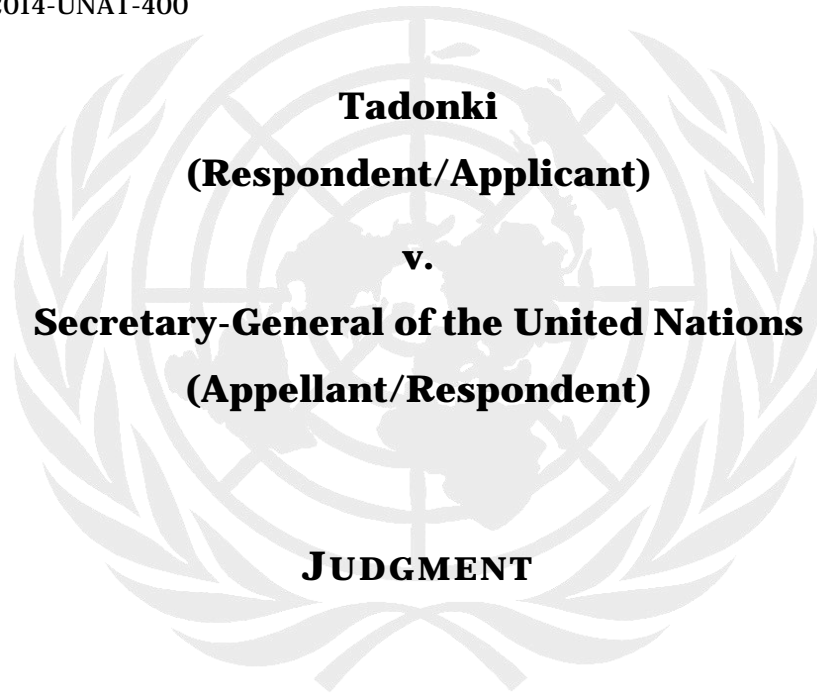




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2014-UNAT-400



**Tadonki  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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**Before:** Judge Luis María Simón, Presiding  
Judge Sophia Adinyira  
Judge Richard Lussick

**Case No.:** 2013-449

**Date:** 2 April 2014

**Registrar:** Weicheng Lin

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**Counsel for Respondent/Applicant:**

Andrew J. Durkovic

**Counsel for Appellant/Respondent:**

Phyllis Hwang/Paul Oertly/Rupa Mitra

**JUDGE LUIS MARÍA SIMÓN, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/032, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 26 February 2013 in the case of *Tadonki v. Secretary-General of the United Nations*. The Secretary-General appealed on 29 April 2013 and Mr. Georges Tadonki answered on 28 June 2013.

**Facts and Procedure**

2. Mr. Tadonki joined the Organization in 1999 with the United Nations Office for Project Services. He later joined the Office for the Coordination of Humanitarian Affairs (OCHA) as a Senior Regional Advisor for the Southern Africa Humanitarian Information Management Network in Johannesburg.

3. On 24 March 2008, Mr. Tadonki assumed the functions of Head of Office for the Zimbabwe Office of OCHA.

4. By e-mail dated 27 January 2009, the Assistant Secretary-General of OCHA informed Mr. Tadonki that his contract would not be renewed after its expiry on 23 March 2009 and that he was going to be moved to the OCHA Regional Office in Johannesburg to take up the position of Senior Humanitarian Affairs Officer until the expiry of his contract. The decision was based on OCHA's determination that "many of [its] primary interlocutors do not have adequate confidence in [his] leadership to maintain an effective OCHA operation" as well as "concerns related to management of staff [and] OCHA's partnership building".

5. Also on 27 January 2009, Mr. Tadonki filed a complaint with the Panel on Discrimination and Other Grievances (PDOG) against the United Nations Resident Coordinator and Humanitarian Coordinator (RC/HC) and senior management. On 30 June 2009, the PDOG adopted its report, concluding, *inter alia*, that Mr. Tadonki had suffered workplace harassment by the RC/HC and that he had been treated unfairly by OCHA.

6. Mr. Tadonki also challenged the decision not to renew his appointment before the Joint Appeals Board (JAB). Accepting the recommendation of the JAB, the Secretary-General suspended the non-renewal of Mr. Tadonki's appointment until the completion of his performance evaluation and rebuttal process.

7. On 30 July 2009, the Electronic Performance Appraisal (e-PAS) Rebuttal Panel adopted its report. The Panel concluded that while it understood why Mr. Tadonki had been given a rating of "partially meets performance expectations", OCHA had failed to comply with the requirements in the then-applicable Administrative Instruction on the Performance Appraisal System (ST/AI/2002/3). The Panel therefore recommended invalidation of the performance appraisal or, alternatively, if invalidation was not possible, upgrading the final appraisal rating to "fully meets performance expectations".

8. Mr. Tadonki's appointment was further extended, upon an Order of the UNDT, which the Secretary-General appealed. The Appeals Tribunal annulled the UNDT order on the ground that the UNDT had exceeded its jurisdiction and, on 29 April 2010, Mr. Tadonki was separated from the Organization.

9. The following facts regarding the UNDT's Orders on interim measures are uncontested:<sup>1</sup>

*Applicant's Motion for Interim Measures*

... On 2 March 2010, the Applicant requested the Tribunal to grant him two months['] net base salary as an interim measure during the proceedings, pursuant to Article 14 of the Rules of Procedure. ...

... By Order 052 (NBI/2010) dated 31 March 2010, the Tribunal granted the Applicant's motion for interim measures and directed the Respondent to pay him the sum of two months' net base salary, within seven days of the Applicant signing an undertaking to repay any sums which may be due to the Respondent upon judgment being given by the Tribunal.

... On 7 October 2010, the Respondent submitted a Motion for Reconsideration of Order No. 052 (NBI/2010). The Respondent alleged that new facts had emerged since the Tribunal granted interim relief of two months' net base salary ...

...

... On 21 October 2010, the Respondent filed additional documentation relevant to the Motion for Reconsideration and on 25 October 2010, he filed a reply to the

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<sup>1</sup> Impugned Judgment, paras. 48-50, 52-54, 57, 58.

Applicant's response. The Respondent submitted evidence to show that the Applicant's appointment with UNOPS was effective 16 February 2010 ...

... On 26 October 2010, the Respondent filed a Motion to Re-open the hearing and recall the Applicant for further cross-examination. ...

... On 1 November 2010, the Applicant filed his response to the Respondent's Motion to Re-open the hearing and recall the Applicant for further cross examination... The Applicant provided a letter from the Regional Director of UNOPS as evidence confirming that he did not start work with UNOPS until 15 April 2010.

...

... The interim measures granted the Applicant in Order 052 (NBI/2010) were not reversed, and the Respondent's motion to recall the Applicant was denied. The Tribunal rejected that motion on the ground that Respondent had ample opportunity to test all of these issues during the testimony of the Applicant and other witnesses. The Tribunal finds that these two motions constitute an abuse of process of the court.

*Respondent's motion to recall a witness*

... After RC/HC Zacarias had completed his testimony, Counsel for the Respondent made a motion to have him recalled for further examination on the grounds that, as the Tribunal understood it, RC/HC Zacarias was dismayed, disturbed, surprised and allegedly taken aback by the line of cross-examination he was subjected to. The Tribunal rejected this motion on the grounds that no reason was presented to explain whether there was any new element that may have taken RC/HC Zacarias or Counsel for the Respondent by surprise. ...

10. The UNDT in Nairobi issued Judgment No. UNDT/2013/032 on 26 February 2013, making the following findings:

- a) OCHA wrongly took into account "a few" unsubstantiated complaints made against Mr. Tadonki without investigating them and there was no evidence that Mr. Tadonki failed to perform his functions. Furthermore, the failure to follow e-PAS rules resulted in denial of due process.
- b) OCHA management's decision not to renew Mr. Tadonki's contract was tainted by extraneous factors or improper motives and the non-renewal was unlawful.
- c) The requirements of due process and fairness were disregarded by OCHA in relation to the manner in which Mr. Tadonki was separated from service.

11. The UNDT ordered payment of the remaining half of Mr. Tadonki's salary between 1 September 2009 and the date of the Judgment, minus the amount he had already received as advances by virtue of Order No. 052 (NBI/2010); and two years' net base salary as compensation for economic damages. The UNDT also awarded moral damages in the amount of USD 50,000 for the stress, anxiety, and emotional and physical harm Mr. Tadonki suffered as a result of the Secretary-General's unlawful actions. Furthermore, the UNDT awarded costs against the Secretary-General in the amount of USD 10,000.

12. The UNDT ordered the implementation of the PDOG's recommendations: an official apology from senior OCHA management to Mr. Tadonki and the conduct of a formal investigation into the harassment exercised against Mr. Tadonki by the RC/HC. The UNDT also ordered that the e-PAS 2008-2009 be nullified and that all adverse material in relation to this PAS be purged from Mr. Tadonki's personnel file.

13. Finally, the UNDT referred the USG/OCHA, the ASG/OCHA, the Deputy Head of OCHA, and the RC/HC to the Secretary-General for accountability under Article 10(8) of the UNDT Statute.

### **Submissions**

#### **The Secretary-General's Appeal**

*The Secretary-General contends that the UNDT erred in fact and law in concluding that it was improper for OCHA to consider the complaints made against Mr. Tadonki.*

14. Contrary to the UNDT's findings, the complaints against Mr. Tadonki were not limited to isolated concerns raised by a few individuals. OCHA's senior management received complaints against Mr. Tadonki lodged on a regular basis by a broad range of stakeholders. Furthermore, the UNDT erred in concluding that the complaints were not investigated and therefore unsubstantiated when OCHA conducted appropriate inquiries into the complaints against Mr. Tadonki.

*The UNDT erred in fact, law and procedure and exceeded its competence in concluding that there was no justification for OCHA's determination that Mr. Tadonki was not performing his required duties.*

15. Under the terms of reference in the vacancy announcement for his post, Mr. Tadonki was responsible for managing the OCHA Office to provide coordination support to the humanitarian community in Zimbabwe; and to maintain communication among humanitarian agencies and Inter-Agency Standing Committee partners, the international community, the HC, Heads of United Nations Agencies and Programmes, NGO heads of mission, the government, the donor community and the local donor community. The Secretary-General submits that there is considerable evidence that all of these groups encountered sustained difficulties in their interactions with Mr. Tadonki and their concerns about his management style undermined their confidence in OCHA as an effective and collaborative partner.

16. Further, the UNDT erred in fact and procedure by relying on the testimony of the UNHCR Director which reflected the UNHCR Director's own perspective, rather than representing perceptions of a broader segment of the humanitarian community.

*The UNDT erred in law, fact and procedure and exceeded its competence in concluding that the non-renewal of Mr. Tadonki's appointment was motivated by extraneous factors or improper motive.*

17. The UNDT erred in law by stipulating a new burden of proving improper motivation and by failing to even apply that standard. The UNDT simply relied on Mr. Tadonki's own allegations of improper motives, citing his fraught relationships with the RC/HC and Deputy Head of the OCHA Office, without any evidence to support a *prima facie* case, and then required the Secretary-General to prove that the contested decision was not prompted by extraneous or improper motives. The factual conclusions on this issue are therefore equally flawed.

18. Further, the reason for the decision not to renew Mr. Tadonki's contract was not based upon his problems with the RC/HC or the Deputy Head but on Mr. Tadonki's failure to develop and maintain effective harmonious relationships with United Nations agencies, international NGOs and donors. Moreover, in making findings about the RC/HC and the Deputy Head, the UNDT erred in relying substantially on the judge's notes of the hearing on 5 July 2010, when it refused to make the written records of the testimony available to the Secretary-General.

19. The UNDT erred in concluding that the non-renewal of Mr. Tadonki's appointment was motivated by another improper motive, namely that "protecting [the] RC/HC Zacarias and saving his skin was of paramount importance to OCHA leadership in New York". This conclusion is at

odds with the two facts established by the record: Firstly, that the RC/HC was a UNDP staff member and OCHA had no authority to remove him from Zimbabwe; and secondly, that at the time OCHA senior management decided not to renew Mr. Tadonki's appointment, they were aware that the RC/HC did not intend to stay in Zimbabwe much longer.

*The UNDT erred in concluding that Mr. Tadonki's non-renewal was unlawful.*

20. The Secretary-General acknowledges that the manner in which Mr. Tadonki's performance evaluation was undertaken was not in accordance with ST/AI/2002/3, but asserts that the lack of a proper performance appraisal alone cannot automatically render a non-renewal decision based on performance unlawful, when the Administration is able to provide independent evidence demonstrating a reasonable basis for it to conclude that a staff member's performance was unsatisfactory in the particular circumstances.

*The UNDT erred in fact and law in its award of economic and moral damages.*

21. The UNDT erred in awarding economic damages in the amount of three and a half years' salary. The non-renewal decision was lawful and accordingly, there was no basis on which to order compensation in lieu of reinstatement. Moreover, by setting the compensation in lieu of reinstatement at two years' net base salary, the UNDT acted in clear contravention of the Appeals Tribunal's holding in *Mwamsaku*,<sup>2</sup> which confirmed that the two-year limit imposed by the UNDT Statute constitutes a maximum and cannot be the average "in lieu of compensation". Furthermore, while the last appointment held by Mr. Tadonki was only for the duration of one year, the UNDT awarded economic damages totaling over three and a half years' salary which is excessive, especially in view of the fact that Mr. Tadonki's appointment was further extended until 29 April 2010.

22. Moreover, the UNDT failed to take into account the fact that Mr. Tadonki's appointment was extended from 23 March 2009 to 29 April 2010 and that he accepted an appointment with UNOPS before the expiration of his appointment at OCHA. Since there was no gap between the two appointments, Mr. Tadonki did not suffer any economic damages as a result of his non-renewal.

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<sup>2</sup> *Mwamsaku v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-246.

23. Turning to the award of moral damages, the Secretary-General submits that the non-renewal decision was lawful and, accordingly, it is legally unsustainable to award moral damages on this ground. To the extent that the UNDT based its award on the behaviour of specific OCHA officials and the RC/HC, the award is likewise flawed as a result of the UNDT's errors. Should the Appeals Tribunal find it appropriate to award moral damages for non-compliance with the performance appraisal process, the Secretary-General submits that the award of USD 50,000 is excessive.

24. Finally, the Secretary-General submits that the combined economic and moral damages awarded by the UNDT total four years' salary, more than double the general two-year cap on damages set out in Article 10(5)(b) of the UNDT Statute. The UNDT failed to identify the exceptional factors which justified doubling the two-year cap.

*The UNDT erred in awarding costs against the Secretary-General.*

25. The Secretary-General submits that the UNDT erred in fact and procedure in concluding that the Secretary-General's conduct during the UNDT proceedings amounted to a "manifest abuse of proceedings" justifying the award of costs against him.

26. The UNDT misconstrued "allegations of sexual harassment" on the part of Mr. Tadonki which, it concluded, served no relevance to the case and were merely introduced to discredit Mr. Tadonki. The Secretary-General did not seek to introduce such evidence; the issue arose during the testimony of the focal point for sexual harassment who considered that the fact that Mr. Tadonki inquired whether a particular staff member had complained about him, constituted an abuse of power.

27. Furthermore, the UNDT erred in law by concluding that his good faith submissions to admit into evidence a written statement by the RC/HC and to recall Mr. Tadonki for cross-examination constituted an abuse of process.

*The UNDT erred in issuing two remedial orders.*

28. The UNDT erred in ordering the nullification of Mr. Tadonki's 2008-2009 performance appraisal and the purging of all "adverse material" relating to this appraisal from his personnel file. Similarly, the UNDT erred in ordering the implementation of specific recommendations of



the PDOG report. Both orders provide remedies beyond the parameters set out in administrative issuances and therefore lie outside the competence of the UNDT.

*The UNDT erred in referring OCHA staff members to the Secretary-General for accountability*

29. The UNDT erred in referring the USG/OCHA, the ASG/OCHA, the RC/HC and the Deputy Head to the Secretary-General for accountability.

30. The UNDT erred in making referrals for accountability based on conduct that did not rise to the level appropriate for referral. The legislative history of Article 10(8) of the UNDT Statute, read together with and in the context of Staff Rule 10.1, makes it clear that referrals of cases to the Secretary-General for accountability under the UNDT Statute are to be triggered by a high standard of personal wrongful action by a staff member.

31. Furthermore, the UNDT erred in referring staff members without due process. Any referrals by the UNDT must be undertaken with full respect for the due process rights in light of the negative consequences that such referrals will have on their reputation. Yet, neither the RC/HC nor the Deputy Head had the chance to make their case to the UNDT regarding why their conduct did not justify a referral.

32. The Secretary-General asks that the Appeals Tribunal vacate the UNDT Judgment in its entirety.

### **Mr. Tadonki's Answer**

*The UNDT's conclusions about the criticisms against Mr. Tadonki were justified.*

33. The Secretary-General's argument that the UNDT erred in law fails since he misconstrues the UNDT's legal finding. The UNDT did not find that OCHA should have, as a matter of law, ignored the complaints, either because they were too few or because they had not been investigated. Rather, the UNDT found that unsubstantiated complaints cannot be the ground for non-renewal. The Secretary-General has not appealed the latter finding.

34. The Secretary-General's argument that the UNDT erred in fact also fails, because the undisputed evidence demonstrates that the complaints against Mr. Tadonki were unsubstantiated. The proper inquiry is not the number of alleged complaints but the question of whether or not the complaints were investigated and therefore substantiated.

*The UNDT correctly concluded that OCHA was not justified in holding that Mr. Tadonki had not performed his required duties.*

35. A review of the evidence on record reveals that the UNDT did not err in fact in concluding that OCHA was not justified in holding that Mr. Tadonki had failed to perform his duties. Furthermore, the UNDT did not err in procedure by relying on the testimony of the UNHCR Director to conclude that Mr. Tadonki had been performing his duties to the satisfaction of the humanitarian community in Zimbabwe when the UNDT refused to provide the Appellant with the record of such testimony. The Secretary-General has not provided any authority for the notion that a Tribunal is required to provide copies of the judges' notes when proceedings are not recorded. Furthermore, he has not asserted that the lack of access to the judges' notes would affect the decision of the case.

*The UNDT did not err in concluding that the non-renewal of Mr. Tadonki's contract was motivated by extraneous factors or improper motive.*

36. The UNDT identified and properly applied the correct standard of proof, requiring Mr. Tadonki to demonstrate a *prima facie* case which, once established, shifts the burden to the Secretary-General to refute that evidence.

37. The factual considerations cited by the Secretary-General do not overcome the "overwhelming evidence" cited by the UNDT for its determination that the non-renewal of Mr. Tadonki's appointment was motivated by extraneous factors and improper motives.

*The UNDT properly concluded that Mr. Tadonki's due process rights were violated by not properly administering his PAS and not clarifying reporting lines.*

38. OCHA's management's failure to initiate a timely PAS for Mr. Tadonki, coupled with the absence of clear reporting lines, is contrary to ST/AI/2003/2 and an unjustifiable violation of Mr. Tadonki's due process rights.

*The UNDT did not err in awarding economic and moral damages.*

39. The UNDT did not err in awarding economic and moral damages. Several elements support the instant case as exceptional. The economic and moral damages awarded are an

accurate assessment of damages. The UNDT is not bound by the limitation in Article 10(5)(b) of the UNDT Statute as the UNDT outlines concrete reasons to qualify this as an exceptional case.

40. Mr. Tadonki's performance was recognized as satisfactory in his PAS and by the UNDT. The non-renewal decision based on non-performance is therefore unlawful. His non-renewal resulted in economic loss and the UNDT properly compensated him.

41. The award of USD 50,000 for non-compliance with the performance appraisal process is appropriate. It accounts for due process violations related to performance, abuse of process and associated stress. The Appeals Tribunal should give deference to the UNDT on this point.

*The UNDT did not err in awarding costs against the Secretary-General.*

42. It was within the UNDT's competence to award costs based on its findings that the Secretary-General unjustifiably introduced accusations of sexual harassment against Mr. Tadonki; and that in introducing its motion for reconsideration of Order No. 052, he filed submissions that were solely intended to undermine Mr. Tadonki's credibility and caused him needless distress.

*The UNDT did not err in issuing the two remedial orders.*

43. Purging a flawed PAS from a staff member's personnel file is not prohibited by ST/AI/2002/3 and the UNDT's determination and order on this issue are reasonable and lawful.

44. Contrary to the Secretary-General's contention, the UNDT did not order the implementation of the PDOG's recommendations, but merely stated that these recommendations *should* be implemented.

*The UNDT properly referred the staff members to the Secretary-General for accountability.*

45. The Secretary-General mischaracterizes the threshold for "appropriate cases" by linking Article 10(8) of the UNDT Statute to Staff Rule 10.1. Article 10(8) is disjunctive. Contrary to the Secretary-General's contention, the UNDT may refer cases surrounding disciplinary proceedings or financial measures. The UNDT applied the correct threshold and extensively reviewed the evidence before making its finding of fact that the Secretary-General's conduct rose to the level of "misconduct" and met the applicable threshold.

46. For the purpose of Article 10(8) of the UNDT Statute, staff members only have due process rights once the Secretary-General has acted upon the referral.

47. Mr. Tadonki requests that the Appeals Tribunal affirm the UNDT Judgment and hold an oral hearing

### **Considerations**

48. The requested oral hearing was not needed since the issues for decision have already been clearly defined by the parties' submissions.

49. The Appeals Tribunal is of the view that the main issues for determination in the present case are whether or not the non-renewal of Mr. Tadonki's fixed-term appointment was lawful; and the consequences of such determination. Most of the other grounds of appeal are related to these main issues. While the former are extensively argued by the parties, considered and decided in a rather peculiar style by the UNDT, we shall focus on the main issues at bar as identified above.

50. The first four grounds of appeal introduced by the Administration refer to the alleged legality of the decision not to renew Mr. Tadonki's fixed-term appointment. The issues involved are: whether the UNDT erred in fact and law in concluding that it was improper for OCHA to consider the complaints made against Mr. Tadonki; in concluding that there was no justification for OCHA's pronouncement that the staff member was not performing his assigned duties; and that the non-renewal of the contract was motivated by extraneous factors.

51. The Secretary-General does not contest that the Administration did not follow the steps established in the applicable norms for the formal performance evaluation procedure. The Rebuttal Panel noted that Mr. Tadonki had been given a rating of "partially meets performance expectations" but the Administration failed to comply with the requirements set out in the Administrative Instruction in force at that time, causing the appraisal to be invalid or the need to upgrade it to "fully meets performance expectations".

52. As the non-renewal was based on under-performance, the outcome of the rebuttal process, consisting of an evaluation of satisfactory performance, in principle renders the non-renewal unlawful, since it has no legal basis.

53. As indicated in *Rees*:

The Appeals Tribunal recalls the jurisprudence that it is imperative that the Administration adheres to the rule of law and standards of due process in its decision-making. Given that Ms. Rees' performance was the principal reason for the decision to reassign her, the Administration was required to provide a performance-related justification for its decision. This could have been properly done with the PAS, in accordance with ST/AI/2002/3.<sup>3</sup>

54. Taking into account that non-contested fact, the Secretary-General has not persuaded the Appeals Tribunal that the impugned judgment "erred on a question of fact resulting in a manifestly unreasonable decision" (as required by Article 2(e) of the Statute). It was correct to conclude that the Administration acted unlawfully when it did not renew the staff member's appointment because there was not enough evidence to support a determination that Mr. Tadonki failed to perform his functions. Thus, the Administration's decision became arbitrary.

55. The objectiveness, transparency and legality of a performance evaluation stems primarily from the procedures indicated in the applicable Administrative Instruction, which were established in a detailed manner to ensure that these objectives are reached, that the staff member acknowledges the faults or reasons for his or her under-performance, and that the managers properly guide, advise and supervise their staff, provide adequate performance improvement goals and communicate goals to be achieved.

56. If the Administration does not follow the clear norms which apply to evaluate staff members' performances, it risks arbitrariness and bears the burden of proof that an evaluation reached after an irregular procedure is nonetheless objective, fair and well based.

57. Examining the evidence produced before it, the UNDT concluded that the non-renewal was tainted by extraneous factors or improper motives and that Mr. Tadonki had not been treated fairly. Even though the Appeals Tribunal does not necessarily share all the arguments that the UNDT adopted in support of that conclusion, it finds that it is not absurd or unreasonable, because it is mainly based on the unlawful performance procedure, which is not remedied by the evidence and arguments presented by the Administration in its effort to justify the administrative decision. The reasons provided by the Administration, considered

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<sup>3</sup> *Rees v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-266, para. 65.

individually or collectively, become immaterial for the purpose of remedying the non-compliance with the performance procedure and its outcome, which constitutes the main basis for the UNDT's conclusion.

58. Once determined that the non-renewal was unlawful, the next grounds of appeal to be considered are the ones related to the consequences of that administrative wrongdoing: *i.e.* damages and compensation.

59. With respect to compensation for material damages, the Appeals Tribunal will vacate the first instance judgment because there was no relevant interruption between the staff member's end of service with OCHA and the commencement of his new appointment with UNOPS and he has not established that he in fact suffered loss of earnings.

60. Turning to moral damages, apart from the breach of duty towards the staff member, the Judgment under appeal listed evidence related to the emotional harm suffered by Mr. Tadonki.

61. Notwithstanding the fact that the proffered evidence and the circumstances of the case support the conclusion of a resulting moral injury and the need to compensate it, the Appeals Tribunal considers that the nature of the non-renewed position, the context in which it was taken and the fact that the staff member got a new position, indicate a non-permanent damage whose relevance must not be seen out of proportion. Thus, this Court will reduce the excessive sum awarded by the UNDT for non-pecuniary damages to USD 10,000.

62. The Appeals Tribunal will grant the ground of appeal related to the award of costs against the Administration, since the impugned Judgment erred on a question of law by qualifying as abuse the simple introduction of motions, irrespective of whether or not these were subsequently granted.

63. This Court will also vacate the order of specific performance contained in sub-paragraph 346(vi) of the Judgment under appeal.<sup>4</sup> An adjudication of these issues was not requested in the application before the UNDT, so it acted unlawfully *ex officio* by making these orders.

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<sup>4</sup> At paragraph 346(vi) of the impugned Judgment, the UNDT ordered “[t]hat the Applicant’s PAS for 2008-2009 be nullified and that all adverse material in relation to this PAS be purged from his personnel file”.

64. The illegality of the e-PAS for the year 2008-2009 and related statements in the personnel file is established by the UNDT and affirmed by this Tribunal. Therefore, there is no need to purge it from the staff member's file, but what is required is to include, at the same time, the administrative illegal act and the judicial pronouncement that so declares, which makes perfectly understandable why the former is null and only the latter prevails, vindicating the adequate performance evaluation and reputation of the staff member.

65. With regard to the referral of certain staff members or former staff members to the Secretary-General for accountability purposes (sub-paragraph 346(vii) of the Judgment under appeal) it must be pointed out that Article 10(8) of the UNDT Statute provides the UNDT with discretionary power in this regard. Given that despite the partial vacation of the Judgment, the finding of an illegal non-renewal stands, this Court finds no reason to interfere with the exercise of that discretion. Such an exercise of discretion cannot constitute a ground for appeal in the present case, since the referral only implies a communication from the UNDT to the Secretary-General, and the Secretary-General is vested with the discretionary power to determine a course of action to adopt or not to adopt as sequel to the referral. Naturally, this solution does not imply that the Appeals Tribunal exercised its own discretionary power to refer, because the Appeals Tribunal did not consider it opportune to exercise its discretion in the present case.

### **Judgment**

66. The Judgment under appeal is vacated, with the exception of sub-paragraph (iv), under which heading the compensation is reduced herewith to USD 10,000, and sub-paragraph (vii).

Original and Authoritative Version: English

Dated this 2<sup>nd</sup> day of April 2014 in New York, United States.

*(Signed)*

Judge Simón, Presiding

*(Signed)*

Judge Adinyira

*(Signed)*

Judge Lussick

Entered in the Register on this 13<sup>th</sup> day of May 2014 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar