final recommendation confirming or modifying the supervisor's performance rating of the staff member's performance. The staff member has a further right to rebut the performance rating before a Rebuttal Panel.

8. On 16 March 2006, Koumoin met with the GEF Executive Director and the Deputy Executive Coordinator to discuss his performance rating and his concerns with his immediate supervisor. On 23 March 2006, Koumoin was notified that his appointment would expire on 30 June 2006.

9. On 30 March 2006, Koumoin filed a complaint with the UNDP Harassment Focal Point, Office of Human Resources, Bureau of Management (OHR/BOM), UNDP and a request for an "Ethics/Administrative review". Koumoin alleged that following his refusal to act unethically on behalf of his supervisors, he had become a victim of retaliation, had received a poor performance rating and that his appointment with the UNDP had not been renewed. By a letter dated 2 April 2006 to the Director, Energy and Environment Group, BDP, Koumoin requested a suspension of the decision not to renew his appointment claiming that the non-renewal decision was retaliatory. On 21 April 2006, the Human Resources Business Advisor, BDP, informed Koumoin of the procedures for suspension of action and administrative review. On 22 April 2006, Koumoin filed a request for administrative review of the decision not to renew his appointment.

10. On 4 May 2006, the Director, OHR/BOM, UNDP advised Koumoin that his report of alleged harassment and discrimination concerned work-related issues and did not constitute

allegations of harassment falling within the purview of the UNDP Policy on Workplace Harassment, Sexual Harassment and Abuse of Authority.

11. On 31 May 2006, the CRG held a second meeting regarding Koumoin's performance rating, and on 9 June 2006, a third meeting. The CRG reviewed the documentation submitted by Koumoin, and confirmed the rating of "partially met expectations". On 19 June 2006, Koumoin filed a rebuttal of his performance rating.

12. On 21 June 2006, Koumoin made allegations of misconduct against his supervisor to the UNDP Office of Audit and Performance Review (OAPR). On 22 June 2006, Koumoin was placed on Special Leave with Full Pay (SLWFP). On 21 July 2006, Koumoin was advised by the OAPR that "they [had] found no evidence" to support Koumoin's allegations against his supervisor.

13. On 27 June 2006, the CRG had a fourth meeting to give Koumoin the opportunity to personally present his case. During the following weeks he twice presented additional documents at the CRG's request. Koumoin also presented his allegations of harassment to the CRG, and supplied further information pursuant to the CRG's request. On 28 June 2006, the CRG held a final meeting to confirm the rating of "partially met expectations". In August 2006, Koumoin signed the CRG's comments in respect of the review. In September 2006, Koumoin requested the OHR/BOM, UNDP to re-open his harassment case and OHR/BOM, UNDP dismissed his request.

14. On 7 December 2006, the Rebuttal Panel upheld the performance rating of "partially met expectations". By a letter dated 18 December 2006 from OHR/BOM, UNDP, Koumoin was informed of the Rebuttal Panel's decision and was advised that his separation from service of UNDP would be effective 31 December 2006.

15. By letter dated 9 January 2007, OHR/BOM, UNDP informed Koumoin that his request for administrative review did not reveal any basis for reversal of the decision not to renew his appointment. On 6 February 2007, Koumoin filed a statement of appeal with the Joint Appeals Board (JAB) contesting the non-renewal of his appointment.

16. On 4 September 2007, Koumoin requested the United Nations Ethics Office to review his case of whistle-blower retaliation. The United Nations Ethics Office advised that it could only review allegations of whistle-blower retaliation after the UNDP Ethics Office had

conducted a review. Koumoin then sought a review of his case from the UNDP Ethics Office. The UNDP Ethics Office found that there was no evidence of retaliation from management and that Koumoin had been fully afforded due process. The United Nations Ethics Office, in its capacity as Chair of the United Nations Ethics Committee, and following consultation with the members of the Committee, decided not to undertake an independent review of Koumoin's case.

17. On 18 June 2008, the JAB issued its report. It concluded that Koumoin had failed to provide clear and convincing evidence that the decision in question was ill-motivated; that the Respondent had submitted an adequate record detailing the issues concerning Koumoin's performance and justifying his performance rating; and decided not to make any recommendations. On 14 August 2008, Koumoin was informed that the Secretary-General had endorsed the JAB's report and its conclusions.

18. On 31 August 2009, Koumoin filed an application before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal). On 7 June 2010, the UNDT issued Judgment No. UNDT/2010/105. The Judgment dismissed Koumoin's application challenging the decision of the UNDP not to renew his appointment beyond 31 December 2006 on the grounds of non-performance. The UNDT concluded that the non-renewal of Koumoin's appointment was a legitimate and proper exercise of the Organization's discretion; that UNDP had correctly followed the performance appraisal procedures; and that Koumoin's rights to whistle-blower protection had not been violated.

19. On 26 July 2010, Koumoin filed an appeal with the Appeals Tribunal. Because the appeal failed to comply with the page limitation requirements pursuant to Article 8(2)(a) of the Statute of the Appeals Tribunal, he was granted an extension to re-file the appeal to comply with the page limitation requirements. On 2 August 2010, Koumoin resubmitted the appeal. On 6 August 2010, Koumoin submitted a motion requesting interim relief. On 23 August 2010, the Appeals Tribunal dismissed the motion. On 16 September 2010, the Secretary-General filed his answer.

Submissions and Considerations

20. Before we set out to examine the contentions raised in this appeal, we must be clear about the basic legal position. What is the extent to which project personnel, holding a

200-series temporary fixed-term appointment at the L-5 level, which does not carry any expectancy of renewal (former Staff Rule 204.3(d), can successfully challenge an administrative decision not to renew an appointment? Separation as a result of expiration of a fixed-term appointment takes place automatically, without prior notice, on the expiration date specified in the letter of appointment.

21. Koumoin challenged the administrative decision of non-renewal of his appointment before the UNDT. His plea was that the decision was based on his 2005 performance appraisal, having only “partially met expectations”. According to Koumoin, his supervisor gave him this rating in retaliation of his refusal to act unethically. The decision was based on bias, prejudice, discrimination and improper motives.

22. The UNDT found that Koumoin was afforded a fair review of his performance rating for 2005. The CRG met five times before confirming the rating, which was later upheld by the Rebuttal Panel. His right of protection from retaliation was not violated by the United Nations or UNDP Ethics Offices. The allegations of discrimination, harassment, and retaliation were not substantiated.

23. On appeal, Koumoin has raised several pleas, in paragraphs (a) to (x) of the appeal form, and under each paragraph, he claims compensation equal to three to ten years of pensionable salary (a total amount of about 154 years). Koumoin in particular alleges that the Dispute Tribunal failed to exercise its jurisdiction; that it erred on fundamental questions of law (interpretation of law) and/or fact (related to evidentiary issues) resulting in a manifestly unreasonable decision; and that it erred in procedure such as to affect the decision of the case. The remaining grounds of appeal raised by Koumoin are insignificant.

24. Therefore, if we find that the rating that Koumoin received was a measure of retaliation, we would be required to examine if this action of the supervisor led to the non-renewal decision and, in the affirmative, rescind the decision. The crux of Koumoin’s case is that he has been a victim of retaliation for whistle-blowing against his supervisor.

25. This is the appropriate stage to briefly summarize the Secretary-General’s Bulletins on “Protection against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorized Audits or Investigations” (ST/SGB/2005/21) and on the Ethics Office (ST/SGB/2005/22).

26. Protection against retaliation is provided in the detailed guidelines contained in ST/SGB/2005/21. Under ST/SGB/2005/21, retaliation means “any direct or indirect detrimental action recommended, threatened, or taken because an individual engaged in an activity protected by the present policy”. To be entitled to protection, the staff member has to comply with the duty to report any breach of the Organization’s regulation and rules in good faith, or the duty to cooperate in good faith with duly authorized audits or investigations. The Administration bears the burden of proving by clear and convincing evidence that it would have taken the same action absent the protected activity.

27. Once retaliation has been reported to the Ethics Office, certain procedural steps are taken. After receiving the complaint of retaliation, a preliminary review is conducted of the complaint to determine “if (i) the complainant engaged in a protected activity; and (ii) there is a prima facie case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation”. The preliminary review is to be completed within 45 days of receiving the complaint of retaliation. If the Ethics Office finds that there is a credible case of retaliation or threat of retaliation, it will refer the matter in writing to the Office of Internal Oversight (OIOS) for investigation and immediately notify the complainant in writing that the matter has been referred. Pending the investigation, the Ethics Office may recommend that the Secretary-General take appropriate measures to safeguard the interests of the complainant, including temporary suspension of the action reported as retaliatory.

28. The Ethics Office, established through ST/SGB/2005/22, reports directly to the Secretary-General. The Ethics Office provides annual reports to the Secretary-General, and through him, to the General Assembly. The objective of the Ethics Office is to assist the Secretary-General in ensuring that all staff members observe and perform their functions consistent with the highest standards of integrity required by the Charter of the United Nations. Safeguards against retaliation are also provided by ensuring that no staff member shall be subject to reprisals for bringing a matter to the attention of the Ethics Office or providing information to it.

29. The Ethics Office may well find that there is no credible case of retaliation, but if it is a case of an interpersonal or managerial problem, then of course the matter would be dealt with differently by advising the complainant about the Ombudsman, and other informal means of conflict resolution (Section 5.8 of ST/SGB/2005/21) or about the Management Performance Board (Section 5.9 of ST/SGB/2005/21). The guidelines also provide how the

person who suffered retaliation has to be protected and how the person who engaged in retaliation is to be dealt with. The guidelines are detailed and comprehensive but make no specific mention of whistle-blowers.

30. The term whistle-blower has not been defined, but in common parlance means someone who reports an act of wrongdoing on the part of a colleague in his department, to the higher authorities. The Appellant is claiming to be a whistle-blower, but what he really means is that he is victim of retaliation because he is a whistle-blower.

31. In this case, the Appellant claimed that he had refused to take unethical steps on behalf of his supervisors and that as a result of this he became a victim of retaliation leading to a poor performance assessment and ultimately the non-renewal of his appointment. It appears from the record that Koumoin first reported the alleged misconduct in March 2006, shortly after his 2005 performance appraisal was completed and he was informed of the non-renewal of his contract.

32. Koumoin's allegations of alleged misconduct by his superiors were investigated by OPAR. In July 2006, OPAR informed Koumoin that it found no evidence to support the allegations. Koumoin's complaint of retaliation in connection with his 2005 performance appraisal and subsequent non-renewal of contract was investigated by the UNDP Ethics Office, which found that there was no evidence that he was subject to retaliation. In an e-mail to Koumoin dated 19 April 2008, the Head of UNDP Ethics Office stated that there was "ample evidence to conclude that you disagreed with management on substantive issues ... Such disagreements do not constitute wrong-doing *per se*, and nothing in the case file suggests that you reported wrong-doing or breach of regulations or rules to anyone in the organization, including senior management".

33. There is no evidence to suggest that the investigations which were carried out by OPAR and the UNDP Ethics Office were not conducted in a professional manner or there was a failure to properly investigate the allegations of misconduct and retaliation. The UNDT observed that it could find no evidence that Koumoin reported retaliation to the competent authorities before he was informed that his contract would not be extended. Further, there was no evidence to substantiate the allegations that he denounced his supervisors of unethical behaviours or attempts on their part to pressurize him from taking unethical steps.

34. In the present case, save for the Appellant's bald assertion of retaliation, we find no evidence to show that he was a genuine whistle-blower. This was not a case of retaliation following a report of possible misconduct, but instead a disagreement between the Appellant and management regarding work matters which was properly addressed in the context of the performance assessment process. The appeal fails to put forward persuasive arguments that there are any grounds for this Tribunal to find that the UNDT made any errors in finding that Koumoin's right to protection from retaliation was not violated, that the rating of "partially met expectations" in his performance appraisal was retaliatory or that the non-renewal of contract was likewise retaliatory.

35. The next question to be considered is whether the Appellant was unjustifiably given the "partially met expectations" rating for 2005. According to the Appellant, his previous two reports for 2003 and 2004 were outstanding and "exceeding performance expectations". The Appellant was not informed of his shortcomings during 2005, his supervisor did not prepare a development plan for him to improve. The Appellant has relied on the ruling of UNDT in *Nogueira* where it was observed:

The Tribunal finds it curious that the Applicant, who was appraised as fully meeting expectations in Montreal, was suddenly, and so abruptly, considered inept in the eyes of the management of UNEP. The Respondent's submissions do not offer an explanation on how this came to be.¹

36. In *Nogueira*, the UNDT went on to hold that the Secretary-General's discretion not to renew a fixed-term contract was not unfettered. *Nogueira* was awarded compensation equivalent to 24 months' net base pay for moral, financial, and professional losses he suffered on account of non-renewal of contract.

37. But the present case is a lot different. *Nogueira* had complained of harassment but not as whistle-blower. Whereas the Appellant claims harassment on account of being a whistle-blower, though a pseudo one. In *Nogueira's* case, the Tribunal expressly found that he had not been fairly appraised, and the decision of non-renewal on the grounds of performance could not be sustained. Whereas in the Appellant's case the decision of non-renewal was based on poor performance, the Appellant's performance appraisal had gone through five reviews by the CRG whereupon the rating was confirmed. The Appellant also

¹ *Nogueira v. Secretary-General of the United Nations*, Judgment No. UNDT/2009/088, para. 156.

had an opportunity to challenge his performance rating through the rebuttal process. The Appellant's case is quite clearly distinguishable from Nogueira's case.

38. Before concluding, we may reiterate that in the ultimate analysis what has to be seen is whether the discretion not to renew the Appellant's 200-series contract was validly exercised. We find no reasons to hold otherwise. Having considered the record of the case, we find that the non-renewal of the Appellant's contract was not retaliatory but based on his performance rating which had been reviewed and confirmed after a rebuttal opportunity was given to the Appellant.

Judgment

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

Original and Authoritative Version: English

Dated this 11th day of March 2011 in New York, United States.

(Signed)

Judge Garewal, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 19th day of April 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar