



**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Hafida Lahiouel

GAUTHIER

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
OSLA

**Counsel for Respondent:**  
Jorge Ballesterro, UNICEF

## **Introduction**

1. The Applicant disputes the administrative decision dated 30 June 2010 of the United Nations Children’s Fund (“UNICEF”) not to renew her fixed-term contract beyond 31 July 2010. In essence, the Applicant contends that she was not provided any proper reason for her non-renewal, while the Respondent submits that, albeit under no obligation to do so, at the management evaluation stage UNICEF did provide the Applicant such explanation being her “past performance and the needs of the [hiring] unit to effectively discharge its mandate, with the best interest of the Organization in mind”.

## **Background**

2. The Applicant included a chronology of the relevant factual events in her application, to which the Respondent, in his reply, indicated that he consented. The parties thereafter agreed that no hearing was necessary, and the Tribunal proceeded to determine the matter on the papers before it. Consequently, the following background facts are based on the information provided by the Applicant in her application and, where necessary, supplemented by the written record before the Tribunal.

3. The Applicant joined the United Nations in 1994. On 11 July 2006, she was reappointed with UNICEF at the G-4 level, on a fixed-term appointment of two years, expiring on 31 July 2008, renewed for one year until 31 July 2009, and thereafter renewed for another year until 31 July 2010, when she was separated from service.

4. In the Applicant’s performance evaluation report (“PER”) for the period 1 January to 31 December 2008, which she signed on 12 June 2009, her supervisor rated her performance in the areas of “quality of work”, “quantity of work”, “team work” and “communication” with a rating of 3 on a scale of 5, which meant that she

was “fully meeting expectations”. The Applicant received a rating of 2 in the area of “technical knowledge” indicating that she “met most expectations, however, there is room for improvement”.

5. In the narrative sections of the PER, in her general comments, the Applicant’s supervisor described her performance as “[she] has worked hard during 2008 and been very supportive and enthusiastic”. In her comments to a range of specific key assignments, the supervisor was positive overall and praised the Applicant for her contributions during the year, stating that she had handled some travel arrangements “very well and very professionally” and that she was “very capable and competent in organizing meetings”. Regarding job-related training, the supervisor noted that it was “really important” that the Applicant undertook some training on UNICEF systems. As for additional major assignments, the supervisor observed that the Applicant was “very supportive of all events and activities held throughout the year”. However, the supervisor’s specific narrative comments to the ratings given to the Applicant in relation to the five areas mentioned in para. 4 above were more critical. For instance, the supervisor stated that “there is a need ... for [the Applicant] to ensure she keeps herself updated”; that she “must remember to give time to reading things properly and thoroughly understanding before responding and finalizing”; that she works hard “but can easily be distracted”; that although she “likes to work in a team environment”, she must “strive to ensure that this continuously happens; and that while “communicating well both [in writing] and verbally [she] needs to listen and read things a little more closely before responding”. In the general comments on her “performance discussion/work plan review”, her supervisor further indicated that:

The Applicant has worked hard during 2008 as the work load and number of people of the team increased. However, [the Applicant] needs to take more time to focus on the details and quality of the work she undertakes rather than speed and quantity.

Taking time to understand and attend training and orientation session on UNICEF’s systems and procedure is very important and this was discussed and stressed to [her] throughout the year.

[The Applicant] enjoys working with people of different levels and across sections, but needs to find the balance with her professional/personal relationships with people and understand that work related activities should not be seen as personal issues.

6. The second reporting officer stated that: “I am familiar with [the Applicant’s] work and agree with the comments and ratings in this PER. I urge [the Applicant] to take note of [her supervisor’s] recommendations in order to improve her performance”.

7. The Applicant did not contest the PER for 2008 through the established rebuttal process.

8. On 1 August 2009, the Applicant was offered a further renewal of her appointment for one year until 31 July 2010.

9. In the Applicant’s PER for the period of 1 January to 31 December 2009, which she and her supervisor signed on 24 May 2010 and 27 May 2010 respectively, her ratings for “quantity of work” and “communication” decreased from 3 to 2, the ratings for “quality of work” and “team work” stayed at 3, while the rating for “technical knowledge” increased from 2 to 3.

10. In the narrative sections, the PER was more critical than the previous year. The comments regarding her key assignments no longer praised her efforts, but simply referred to the tasks that she had undertaken during the year. As for her training needs, the supervisor stated that the Applicant had “successfully undertaken and ... now has a better knowledge of the process [it is unclear to what process this refers]”. The comments expressed in the narrative to her ratings from the previous year were generally reiterated and some new points of criticism were added. This included that “[the Applicant] had difficulties communicating on a personal level when she was regularly absent from August to December which caused a lot of frustration on both sides”. In the supervisor’s general comments to the performance rating, it was emphasised that the Applicant needed to “partake in the trainings [on UNICEF’s processes and systems] and try to continuously keep herself updated”.

The supervisor also noted that “[w]e had a number of discussions during the year on [the Applicant’s] performance and I have tried to assist and advise [the Applicant] as much as possible”. In the general comments to “performance discussions/work plan review”, the supervisor further explained that:

The second half of the year was very difficult for [the Applicant] and she missed a lot of days in the office. During that period it was difficult to communicate with her and there was genuine concern for her well-being. [She] has been advised to either meet with a staff counselor and/or [United Nations Medical Services] to get advice on her health status and if necessary reduced working days. She does struggle working a full five day week and as explained continuously to her we need to be able to plan around her days (either sick or annual leave) off. She also needs to understand how best to communicate her concerns and issues so that we can support her to the greatest extent possible.

11. The second reporting officer agreed with the ratings and further observed that “I am familiar with [the Applicant’s] work. I know that [she] has faced challenges with respect to motivation, focus and consistent attendance. The support of her supervisor in helping her address them has been most appreciated”.

12. In her comments in the PER, the Applicant stated that she “mostly” agreed to the ratings and comments provided by her supervisor and she added that:

I do realize and agree that it was difficult for me and my colleagues to function this year. Because of improvement in my health, my attendance has improved[.] I do appreciate the kindness and understanding during this difficult time[.] I am grateful for my supervisor’s support.

13. The Applicant did not contest the PER for 2009 through the established rebuttal process.

14. On 31 July 2010, the Applicant’s fixed-term appointment expired and she was separated. From the period between the signing of her PER for 2009 and her separation, no written documentation or other evidence is before the Tribunal concerning the Applicant’s performance.

15. By her request for management evaluation dated 9 August 2010, addressed to the Executive Director of UNICEF, the Applicant challenged the decision not to renew her fixed-term appointment to. In support of her request, she submitted that

whereas no reason for the decision has been provided, even though a specific request to that effect was made, [the decision not to renew her contract] is in violation of [her] terms of appointment as it amounts to an improper and disingenuous attempt to evade the internal system of justice established with the promulgation of [General Assembly resolution 53/253].

16. In the management evaluation dated 8 September 2010, the Deputy Executive Director of UNICEF concluded that:

Regarding the non-renewal of the expired fixed-term contract, a thorough review of the matter leads to the conclusion that the contested decision was properly made. The contested decision was based on the analysis made by the hiring unit of [the Applicant's] past performance and the needs of the unit to effectively discharge its mandate, with the best interest of the Organization in mind.

...

Bearing in mind that every effort has been made to facilitate improving [the Applicant's] performance, and considering that, unfortunately, this improvement has not materialized as the hiring unit had hoped, the decision not to renew [the Applicant's] contract—however painful—can only be considered as a good managerial decision, made with the best interest of the Organization in mind.

### **Applicant's submissions**

17. The Applicant submits, *inter alia*, that when she was initially informed of the contested decision, no reasons for it were provided to her. The Applicant submits that the reason subsequently given for the non-renewal of her contract—i.e., her poor performance—is not supported by the facts and is not in compliance with CF/AI/2010-001 (Administrative instruction on separation from service). The Applicant submits that sec. 10.2 of CF/AI/2010-001 requires, as a standard for performance-based non-renewal, that either half or more performance ratings be

1 (met few expectations) in any given performance cycle or that half or more ratings be below 3 (fully met expectations) over two consecutive reporting cycles. She submits that her ratings were higher than those required for non-renewal under sec. 10.2. The Applicant seeks compensation on the basis that she should have been renewed for at least one year. She also seeks compensation for non-pecuniary loss as she was at the time of the non-renewal on continued medical treatment and these medical difficulties were exacerbated by her non-renewal and the associated shock of being faced with unemployment. The Applicant submits that this has caused unnecessary physical and moral suffering, which requires compensation in the amount of USD30,000.

### **Respondent's submissions**

18. The Respondent submits, *inter alia*, that the decision not to renew the Applicant's contract was based on the analysis of her past performance and the need of the unit to effectively discharge its mandate, with the best interest of the Organization in mind. The Respondent submits that the reason for the contested decision was disclosed to the Applicant at the management evaluation stage. The Respondent states that the Applicant's direct supervisor and the Division Director determined in line with sec. 4.8 of CF/AI/2009-005 (Administrative instruction on types of appointment and categories of staff) that it was not in the best interest of the Organization to renew the contract, as they considered that the needs of the unit would not be effectively discharged by the Applicant. The Respondent submits that fixed-term contracts carry no expectancy of renewal and expire automatically. Although there was no obligation to provide the Applicant with any reason for non-renewal, after a thorough review of the contested decision, the Respondent found that it was properly made. The Respondent submits that the contested decision was a proper exercise of discretion and was not tainted by any bias or improper motives.

## **Applicable law**

19. The principal administrative instruction governing the non-renewal of the Applicant's fixed-term contract is CF/AI/2010-001, dated 10 March 2010, of which sec. 5 provides as follows:

### **Section 5**

#### **Expiration of a temporary or fixed-term appointment**

5.1 A ... fixed-term appointment expires automatically, without prior notice, at the close of business on the expiration date stipulated in the letter of appointment (see United Nations staff rule 9.4). As specified in that letter, a temporary or fixed-term appointment does not carry any expectancy of renewal or conversion, irrespective of the length of service. Separation upon expiration of appointment is not regarded as a termination.

5.2 Notwithstanding the provisions of paragraph 5.1, a temporary or fixed-term appointment may be extended, subject to organizational needs, satisfactory service and availability of funds, and in accordance with the provisions of CF/AI/2009-005 on Types of Appointment and Categories of Staff, section 4.

20. In a footnote to sec. 5.2, aligned to the mention of "satisfactory service", is indicated "See section 10 for a definition of 'unsatisfactory service'". Of relevance, sec. 10.2 provides that:

### **Section 10**

#### **Termination of appointment for unsatisfactory performance**

The performance of a staff member is considered unsatisfactory for the purposes of this instruction if he or she receives,

- (a) in cases where the paper-based PER is used,
  - (i) half or more PER ratings of "1" ("met few expectations") in a given reporting cycle; or
  - (ii) half or more PER ratings below "3" ("fully met expectations") over two consecutive reporting cycles[.]



## Consideration

### *Scope of the case*

21. The issue in the present case, that is the propriety of the non-renewal of the Applicant's fixed-term contract, and the contentions of the parties, raise three principal questions:

- a. Was UNICEF under a legal obligation to provide the Applicant with a reason for not extending her fixed-term contract?
- b. What reason did UNICEF provide the Applicant with?
- c. Was the provided reason (i) properly made as a matter of law and (ii) correctly based on facts?

### *UNICEF's obligation to provide the Applicant with a reason for her non-renewal*

22. It is trite law that once the Respondent advances a reason for the non-renewal of a contract, such reason must be shown to be supported by the facts (see, e.g., United Nations Appeals Tribunal in *Islam* 2011-UNAT-115). However, as the Respondent is insisting that no reason needed to be provided, and that in any event it did so at the management evaluation stage, the Tribunal will deal with this matter briefly.

23. Sec. 5.1 of CF/AI/2010-001 expressly provides that a fixed-term appointment carries no expectancy of renewal (see also the Appeals Tribunal in *Syed* 2010-UNAT-061). Prior to the decision in *Obdeijn* 2012-UNAT-201, this generally led the Respondent to contend that he was therefore under no obligation to provide any reason for the non-renewal of a staff member's fixed-term appointment. Assumedly, this is why this submission is reiterated in the present case. However, when affirming this Tribunal's judgment in *Obdeijn* UNDT/2011/032, the Appeals Tribunal ruled that, to ensure proper access to justice, the Administration "cannot legally refuse to

state the reason for a decision that creates adverse effects on the staff member, such as a decision not to renew [a fixed-term appointment], where the staff member requests it” (see *Obdeijn* 2012-UNAT-201, para. 37).

24. The Tribunal therefore finds that the UNICEF was obliged to provide the Applicant with a reason for non-renewal of her fixed-term contract when she requested it.

*Discretion to renew*

25. Although sec. 5.1 of CF/AI/2010-001 explicitly stipulates that a fixed-term appointment expires automatically at the end of the contract, it follows from sec. 5.2 that a UNICEF staff member’s fixed-term appointment may be extended and that a factor to be considered is whether the staff member’s performance has been satisfactory. However, this does not mean that just because a UNICEF staff member has performed satisfactorily she or he has secured a renewal of the fixed-term appointment.

26. The Tribunal finds that UNICEF is provided with a significant degree of latitude when deciding whether or not to renew one of its staff member’s fixed-term appointment. In line herewith, in both *Abdallah* 2010-UNAT-091 and *Koumoin* 2011-UNAT-119, the Appeals Tribunal found that poor performance may constitute a valid reason for not renewing a fixed-term contract.

*The reason provided to the Applicant for not extending her fixed-term appointment and its propriety*

27. The Respondent states that the hiring unit complied fully with CF/AI/2010-001, including sec. 5.2 and, as mandated, assessed whether renewing a contract served the “organizational needs”, namely if the services provided had been satisfactory and if there were funds available to pay for such an extension.

28. The Respondent has not claimed that there was any financial impediment resulting in the non-renewal of the Applicant's contract and, in any event, there was no evidence proffered demonstrating that there were no funds available. The only reason the Respondent advanced for the non-renewal of the Applicant's fixed-term appointment is the Applicant's "past performance and the needs of the [hiring] unit to effectively discharge its mandate, with the best interest of the Organization in mind". Although the Respondent appears to contend that the reason behind the Applicant's non-renewal had two distinctive and separate elements, namely her "past performance" and "the best interest of the Organization", the Tribunal finds that, based on the specific circumstances of this case, these two elements must be considered as intrinsically intertwined and relating to the same negative appraisal of the Applicant's ability to do her job, such that it had a negative impact on the unit's ability to fulfill its mandate.

*Was the reason correct as a matter of law and was it correctly based on facts?*

29. As already mentioned, reasons for not extending a fixed-term contract must be justified by the facts (*Islam*). Although the Tribunal is not to substitute the Applicant's supervisors' appraisal of her performance, the question remains whether the documents before the Tribunal properly corroborate the reason provided by the Deputy Executive Officer of UNICEF for her non-renewal, namely that the supervisors had previously deemed her performance to be so inadequate that it impacted on the unit's ability to fulfill its mandate and justified not renewing her appointment.

30. This is a case of non-renewal of a contract upon its expiration, and not termination (i.e., ending of the contract at the initiative of the Organization prior to the date of expiration). However, in UNICEF, the definition of "unsatisfactory performance" is exactly the same for termination (sec. 10.2) and non-renewal (sec. 5.2). This is because sec. 5.2 (on renewals) specifically refers to the definition of "unsatisfactory performance" given in sec. 10.2 of CF/AI/2010-001.

31. According to the ratings provided by the Applicant's supervisors in her PERs for 2008 and 2009, and the system outlined in secs. 5.2 and 10.2 of CF/AI/2010-001, her performance, as a matter of law, cannot be regarded as unsatisfactory. As submitted by the Applicant, this follows from the fact that none of the conditions outlined in sec. 10.2 for doing so are satisfied—the Applicant received neither (a) half or more PER ratings of 1 in a given reporting cycle nor (b) half or more PER ratings below 3 over two consecutive reporting cycles. In the two PERs for 2008 and 2009, the Applicant received in total seven ratings of 3 (“fully met expectations”) and three ratings of 2 (“met most expectations, however, there is room for improvement”).

32. The ratings and the narrative sections of the PERs are consistent. Some criticisms were made of the Applicant's performance in these narrative sections, in particular in the PER for 2009 in which the supervisor stated that the last six months of 2009 had been “very difficult” for the Applicant and mainly referred to her low attendance and unstable health situation. The second reporting officer confirmed this finding and noted that the Applicant had “faced challenges with respect to motivation, focus and consistent attendance”. Whilst the Applicant acknowledged in her PER for 2009 that “it was difficult for [her] and [her] colleagues to function this year”, she also stated that “[b]ecause of improvement in [her] health, [her] attendance has improved” and felt she was an integral part of a successful section. Nowhere in the PER for 2009 was it stated that the performance was at such inferior level that the mandate of the unit was impacted and that, accordingly, her appointment was at risk of not being renewed. In fact, her supervisor indicated that the Applicant would benefit from further training and gave some specific advice on how the Applicant could improve her performance. This would appear to indicate that the supervisor sought to improve the Applicant's performance and even wanted to extend her fixed-term appointment. In the Applicant's PER for 2008, in a positive and encouraging manner, the same supervisor even praised the Applicant for some of her skills and achievements during the year, while the points of criticism were of somehow moderate nature.

33. It is a general requirement that managers must use established performance tools to record unsatisfactory performance, that performance issues shall be brought to the attention of staff members in a timely manner, and that proper time shall be given for improvement. In particular, the Tribunal notes that sec. 10.1 of CF/AI/2010-001 provides that

[t]he principal tool for assessing performance is the paper-based Performance Evaluation Report (PER), or the new electronic Performance Appraisal System (e-PAS). Managers must use the PER/e-PAS to record unsatisfactory performance, and to bring it to the attention of the staff member in a timely manner, in order to offer the staff member an opportunity to improve his or her performance.

34. The PER for 2009 gave the impression that the Applicant was being given room to improve and that no drastic measures, such as a non-renewal, were being contemplated. Nevertheless, despite the requirement of sec. 10.1, the decision not to renew the Applicant was taken very shortly after the completion of the PER for 2009. In this regard, the Tribunal takes note of the fact that, before her separation, the Applicant had a long career with the United Nations, namely 14 years, of which the last six years had been with UNICEF.

35. The 2009 PER refers to the Applicant's absenteeism as a result of her poor health. The Tribunal notes that in considering cases of incapacity or inability to perform due to ill health, particularly in the light of prolonged or persistent absences from work by an employee, an employer may be entitled to look at not only the employee's condition but also the operational requirements of the Organization. There is no evidence on the record establishing that the Applicant's low attendance impacted on the ability of the unit to fulfill its mandate. Also, there is no evidence before the Tribunal of any evaluation of the Applicant's medical incapacity such that the alleged operational impact was that the unit was unable to discharge its mandate.

36. Further, there is no documentation on the record regarding the Applicant's performance from 1 January 2010 to the date of her separation in July 2010 that would indicate that her performance had deteriorated to such a degree that it was, in

the words of the Deputy Executive Director of UNICEF, “in the best interest of the Organization” not to employ her any longer.

37. As stated above, the Applicant was not given any warning that her employment was in jeopardy. When dealing with the separation of a long-serving staff member, she or he should be informed and warned that her or his performance has reached such an inferior level that the staff member risks not being renewed. In this regard, several ways for communicating such message are available, including through the established performance appraisal and reporting mechanisms.

38. Consequently, the Tribunal finds that the Respondent has been unable to justify in law or on the facts the reason given for the non-renewal of the Applicant’s fixed-term appointment.

### **Conclusion**

1. The Applicant’s claim on liability succeeds. Further directions to the parties on the issue of relief will follow in a separate Order from the Tribunal.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 28<sup>th</sup> day of February 2013

Entered in the Register on this 28<sup>th</sup> day of February 2013

*(Signed)*

Hafida Lahiouel, Registrar, New York