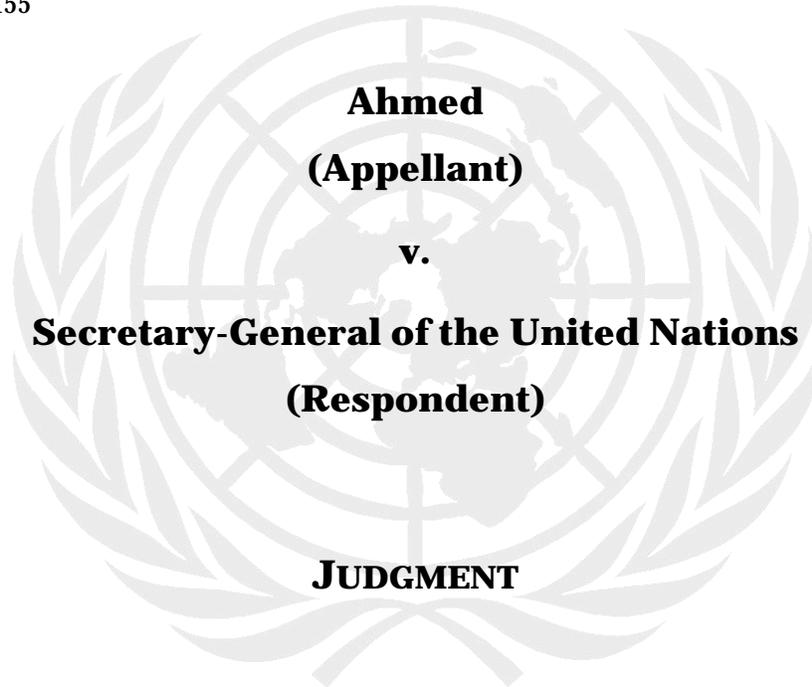




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-155



**Ahmed
(Appellant)**

v.

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

JUDGMENT

Before: Judge Sophia Adinyira, Presiding
Judge Luis María Simón
Judge Jean Courtial

Judgment No.: 2011-UNAT-153

Date: 8 July 2011

Registrar: Weicheng Lin

Counsel for Appellant: Salim U. Shaikh

Counsel for Respondent: Melanie Shannon

JUDGE SOPHIA ADINYIRA, Presiding.

Synopsis

1. Under Article 8(1)(c) of the Statute of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), the jurisdiction of the UNDT can only be invoked if a contested administrative decision has been previously submitted for management evaluation. The remedy sought by Amin Ahmed (Ahmed) before the UNDT was the rescission of the decision not to renew his fixed-term appointment for poor performance.
2. Accordingly, the UNDT did not err in limiting the scope of his application to the non-renewal of his fixed-term appointment.
3. We affirm the decision of the UNDT that Ahmed's adverse performance appraisals constituted a proper basis for the non-renewal of his fixed-term appointment.

Facts and Procedure

4. Ahmed joined the United Nations Information Centre (UNIC) in Islamabad, Pakistan, in 1985 as an Information Assistant at the G-6 level. In 1993, his title changed to National Information Officer. From 1 January 1999 to 31 December 2005, Ahmed received successive extensions of his fixed-term appointment.
5. Starting in January 2004, Ahmed and his supervisor, the Director of UNIC, exchanged a series of communications concerning the new tasks that had been assigned to Ahmed. The communications contained accusations by both parties of, inter alia, unprofessional behaviour, lack of cooperation, and sabotage.
6. In his 2004-2005 Performance Appraisal System (PAS) report, Ahmed received an overall performance rating of "does not meet performance expectations", which he had also received for the previous 2003-2004 PAS reporting cycle.
7. On 20 April 2005, Ahmed filed a rebuttal to both of his PAS reports. In his rebuttal letter and subsequent communications to the Executive Officer of the Department of Public Information (DPI), Ahmed alleged that his supervisor had isolated various staff members, including Ahmed, to cover up "financial irregularities, mismanagement and corruption" at UNIC. Ahmed also claimed that his supervisor had

hidden fraudulent invoices and quotations, and did not follow proper procedures when engaging contractors.

8. An investigation into Ahmed's claims conducted by the Office for Budget and Finance of the United Nations Development Programme (UNDP) in Pakistan found that there was no evidence to substantiate the allegations.

9. On 1 September 2005, the Chief, Information Centre Services (ICS), DPI, informed Ahmed about her concerns regarding his performance. He was further informed that following the review of his contract, effective 1 October 2005, his contract would be extended on a monthly basis.

10. On 12 December 2005, Ahmed was informed that the PAS Rebuttal Panel had completed its review of his case and recommended that the ratings for both reporting cycles remain unchanged.

11. On 30 December 2005, Ahmed was informed by the Office of Human Resources Management (OHRM) that his appointment would not be renewed beyond its expiration on 31 December 2005 and that he would be paid three months salary in lieu of notice in recognition of his 19 years of service to the Organization. That same day, Ahmed was prevented from entering the UNIC premises.

12. Ahmed challenged the non-renewal decision before the Joint Appeals Board (JAB), which adopted its report on 26 October 2007. The JAB made no recommendation in support of Ahmed's appeal. The Secretary-General agreed with the JAB's findings and recommendation. On 17 December 2007, Ahmed was informed of the Secretary-General's decision.

13. On 11 April 2008, Ahmed filed an application with the former Administrative Tribunal. The former Administrative Tribunal did not dispose of the appeal before its abolishment and the appeal was transferred to the UNDT as of 1 January 2010.

14. On 9 September 2010, the UNDT rendered Judgment No. UNDT/2010/161. It found no basis to support Ahmed's allegation that his due process rights had been violated. In particular, it found that the non-renewal decision was taken in accordance with the relevant procedures, and that there was no retaliation against him for bringing

to the Administration's attention his allegations of financial fraud and misconduct. It concluded that Ahmed's allegations were properly investigated and were found to be lacking in substance. Accordingly, the UNDT dismissed Ahmed's application in its entirety.

15. Ahmed appeals the UNDT Judgment.

Submissions

Ahmed's Appeal

16. Ahmed asserts that the UNDT failed to properly consider his allegations and evidence, and improperly applied the former staff rules concerning the non-renewal of his appointment. Ahmed alleges that the impugned UNDT Judgment contains several factual and procedural errors.

17. Ahmed submits that the UNDT Judgment was based on the misleading submissions of the Secretary-General and the JAB Report which, he alleges, contained factual misrepresentations. He claims that the UNDT failed to consider all the relevant information. In this regard, Ahmed emphasizes that UNDT Order No. 233 directed the parties to provide information only on 8 September 2010, one day before the issuance of the UNDT Judgment, which implies that the UNDT Judgment had already been completed. Further, several submissions filed by the Secretary-General on 8 September 2010 were indecisive and evasive.

18. Ahmed submits that the UNDT erred in finding that the scope of his application was limited to the decision contested in his request for administrative review, namely the non-renewal of his fixed-term appointment. He contends that the UNDT failed to consider the Administration's decision not to investigate his conduct following the comments made in his PAS. Ahmed's complaints and the un-investigated allegations concerning his conduct and behaviour formed the basis of his negative PAS and the decision not to renew his fixed-term appointment.

19. Ahmed requests leave to present evidence on the integrity and credibility of Eric Falt, Director of UNIC, Islamabad, and his successor, Tetsuo Ohno. Ahmed alleges

that his PAS ratings and the non-renewal of his appointment were the result of prejudice and ill intentions of those two supervisors.

20. Ahmed reiterates his allegations of corruption and financial fraud in the UNIC Islamabad Office. He submits that he had been denied access to the reports of the Office of Internal Oversight Services (OIOS) on the investigations into his allegations and requests that the Appeals Tribunal order the production of those reports.

21. Ahmed further submits several claims in relation to the ending of his appointment, in particular that he had not been informed beforehand that his fixed-term appointment would not be extended beyond 31 December 2005; that his human rights were violated when he was prevented from entering the United Nations Office after the expiry of his fixed-term appointment; that he was placed on special leave with pay without the institution of disciplinary proceedings; that it was unclear what the status of his appointment was between 1 January to 31 March 2006; that no formal Personnel Action Form had been issued to him after the expiry of his appointment; and that he had not received payments related to his severance and accrued annual leave which he was entitled to.

22. Ahmed requests the Appeals Tribunal to rescind the decision of the Secretary-General not to extend his appointment; to reinstate him in his original position with all benefits effective 1 April 2006; to protect him from the retaliatory acts of the Secretary-General in compliance with ST/SGB/2005/21, also known as the Whistle Blower Policy; and to order payment of compensation in the amount of 36 months' net base salary for irreparable damages to his dignity, integrity, career and for "mental and emotional torture".

Secretary-General's Answer

23. The Secretary-General maintains that the UNDT correctly concluded that, under the former Staff Rules 104.12(b)(ii) and 109.7(a), Ahmed had no expectancy of renewal of his fixed-term appointment. He submits that the UNDT correctly concluded that there were no countervailing circumstances or improper motives and that therefore Ahmed had no right to a renewal of his appointment.

24. The Secretary-General also submits that the UNDT correctly concluded that Ahmed's adverse performance appraisals constituted a proper basis for the non-renewal of his appointment. Under Section 10.5 of ST/AI/2002/3, when a staff member on a fixed-term appointment is given the lowest appraisal rating, the Administration is entitled not to renew the staff member's appointment on the ground of under-performance alone; and the UNDT correctly held that Ahmed's adverse performance appraisals were not based on retaliation or other improper motives.

25. The Secretary-General contends that Ahmed's request for an order directing the Secretary-General to produce the OIOS reports is not in accordance with the Statute of the Appeals Tribunal.

26. The Secretary-General also contends that the UNDT correctly concluded that the conduct of Ahmed's performance appraisal did not violate his due process rights. He emphasizes that Ahmed's poor performance had not been considered as misconduct and therefore did not warrant the institution of disciplinary proceedings. Ahmed's supervisors correctly determined that his performance was a management issue and concluded that it did not warrant the institution of disciplinary proceedings. The Secretary-General stresses that it is within the discretion of the Administration to decide whether to conduct an investigation or not.

27. The Secretary-General submits that Ahmed has not established any error warranting the reversal of the UNDT Judgment. He contends that Ahmed's assertions that the UNDT erred in determining the scope of its jurisdiction are not sustainable. He contends that Ahmed's claims that the UNDT erred on questions of procedure are unsubstantiated. Finally, he contends that Ahmed's claims that the UNDT erred in fact are either unsustainable or insufficient to warrant a reversal of the UNDT Judgment.

28. The Secretary-General requests that the appeal be dismissed in its entirety.

Considerations

Preliminary Issue

29. Ahmed requests the production of the OIOS reports and leave to present evidence on the credibility of his supervisors whose prejudice and ill intentions, he maintains, influenced his PAS ratings and the decision not to renew his appointment.

30. We note that, under Article 8(1) of its Statute, the Appeals Tribunal may “order production of documents or such other evidence as it deems necessary, subject to Article 2 of the present statute”.

31. Article 2(5) of the Statute of the Appeals Tribunal provides that in exceptional circumstances, this Tribunal “may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings”.

32. As in *Calvani* and *Bertucci* we reiterate that this Tribunal has discretionary authority in the conduct of the proceedings and the production of documents and evidence in the interest of justice for the purpose of achieving a fair and expeditious disposal of a case.¹

33. We do not have sufficient reason to consider it pertinent to order the production of documents and call additional evidence. The request is therefore rejected.

Substantive Issues

Scope of Jurisdiction

34. Ahmed submits that the UNDT failed to consider the Administration’s decision not to investigate his conduct following the comments made in his PAS. He claims that his complaints and the un-investigated allegations concerning his conduct and behavior formed the basis of his negative PAS and the decision not to renew his fixed-term appointment.

¹ *Calvani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-032; *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-121.

35. Ahmed accordingly submits that the UNDT erred in finding that the scope of his UNDT application was limited to the non-renewal of his fixed-term appointment.

36. We find no merit in Ahmed's submission. Ahmed's poor performance cannot be considered as misconduct to warrant the institution of disciplinary proceedings, though it may be the basis for the non-renewal of his fixed-term appointment. However, it should be noted that refusal or failure to carry out one's duty may in certain circumstances amount to misconduct.²

37. Under Article 8(1)(c) of the UNDT Statute, the jurisdiction of the UNDT can only be invoked if a contested administrative decision has been previously submitted for management evaluation.

38. The remedy sought by Ahmed before the UNDT was a rescission of the decision not to renew his fixed-term appointment for poor performance. Accordingly, the UNDT did not err in limiting the scope of his application to the non-renewal of his fixed-term appointment.

Contested Administrative Decision

39. Ahmed requests that this Tribunal rescind the decision of the Secretary-General not to renew his fixed-term appointment.

40. Former Staff Rule 104.12(b)(ii) provides that "[t]he fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment". Former Staff Rule 109.7(a) reads that "[a] temporary appointment for a fixed term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment".

41. Administrative instruction ST/AI/2002/3 entitled "Performance Appraisal System" provides, in Section 10.5, that "[a] rating of 'does not meet performance expectations' may lead to a number of administrative actions, such as transfer to a

² Cf. *Abu Hamda v. Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-022.

different post or function, the withholding of a within-grade increment..., the non-renewal of a fixed-term contract or termination for unsatisfactory service”.

42. Under the above rules Ahmed, who was on a fixed-term appointment, did not have an expectancy of renewal of his appointment. Furthermore the rating of “does not meet performance expectations” was a valid reason for the non-renewal of his fixed-term appointment.

43. Ahmed requests the Appeals Tribunal to rescind the decision of the Secretary-General to “terminate” his appointment and to re-instate him to his former position with, among other reliefs, all benefits. The Secretary-General submits that Ahmed has not established any errors warranting the reversal of the UNDT Judgment.

44. In *Sanwidi*, this Tribunal held that

[a]dministrative tribunals worldwide keep evolving legal principles to help them control abuse of discretionary powers. There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reasons interfere with the exercise of administrative discretion.³

45. It is recognized that, if based on valid reasons and in compliance with procedural requirements, fixed-term appointments may not be renewed. Accordingly, an administrative decision not to renew a fixed-term appointment can be challenged as there is a duty and requirement on the Organization to act fairly, justly, and transparently in its dealings with the staff members.

46. In that respect, if the Administration gives a staff member a legitimate expectancy of renewal of his or her fixed-term appointment, then that may be a good reason for the Tribunal to interfere with the non-renewal decision on the grounds of unfairness and unjust dealing with the staff member. Similarly where a decision of non-renewal does not follow the fair procedure or is based on improper grounds, the Tribunal may intervene.

³ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084.

47. We concur with the former Administrative Tribunal which held that, unless the Administration has made an “express promise ... that gives a staff member an expectancy that his or her appointment will be extended”, or unless it abused its discretion, or was motivated by discriminatory or improper grounds in not extending the appointment, the non-renewal of a staff member’s fixed-term appointment is not unlawful.

48. The UNDT applied the above standard and came to the conclusion that there were no countervailing circumstances or improper motives in the non-renewal decision of Ahmed’s fixed-term appointment.

49. We thus affirm the decision of the UNDT that Ahmed’s adverse performance appraisals constituted a proper basis for the non-renewal of his appointment.

50. Ahmed made other assertions which do not merit any reasoned opinion, as they are ill-founded, and we have the discretion to summarily dismiss them.

Judgment

51. The appeal is dismissed. The Judgment of the UNDT is affirmed.

Original and Authoritative Version: English

Dated this 8th day of July 2011 in Geneva, Switzerland.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Simón

(Signed)

Judge Courtial

Entered in the Register on this 29th day of August 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar