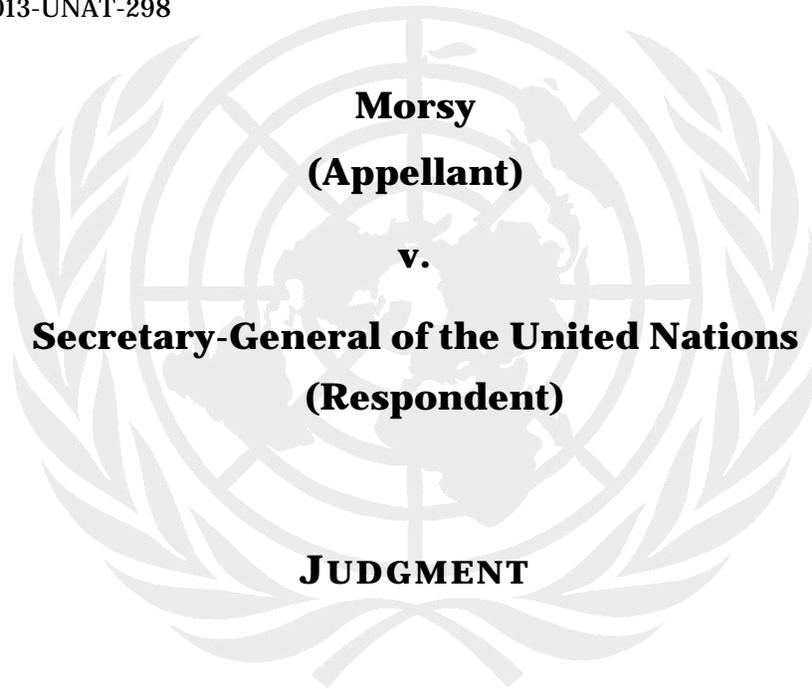




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-298



Before:	Judge Rosalyn Chapman, Presiding Judge Luis María Simón Judge Inés Weinberg de Roca
Case No.:	2012-330
Date:	28 March 2013
Registrar:	Weicheng Lin

Counsel for Appellant:	George Irving
Counsel for Respondent:	Amy Wood

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Mohamed-Alaadin Morsy against Judgment No. UNDT/2012/043, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 30 March 2012 in the case of *Morsy v. Secretary-General of the United Nations*. The Appellant appealed to the Appeals Tribunal on 29 May 2012, and the Secretary-General answered on 27 July 2012.

Facts and Procedure

2. Most of the factual findings by the UNDT are not disputed by either party:¹

... On 20 September 2005, [Mr. Morsy] transferred ... to the [United Nations Population Fund (UNFPA)] as the Director of the Division for Arab States, Europe and Central Asia [(Division)], at the D-2 level. At that time, the [Appellant] had 30 years of professional work experience and had been invited to apply by Ms. Thoraya Obaid, then UNFPA Executive Director. His immediate reporting officer at UNFPA was Mr. Kunio Waki, Deputy [Executive] Director.

... Ms. Obaid became concerned about the [Appellant's] performance in the first half of 2006. While some discussions took place, these were undocumented and the [Appellant] did not receive any formal performance management assistance or a performance improvement plan.

... In May 2006, Ms. Obaid wrote to the Executive Committee, which [was] comprised of senior staff and Directors of UNFPA, asking them to complete the outstanding [Performance and Appraisal Development (PAD)] reports in two weeks.

... The [Appellant] neither initiated his PAD nor was it enforced by Mr. Waki. He reported regularly to Ms. Obaid and completed many mission reports, but did not receive any feedback on these. ...

... Between 24 and 27 November 2006, a [Division] regional planning meeting was held in Sofia, Bulgaria. As a Regional Director, the [Appellant] was among those responsible for leading the meeting. Ms. Obaid also attended and ... observed with concern the way the [Appellant] conducted it. She spoke to several staff members from the Division, some of whom approached her in private. They complained about the [Appellant's] management style. ...

¹ The following facts are taken from Judgment No. UNDT/2012/043, paragraphs 6–84.

...
... Ms. Obaid decided, as a preliminary measure, to change the [Appellant's] reporting arrangements and functions. In an email to him of 8 December 2006, she advised him that, "[i]n the light of serious management issues" brought to her attention, and "pending the outcome of a management review of [the Division], all decisions and relevant transactions under the Financial Regulations and Rules, as well as all actions or decisions of a sensitive political nature and all administrative decisions relating to the staff serving under the [Appellant's] authority would require her prior written approval or, in her absence, approval of one of the Deputy Executive Directors, UNFPA. Following that email, a number of related decisions were taken, which affected the [Appellant's] functions.

...
... Sometime in the fall of 2006, Ms. Obaid commissioned Ms. Heidi MacLean of the Mannet Consulting Services (Mannet), a consultancy firm, to interview [Division] staff members about the [Appellant]. Mannet had been engaged by UNFPA since at least mid-2006 as external management consultants to support, counsel, and coach senior UNFPA officers in their management skills.

... Ms. MacLean prepared a note based on her review, which included both positive and critical observations on his leadership of the Division and his style. ...

... She met with the [Appellant] on 12 December 2006 and shared her findings with him. The [Appellant] told Ms. MacLean that he needed to know who had said the negative things about him and why, so that he could address and fix the issues. The [Appellant] testified that when he asked her what would happen next, she said that he was in trouble. The Mannet note was issued and given to him on the same day.

...
... In March 2007, Ms. Obaid engaged an outside management consultant, Mr. Dieter Goethel, to carry out a fact-finding management review to establish the facts relating to the [Appellant's] management style and performance.

...
... Mr. Goethel issued his report (Consultant Report) on 11 April 2007, which said, in part:

... The Consultant would like to emphasize that he has not carried out an investigation into allegations of misconduct but that his assignment has been a fact-establishment exercise concerning [Mr. Morsy's] performance as a manager, in accordance with UNFPA's Separation Policy. The report resembles a 360° assessment which is customary in UNFPA's PAD system.

... Without prejudging the conclusions the reader of this report might draw, the Consultant is of the view that [Mr. Morsy's] performance as Director [of the Division] has not been in accordance with the requirements laid down in the job

description of his post as amplified in UNFPA's Competency Framework. The picture which emerges from the report is that of a senior manager who does not seem to be committed to UNFPA and does not have an understanding of the organization's substantive work, and whose management practices are wanting. Instead, he seems to be allured to power, prestige, privileges and perks which he believes to belong to the Director ...

...

... Mr. Hand [Director of the Division of Human Resources (DHR),] sent the [Appellant] a copy of the Consultant Report on 11 April 2007. The accompanying letter stated that the Executive Director [in light of the Consultant Report] had decided to place the [Appellant] on [special leave with full pay (SLWFP)] effective immediately ... The letter gave the [Appellant] five calendar days to provide his comments regarding the Report to the Executive Director before "a final determination concerning the matters addressed in the [R]eport" was made. ...

...

... On 8 May 2007, Mr. Hand sent an email to Mr. Waki and the [Appellant], requesting them to "go through ALL of the performance appraisal steps for 2006" (emphasis in original), stating that the "first step would be for [the Appellant] to access the PAD, draft a performance plan for 2006 for himself and identify feedback sources" ... [as] ... none of these mandatory steps had been taken by the [Appellant] or management before that date.

...

... On 18 July 2007, Mr. Waki sent the [Appellant] a draft appraisal of his performance in 2006. Mr. Waki's draft assessment of various indicators included "partially achieved", "fully achieved", "developing proficiency", and "fully proficient".

...

... The PAD evaluation for 2006 was finalised by the [Appellant] on 1 August 2007 and by Mr. Waki on 2 August 2007. The overall ratings of the [Appellant's] performance were as follows: his work plan outputs and developmental outputs were "partially achieved"; his core competencies were rated as "developing proficiency"; and his functional competencies were rated as "fully proficient".

...

... On 6 August 2007, the [Appellant] was informed by the Officer-in-Charge, DHR, that his fixed-term appointment would expire automatically on 18 September 2007 and that UNFPA would not offer him a new appointment. The letter further stated that he would remain on SLWFP in view of the upcoming expiration of his contract and to "provide [him] with time to make any necessary arrangements".

...

... The [Appellant] filed a rebuttal of his PAD evaluation on 26 August 2007 ... [and] ... submitted an updated rebuttal on 20 September 2007.

...

... On 19 September 2007, the Secretary-General agreed to ... the suspension of the decision [not to renew the Appellant's appointment] until 31 October 2007.

...

... The Rebuttal Panel interviewed 16 witnesses before issuing a report on the [Appellant's] PAD evaluation for 2006. In its report of 30 October 2007, the Panel made the following findings:

- a. There were abundant examples that corroborated the ratings. There was a strong consensus that the final ratings given by the supervisor in all areas were substantiated and correct. The Panel therefore concurred with the supervisor's PAD ratings in all areas;
- b. There were significant irregularities in the [Appellant's] performance appraisal process: the PAD report was done *post facto*, thus defeating the purpose for which it was primarily intended and hampering online feedback; there was a risk that external factors could have influenced the ratings, thus decreasing their objectivity; work plan outputs and one competency rating were revised downwards by the supervisor after discussions with the staff member had been completed - although this was within the prerogative of the supervisor, it compromised transparency; [and]
- c. The [Appellant] was not notified of poor performance until the end of 2006 and not given the opportunity to improve.

...

... The ... annual performance evaluation cycles of UNFPA commenced in April of each year and ended in March of the following year. ... [G]iven that the [Appellant] joined UNFPA in September 2005, the performance review cycle for 2006 should have commenced in April 2006 and ended in March 2007.

3. Mr. Morsy's appointment as Division Director ended on 31 October 2007, while he was on SLWFP status. Prior to his departure, he contacted the Office of Internal Oversight Services with complaints concerning the Executive Director, UNFPA, and the Director, DHR.

4. Following the end of his appointment, Mr. Morsy continued to seek review of the UNFPA Executive Director's actions by the Joint Appeals Board (JAB). On 27 March 2009, after the JAB's review was completed, the Secretary-General advised Mr. Morsy that the decision not to renew his appointment was "the final decision on the appeal".

5. On 16 November 2009, Mr. Morsy, represented by counsel, filed an application for review of the decision not to renew his fixed-term contract, and the Secretary-General filed his answer on 14 December 2009.

6. The UNDT held an evidentiary hearing on 14-16 February 2012, taking testimony from witnesses for both parties.

7. On 30 March 2012, the UNDT issued Judgment No. UNDT/2012/043, concluding that UNFPA's decision not to renew Mr. Morsy's fixed-term contract because of poor performance was lawful despite the Agency's violation of Mr. Morsy's rights during the process.² The UNDT determined Mr. Morsy had suffered mental distress, humiliation and damage to his reputation resulting from the Agency's violations of his rights but that he had not suffered any pecuniary loss from these violations. The UNDT then awarded Mr. Morsy moral damages in the amount of USD 25,000 or approximately two to three months' salary.

Submissions

Mr. Morsy's Appeal

8. The UNDT erred in concluding that the non-renewal of his appointment was lawful and also erred in making some of its factual findings, which resulted in a manifestly unreasonable decision. The series of illegal actions by the Agency show a pattern of abuse of authority resulting in the decision of non-renewal allegedly based on the Appellant's poor performance; but his performance was not poor and the true justification for the non-renewal of his appointment was suspect. Rather, as the UNDT determined in paragraph 29 of the Judgment, the decision to end the Appellant's appointment was made long before there was a fair evaluation of his performance. Moreover, the non-renewal of his appointment was a consequence of the Agency's earlier illegal decisions to limit his functions and to place him on SLWFP, both of which constructively dismissed him from his position and were the result of the Appellant's refusal to offer his resignation.

² In particular, the UNDT concluded that Mr. Morsy's rights were violated, as follows: (1) the unlawful decision of 8 December 2006 to limit his managerial reporting duties and functions, which was based on an assessment of his performance that had not been objectively reviewed under a process comparable to the PAD process; (2) the unlawful decision of March 2007 to create and implement a management review of Mr. Morsy by a process other than the PAD process, and which did not have the procedures and protections of the PAD process; and (3) the unlawful decision of 11 April 2007 to place him on SLWFP, which was made without a fair and objective evaluation of his performance.

9. The UNDT erred in concluding that the 2006 PAD report justified the non-renewal of the Appellant's appointment. The results of the PAD process, when finally carried out, did not warrant non-renewal. In fact, his performance was not rated unsatisfactory and his supervisor viewed the 2006 PAD report as a positive evaluation, while identifying room for improvement. However, the Appellant was not given an opportunity to improve. The UNDT failed to consider these factors.

10. The UNDT erred in awarding insufficient moral damages to compensate the Appellant for the extensive series of illegal actions by UNFPA, which ultimately led to his unlawful separation from service. The amount of compensation awarded the Appellant is inconsistent with the UNDT's factual findings. Moreover, the amount of compensation awarded is not commensurate with awards in similar cases and does not recognize the misuse of SLWFP in the context of an investigation, which amounted to a veiled disciplinary measure.

11. The UNDT did not directly address the Appellant's plea for reinstatement or the fact that he had been unable to find other employment while his case dragged on for four years.

Secretary-General's Answer

12. The UNDT correctly concluded that the Agency's decision not to renew the Appellant's appointment was lawful. Generally, the UNDT should not substitute its discretion for that of the Administration unless there is "manifest error". In the present case, there was no "manifest error". Rather, the Appellant's appointment was not renewed due to his poor performance as Division Director and poor performance is a proper basis for the non-renewal of an appointment. The Secretary-General's discretion should stand unless fair procedures have not been followed or the non-renewal is based on an improper motive or basis. In the present case, there were procedural irregularities, but those irregularities were insufficient to negate the final poor performance assessment, which was supported by the record. And, the Appellant did not meet his burden to show an improper motive or basis for the non-renewal of his appointment.

13. The Appellant has not established any error warranting a reversal of the UNDT's conclusion that the non-renewal of his appointment was lawful. It is the role of the UNDT to assess the weight of the evidence before it. And the evidence in the present case, specifically the Report of the Rebuttal Panel, confirmed the Appellant's poor performance when it determined "the final ratings given by the supervisors in all areas are substantiated and correct". The

Appellant has not identified any defects in the Judgment and merely restates arguments submitted to the UNDT.

14. The Appellant has failed to establish any errors by the UNDT warranting a revision of the Judgment to increase the amount of compensation awarded to him. He did not suffer any pecuniary loss, as the UNDT correctly determined. Rather, the UNDT determined the Appellant suffered stress and humiliation as a result of the procedural irregularities and awarded him USD 25,000, approximately two to three months' salary. It is within the discretion of the trial court to determine the amount of moral damages, and the amount awarded by the UNDT is fully consistent with previous awards of compensation for procedural violations, which generally range from one to four months' net base salary. The jurisprudence cited by the Appellant to support his claim for an increase in the amount of moral damages is distinguishable because he was neither terminated nor otherwise improperly separated from service. Moreover, there is no evidence that he was placed on SLWFP status in the context of an investigation into possible misconduct. To the contrary, he was placed on SLWFP as an administrative matter pending his performance evaluation.

15. The UNDT did not err in failing to address the Appellant's claim that he should be reinstated because there was no basis to reinstate him when the non-renewal of his appointment was lawful.

Considerations

16. Mr. Morsy, in challenging the UNDT's conclusion that the non-renewal of his appointment was lawful, argues that the series of illegal actions taken by the Agency from 8 December 2006 through 11 April 2007 shows an ulterior motive other than his alleged poor performance as the basis for his separation from service. Similarly, Mr. Morsy contends that the series of illegal actions taken by the Agency amounted to his constructive dismissal as Director, and was the result of his refusal to offer his resignation to the Executive Director. These arguments were presented to the UNDT and do not warrant being raised on appeal without specification of error within the meaning of the Appeals Tribunal Statute.³

³ *Larkin .v Secretary-General of the United Nations*, Judgment No. 2011-UNAT-134; *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051.

17. It is well-established jurisprudence that a fixed-term appointment does not carry an expectation of renewal or conversion to another type of appointment.⁴ This jurisprudence is consistent with staff rule 104.12(b)(ii), which was in effect in 2006 and 2007, and which similarly provided that “[t]he fixed term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment”.

18. This Tribunal has concluded that “poor performance ... may [lawfully] be the basis for the non-renewal of [a] fixed-term appointment”.⁵

19. The Dispute Tribunal determined that the decision not to renew Mr. Morsy’s appointment was lawful and was based on his poor performance, stating:

This means that the reason for the non-renewal decision was verified through an independent process ... and was properly documented through the Rebuttal Panel’s report. The Rebuttal Panel carried out what appears to have been an objective assessment and interviewed a number of relevant witnesses. Although it found that the PAD process had irregularities, it nevertheless concluded that the assessments of the [Appellant’s] performance were correct. The procedural flaws identified by the Panel were insufficient to negate the entire final performance assessment. Based on the extensive examination by the Rebuttal Panel, the ratings given to the [Appellant] by his supervisors were confirmed.⁶

20. Mr. Morsy contends that the 2006 PAD report, as affirmed by the Rebuttal Panel, did not warrant the non-renewal of his appointment on the grounds of poor performance, arguing that he was not rated “unsatisfactory” and his direct supervisor viewed the PAD report as a “positive” evaluation, although identifying room for improvement. This argument, however, ignores the nature of the position Mr. Morsy filled within the Division and Agency. He was recruited and hired because he had 30 years’ professional experience. His position as Director of the Division meant he was supposed to act as the leader of the Division. In light of Mr. Morsy’s high-level managerial position, the UNDT could properly determine that his poor performance was not acceptable and was sufficient grounds for the non-renewal of his appointment despite the fact that he was not rated “unsatisfactory” in the 2006 PAD report. It is fair to say that, for the

⁴ *Badawi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2012-UNAT-261; *Syed v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-061; *Balestrieri v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-041.

⁵ *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153.

⁶ Judgment No. UNDT/2012/043, para. 107.

Director of the Division to be considered performing satisfactorily, his work plan outputs and developmental outputs should have been rated higher than “partially achieved” and his core competencies should have been rated higher than “developing proficiencies”.

21. The International Civil Service Commission’s 2001 Standards of Conduct for the international civil service were adopted by the Secretary-General and annexed to ST/SGB/2002/13, entitled “Status, basic rights and duties of United Nations staff members”, of 1 November 2002. Paragraphs 15 and 16 of the 2001 Standards of Conduct provide:

15. Managers and supervisors are in positions of leadership and it is their responsibility to ensure a harmonious workplace based on mutual respect ... Managers are also responsible for guiding and motivating their staff ...

16. It is natural for managers to be seen as role models and they have therefore a special obligation to uphold the highest standards of conduct. ...

22. Staff members in high-level management positions, such as Mr. Morsy, are expected to be able to quickly step into their positions and to provide quality leadership. Within the first year of his appointment, it became clear to the Agency’s Executive Director that Mr. Morsy was not fulfilling his role as manager of the Division, and she took steps to limit his adverse impact on the Division’s functions and staff.

23. An administrative decision not to renew a fixed-term appointment -- even one not to renew based on poor performance -- can be challenged on the grounds the decision was arbitrary, procedurally deficient, or the result of prejudice or some other improper motivation.⁷ The staff member has the burden of proving such factors played a role in the administrative decision.⁸

24. The UNDT concluded that the non-renewal of Mr. Morsy’s appointment was lawful and not vitiated by procedural deficiencies during the performance evaluation process. Moreover, the UNDT concluded that the non-renewal decision was lawful despite noting that the final decision “was effectively an affirmation of the decision that had been made by the Executive Director” on 2 February 2007, when she advised Mr. Morsy by e-mail that she was considering either following “the established procedures for 3 months with SLWFP and then separation/transfer or

⁷ *Assad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-021; *Ahmed*.

⁸ *Badawi; Assad, ibid.*

... start[ing] the investigation process leading to the termination of [his] contract". Mr. Morsy points to this e-mail as showing that the Agency had an improper motive or basis for not renewing his contract. But that is not so. All along, the Executive Director was concerned about only one thing: Mr. Morsy's unsatisfactory managerial performance and style. Concern about a high level manager's poor performance is not an improper motive or basis for the Agency's (preliminary or ultimate) decision not to renew a fixed-term appointment.⁹

25. Generally, it is well within the discretion of the Dispute Tribunal to determine the amount of moral damages to award a staff member for procedural violations in light of the unique circumstances of each case.¹⁰ The amount of moral damages awarded by the Dispute Tribunal may vary from case to case, as it should, depending on the factors considered by the Tribunal. Mr. Morsy challenges the amount of compensation awarded him as moral damages, arguing his injury was quite substantial and the amount is not commensurate with awards in similar cases, including cases involving the misuse of SLWFP.

26. The Dispute Tribunal listed the factors it considered in setting the amount of moral damages to award Mr. Morsy, and determined that he should be awarded damages in the amount of two to three months' salary or USD 25,000. To support his contention that this amount is not sufficient, Mr. Morsy cites several judgments in which larger awards of damages were made by the Dispute Tribunal and/or by the Appeals Tribunal. This Tribunal, however, does not find the cases Mr. Morsy cites to be either applicable or persuasive because they involved either: (1) procedural violations in the context of the staff member's unlawful separation from service, and Mr. Morsy was lawfully separated from service; (2) damages as an alternative to reinstatement, and reinstatement was not a remedy ordered in the present case; or (3) the unlawful use of SLWFP for disciplinary purposes, and SLWFP was not employed for disciplinary purposes in the present case. Moreover, Mr. Morsy was partially responsible for the Agency's failure to timely evaluate his 2006 performance since he did not respond to requests to begin the PAD process, which was a necessary first step. For all these reasons, this Tribunal determines the UNDT did not err in awarding Mr. Morsy moral damages in the amount of USD 25,000.

⁹ *Ahmed*.

¹⁰ *Cieniewicz v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-232.

27. Mr. Morsy contends that the UNDT did not provide an adequate remedy for his procedural violations and should have addressed his request for reinstatement. This contention ignores the UNDT's ultimate conclusion that the Agency acted lawfully when it did not renew Mr. Morsy's fixed-term appointment and separated him from service. Reinstatement is a remedy that addresses a staff member's illegal separation from service. Thus, there is no merit to this claim.

Judgment

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

Original and Authoritative Version: English

Dated this 28th day of March 2013 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Simón

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 24th day of May 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar