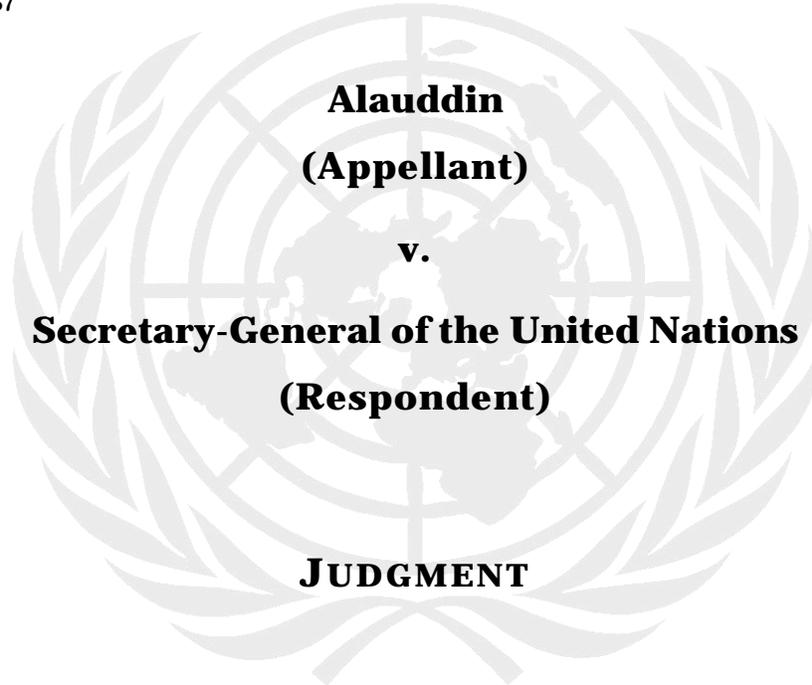




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Case No. 2010-187



**Alauddin  
(Appellant)**

**v.**

**Secretary-General of the United Nations  
(Respondent)**

**JUDGMENT**

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Before:	Judge Sophia Adinyira, Presiding Judge Kamaljit Singh Garewal Judge Luis María Simón
Judgment No.:	2011-UNAT-181
Date:	21 October 2011
Registrar:	Weicheng Lin

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Counsel for Appellant:	Stephen Goldstein
Counsel for Respondent:	Stéphanie Cartier

**JUDGE SOPHIA ADINYIRA**, Presiding.

### **Synopsis**

1. In the underlying Judgment No. UNDT/2010/200, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) determined that it would not be appropriate to order the reinstatement of Mr. Alauddin, due to the fact that: firstly, Mr. Alauddin's probable period of employment, had the United Nations Development Programme (UNDP) offered him another appointment beyond 31 December 2007, would have ended in November 2008; and secondly, under the rules of UNDP and the policy of the Government of Pakistan, as explained in a 16 June 2009 communication, there was a general restriction of five years for such appointments.

2. The United Nations Appeals Tribunal (Appeals Tribunal) finds that Mr. Alauddin's argument about the accuracy of the communications from the Pakistani Government of 16 June 2009 does not establish any errors of law or fact that warrant a reversal of the UNDT's conclusions regarding his probable period of employment.

3. On the issue of compensation, we find that the UNDT correctly assessed the compensation for pecuniary damages at an amount that puts Mr. Alauddin in the position that he would have been in, had he been reinstated.

4. The appeal is dismissed. The UNDT Judgment is affirmed.

### **Facts and Procedure**

5. Mr. Alauddin was appointed as Assistant Resident Representative/Chief, Environment Unit, in the UNDP Country Office in Pakistan on 21 November 2003 for an initial period of three months and his contract was extended each year until 31 December 2007.

6. On 17 September 2007, Mr. Alauddin was advised that his contract would not be extended beyond 31 December 2007. On 16 November 2007, Mr. Alauddin filed a request for administrative review of the decision not to renew his contract and claimed that his non-renewal was arbitrary and in retaliation for the fact that he had raised issues of wrongdoing in UNDP's Country Office in Pakistan. Mr. Alauddin subsequently filed requests for

suspension of action on 19 December 2007, 11 February 2008 and 23 May 2008. On 16 June 2008, Mr. Alauddin was placed on special leave without pay, enabling him to assume a position with the Pakistani Government for one year from 1 July 2008 to 30 June 2009. Following the implementation of the new United Nations internal justice system, Mr. Alauddin's filings in front of the Joint Appeals Board (JAB) were transferred to the Dispute Tribunal.

7. On 16 June 2009, UNDP, following a request for clarification submitted to the Pakistani Government regarding its deputation policy, was informed that “an officer cannot be sent on deputation [a] second time unless he has completed three years service in his parent department after return from an earlier deputation”. On 5 August 2009, UNDP informed Mr. Alauddin that in order to return to UNDP he first needed to resign from the Pakistani Government.

8. On 1 September 2009, counsel for Mr. Alauddin informed UNDP that he had started the process of resigning with a view to being reintegrated into UNDP. On 3 December 2009, UNDP extended the deadline by which Mr. Alauddin had to resign from his government and on 7 January 2010, Mr. Alauddin was informed that he had to return to UNDP by 1 February 2010 with the required governmental acceptance of his resignation or he would be separated effective 31 January 2010.

9. On 16 April 2010, the UNDT, following a directions hearing on 19 February 2010, issued Order No. 73 rejecting the Secretary-General's 1 March 2010 application for summary judgment. On 25 June 2010, the UNDT issued Judgment No. UNDT/2010/114 in which it found that the Secretary-General was in breach of his contractual obligations towards Mr. Alauddin. However, due to the impending end of his judicial term, Judge Adams ordered that the question of compensation be determined by a separate Judge.

10. On 19 November 2010, the UNDT issued Judgment No. UNDT/2010/200 in which it found that Mr. Alauddin's “contract would have been renewed for the period from 1 January 2008 to November 2008 but for the contractual breach and therefore awards compensation for that period. The Tribunal awards compensation for moral harm of USD 30,000”.

11. On 19 January 2011, Mr. Alauddin appealed Judgment No. UNDT/2010/200. On 11 March 2011, the Secretary-General filed his answer.

### **Submissions**

#### **Mr. Alauddin's Appeal**

12. Mr. Alauddin submits that the UNDT erred on a matter of law and fact in not ordering his reinstatement, stating that it was based on “(i) the incorrect application of rules regarding ‘secondment’, and (ii) it relied upon factually incorrect and [a] fraudulently obtained statement of Pakistani policy regarding deputation...”.

13. Mr. Alauddin contends that contrary to the United Nations General Assembly Memorandum dated 18 April 1993 which defines secondment as a tripartite relationship, he had a bilateral agreement with the Pakistani Government and a separate bilateral agreement with UNDP. Consequently, due to the fact that there was “no privity of contract whatsoever between the UNDP and the Pakistani Government” no tripartite agreement had been entered in between the parties.

14. Similarly, Mr. Alauddin contends that his recruitment did not follow UNDP’s “Secondment of government officials as national officers” guidelines, nor did his offer of appointment contain any of the defining factors for a secondment.

15. Mr. Alauddin submits that the UNDT committed a “material error” when relying on a 16 June 2009 facsimile from the Pakistani Government informing UNDP that “the normal period of deputation is three years, extendable for another two years ... a second deputation is allowed as per our deputation policy only after the completion of 3 years of service in the parent Government Department”. Mr. Alauddin contends that, in addition to the fact that the facsimile refers to deputation and not secondment, per an 11 January 2011 letter from “Rukhsana Soomro, Section Officer of the Cabinet Secretariat, Establishment Division of the Government of Pakistan, which states ‘[t]here is no requirement to return to the parent department and serve for three (03) years period before availing next deputation’”.

16. Mr. Alauddin concedes “that each year he must obtain the permission of the Pakistani Government for an extension of his deputation to the UNDP” and, consequently, any rules

regarding secondment are not applicable. Mr. Alauddin therefore submits that the UNDT erred in law in applying rules regarding locally recruited staff instead of the rules applicable to fixed-term appointments.

17. Mr. Alauddin submits that seeing that the secondment rules and policy do not apply to his contract, the UNDT erred in concluding that his “contract would have been renewed for the period outstanding up to the five year limit” instead of “through April 1, 2017 (when [Mr. Alauddin] would retire at the age of 62)” and also erred in calculating his compensation for loss of salary and emoluments.

18. Mr. Alauddin seeks to be reintegrated under the original terms of his contract; compensation for the period he was not employed by UNDP; if he is not reintegrated, loss of salary and emoluments up to his age of retirement; increase in the award of compensation for non-economic loss; and reimbursement of his legal fees.

#### **Secretary-General’s Answer**

19. The Secretary-General submits that the term “secondment” as used by the Organization and “deputation” as used by the Pakistani Government refer to one and the same type of service, namely when a staff member is on leave from his or her government’s service to perform duties within the United Nations.

20. The Secretary-General submits that while the UNDT Judgment refers to the UNDP rules in calculating the limitations on the duration of Mr. Alauddin’s employment, it primarily relies on the policy information provided by the Pakistani Government from whom Mr. Alauddin conceded he had to seek permission on a yearly basis “for an extension of his deputation”. Consequently, the absence of a tripartite agreement does not result in the UNDT having erred in determining the limitations of Mr. Alauddin’s probable period of employment.

21. The Secretary-General submits that Mr. Alauddin, when stating that his deputation could have been extended beyond five years, relies on evidence which was not previously before the Dispute Tribunal and for which he did not seek, nor was he granted, leave to adduce before the Appeals Tribunal. Pursuant to Article 2(5) of the Statute of the Appeals

Tribunal, and as expressed in *Shakir*,<sup>1</sup> the Appeals Tribunal “will not admit evidence which was known to the party and could have, with due diligence, been presented to the UNDT”. In this case, Mr. Alauddin waited until 1 January 2011 to look into communications that were shared with the UNDT on 1 March 2010 and were relied upon in the 25 June 2010 and 18 November 2010 Judgments. Consequently, he “failed to exercise the necessary due diligence to raise his concerns about the 16 June 2009 communication before the Dispute Tribunal”.

22. The Secretary-General further submits that the new communication also refers to a five-year limit but notes that exceptions can be approved by the Prime Minister of Pakistan and that the UNDT therefore did not err when it decided that it was “of the opinion that [there was] evidence that extensions beyond the five years are possible, but it is far from evidence that such extensions are not exceptional”. Accordingly, the UNDT did not err in determining that Mr. Alauddin’s appointment would have ended in November 2008 and in not ordering his reinstatement.

23. The Secretary-General also contends that for Mr. Alauddin’s reinstatement to have been possible would have required the issuance of a new separate appointment beyond the 31 December 2007 expiration of his last appointment. Furthermore, had such a reinstatement been ordered, the only practical issue, under Article 10(5)(a) of the Statute of the Dispute Tribunal, is the appropriateness of the compensation ordered by the UNDT. Consequently, in ordering compensation in the amount of “net base pay (including entitlements) as if he had been renewed for the period of 1 January to 1 November 2008, less income for the same period”, the UNDT correctly applied the jurisprudence from *Warren*<sup>2</sup> as that amount would put Mr. Alauddin “in the position he would have been in had [Mr. Alauddin] been reinstated”.

24. The Secretary-General also submits that, similarly to the newly submitted e-mails regarding the deputation terms from the Pakistani Government, the contract submitted by Mr. Alauddin as evidence that his employment status resulted in him turning down other lucrative employment is new evidence that had not been previously presented in front of the

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<sup>1</sup> *Shakir v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-056.

<sup>2</sup> *Warren v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-059.

UNDT even though he had “been afforded every opportunity to provide detailed information of which he has not availed himself” and should therefore be rejected.

25. The Secretary-General requests that the Appeals Tribunal affirm the Dispute Tribunal’s Judgment in its entirety.

#### Considerations

26. Mr. Alauddin appeals the decision of the UNDT stating that it erred on questions of law and questions of fact.

27. In its Judgment, the UNDT determined that it would not be appropriate to order the reinstatement of Mr. Alauddin, due to the fact that: firstly, Mr. Alauddin’s probable period of employment, had the UNDP offered him another appointment beyond 31 December 2007, would have ended in November 2008; and, secondly, under the rules of UNDP and the policy of the Government of Pakistan, as explained in the communication dated 16 June 2009, there was a general restriction of five years which applied to such appointments.

28. Mr. Alauddin submits that the UNDT erred on a matter of law and fact in not ordering his reinstatement, stating that its conclusion was based on the incorrect application of rules regarding secondment, and also that the UNDT relied on a factually incorrect and fraudulently obtained statement of Pakistani policy regarding deputation.

29. We agree with the Secretary-General that Mr. Alauddin has failed to establish that the UNDP decision to contact the Pakistani Government directly to inquire about its deputation policy was improperly motivated.

30. Mr. Alauddin seeks to rely on a communication dated 11 January 2011 to support his submission that his deputation from the Pakistani Government could have been extended beyond the five-year limit.

31. We note that Mr. Alauddin requested this information on 1 January 2011; nearly two months after the UNDT rendered its 19 November 2010 Judgment.

32. The Secretary General correctly submits that the communication of 11 January 2011 constitutes new evidence that was not previously before the UNDT, and which he did not seek, nor was he granted, leave to adduce before this Tribunal pursuant to Article 2(5) of the Statute of the Appeals Tribunal.<sup>3</sup>

33. Article 2(5) of the Statute of the Appeals Tribunal provides in part that:

In exceptional circumstances, and where the Appeals Tribunal determines that the facts are likely to be established with documentary evidence, including written testimony, it may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings.

34. We do not find any exceptional circumstances that would require this Tribunal to receive this documentary evidence as its content would not affect the decision of the case.

35. There is no fundamental inconsistency between the two communications on the issue of the normal deputation period of five years.

36. Mr. Alauddin was on leave from government service during the period of his appointment with UNDP and he concedes that each year it was necessary for him to obtain the permission of the Pakistani Government for his deputation to the UNDP to be extended.

37. Accordingly, the UNDT did not err in taking into consideration the conditions governing Mr. Alauddin's deputation in order to determine his probable period of appointment with UNDP.

38. From the foregoing, Mr. Alauddin's arguments about the accuracy of the communications from the Pakistani Government of 16 June 2009 do not establish any errors of law or fact that warrant a reversal of the UNDT's conclusions regarding his probable period of employment.

39. Accordingly, we hold that the UNDT correctly determined that it would not be appropriate to order Mr. Alauddin's reinstatement.

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<sup>3</sup> *Abboud v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-100.

40. On the issue of compensation, we recall the decision of this Tribunal in *Warren*<sup>4</sup> that the very purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations.

41. The UNDT ordered compensation in the amount of Mr. Alauddin's net base pay with entitlements as if he had been reinstated for the period from 1 January 2008 to 21 November 2008.

42. We find that the UNDT correctly assessed the compensation for pecuniary damages at an amount that places Mr. Alauddin in the position that he would have been in had he been reinstated.

43. For the same reasons we decline to enhance the compensation for non-economic loss.

**Judgment**

44. The appeal is dismissed in its entirety. The UNDT Judgment is affirmed.

Original and authoritative version: English

Dated this 21<sup>st</sup> day of October 2011 in New York, United States.

*(Signed)*

Judge Adinyira, Presiding

*(Signed)*

Judge Garewal

*(Signed)*

Judge Simón

Entered in the Register on this 2<sup>nd</sup> day of December 2011 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar

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<sup>4</sup> *Warren v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-059.