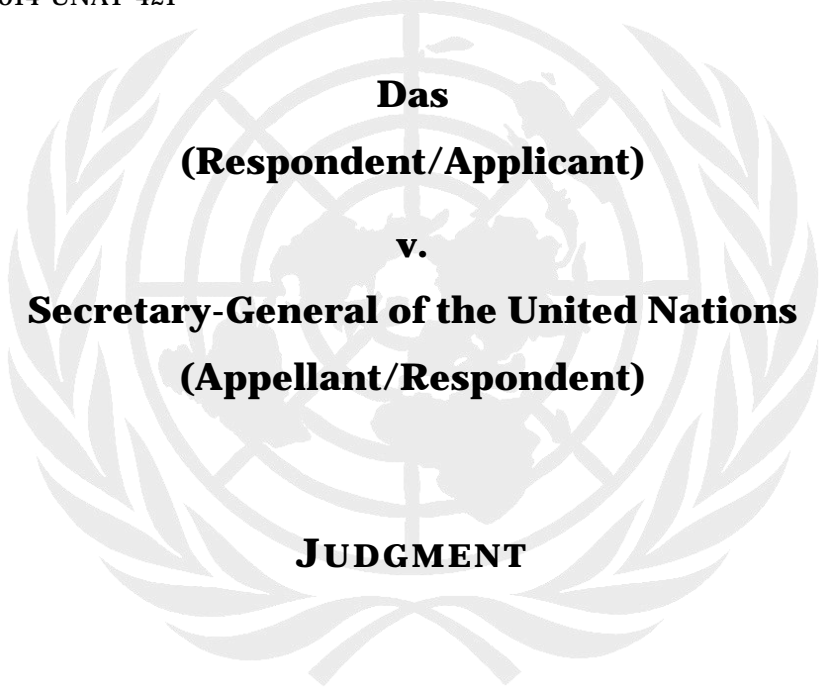




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-421



Das
(Respondent/Applicant)
v.
Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

Before: Judge Sophia Adinyira, Presiding
Judge Mary Faherty
Judge Rosalyn Chapman

Case No.: 2013-475

Date: 2 April 2014

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Self-represented

Counsel for Appellant/Respondent: Paul Oertly

JUDGE SOPHIA ADINYIRA, 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/2013/051, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in New York on 14 March 2013, in the case of *Das v. Secretary-General of the United Nations*. The Secretary-General appealed on 9 May 2013, and Ms. Malabika Das answered on 8 July 2013.

Facts and Procedure

2. The Dispute Tribunal made the following findings of fact, which are not contested by the parties:¹

... The Applicant was employed by [the United Nations Children’s Fund (UNICEF)] since 2004. In December 2007, she was offered a one-year fixed-term appointment as a Secretary, at the GS-4 level, in the Kolkata Field Office of UNICEF. She accepted this offer on or about 31 December 2007.

... UNICEF ended the Applicant’s employment effective 31 July 2010. Although the Respondent maintains that this was a case of non-renewal based on poor performance, the decision to end the Applicant’s contract was presented and processed as a termination. The India Country Office sent it to the Central Review Body (“CRB”) for review, as required under UNICEF procedures for termination. On 7 June 2010, the CRB unanimously stated:

The CRB thoroughly reviewed the recommendation and all the relevant documents. The CRB acknowledged that the staff member was given ample opportunities including change of Supervisors and Sections so that she can improve her attitude and performance. It was evident from the last two [performance evaluations reports (PERs)] as well as other performance related documentation that despite having all best efforts and support by the Field Office, the staff member did not make any attempt to improve her performance. Given all the considerations and based on the documents which corroborate her consistent non-performance, the CRB unanimously agreed to terminate the [fixed-term] contract of [the Applicant] with immediate effect.

... On 14 June 2010, the Applicant filed with the Executive Director and the Office of Internal Audit, UNICEF, a complaint of harassment and abuse of authority against her supervisors. She requested, *inter alia*, that the entire case “be adjudged in the proper light”, that the PERs for 2008–2009 and January–June 2010 be revoked or quashed, and that she be compensated.

¹ The following text is taken from Judgment No. UNDT/2013/051, paras.5-41.

... On 28 June 2010, the Applicant was informed by letter signed by the Officer-in-Charge, India Country Office, that the Country Representative had approved the recommendation of the CRB to terminate her appointment based on unsatisfactory performance for the period of “2007 to 2010”. Accordingly, the Applicant was informed that her appointment would be terminated effective 31 July 2010. The letter stated:

We regret to inform you that the Representative has approved the recommendation of the Central Review Body that your appointment should be terminated. This decision has been taken after an extensive review of your performance which has been consistently unsatisfactory, as documented in your PERs from 2007 to 2010, as well as other supporting documents including attendance reports and performance improvement plan. In order to give you one month’s notice period, as required, your current contract will be extended up to 31 July 2010 after which you will separate from the organization. In connection please find, attached, the administrative details relating to your entitlements, formalities and actions in respect of your separation from service.

... On 30 June 2010, the Applicant sent an email to the Office of Internal Audit, UNICEF, and addressed to the Executive Director, asking for cancellation or rescission of the decision to terminate her contract.

... On 16 August 2010, the Chief of the Policy and Administrative Law Section, Division of Human Resources, UNICEF, sent the Applicant a letter, requesting “clarifications as to [her] specific allegations and requests”. The letter referred to the Applicant’s emails of 14 June and 30 June 2010. The Applicant was asked to “clarify the scope and grounds of [her requests]”. The letter further sought to “clarify” to the Applicant that hers was a case of non-renewal and not termination.

... By email of 5 October 201[0], the Administrative Law Specialist, Policy and Administrative Law Section, Division of Human Resources, UNICEF, informed the Applicant that the Office of Internal Audit, UNICEF, had considered her allegations of harassment and abuse of authority “and, having found no grounds to proceed, the case was closed in June 2010”, of which the Applicant was allegedly informed by email dated 7 July 2010. He further stated that since the basis of the Applicant’s complaint “was precisely the alleged harassment and abuse of authority, which has been found unsubstantiated, in principle, [her] case as a whole is closed”. He added that the Applicant would receive “a final decision on this matter within the next few days”.

... By letter dated 11 October 2010, the Deputy Executive Director informed the Applicant that her email of 30 June 2010 as well as her other “concerns” and “submissions” regarding harassment and abuse of authority had been treated as a request for management evaluation. The letter stated that, although originally the decision was presented as a termination of her contract (letter of 28 June 2010), the

administrative decision made was not to renew her fixed-term contract after its expiration. The letter stated that her contract was extended up to 31 July 2010 “to give [her] one month notice, even though there was no need to do that, since [her] fixed-term contract ... expire[d] automatically, without prior notice”. The letter further stated that “the decision not to renew [her] contract - however painful to [the Applicant] - can only be considered as a sound managerial decision, made with the best interest of the Organization in mind”.

3. The Dispute Tribunal then recounted the history of Ms. Das’ PERs from January 2008 through 30 June 2010. However, in its Considerations, the UNDT only discussed Ms. Das’ January-June 2010 PER. Accordingly, only its findings of fact concerning the PER for that period are quoted below.

Performance improvement plan for January to June 2010

... A performance improvement plan was prepared and agreed with the Applicant following a meeting in late January 2010. The improvement plan stated that, in order to “place a performance improvement plan with measurable indicators, the following is suggested for assessment *in the third week of each month* so that reports can be *finalized by the month end*” (emphasis added). The areas of assessment included attendance, focus on quality, and various work tasks.

Improvement plan evaluations for January to June 2010

... On 29 April 2010, the Applicant sent another complaint to the Chief of Human Resources, UNICEF, India Country Office. The Applicant stated that, “[to] date, there [was] not meeting to update, analyze and evaluate [her] performance so far in the current reporting period”. She stated that she was “awaiting [her] ‘performance feedback’ from both [her] first supervisor and second supervisor”. The Applicant stated that she was “under ‘scanner’ and ha[d] been given a contract from January - June 2010” and was “expected to give 100% towards [her] job, which [she was] delivering”. She described several instances of what she considered to be “workplace harassment” and stated that she was experiencing “agony and gruelling experience”. She added, “If this continuity of eventful harassment (both mental and ethical) is not put to an end, then I am afraid it is becoming extremely challenging to put in my best efforts and continue to be motivated towards the small but important contribution I make towards the esteem[ed] organization”.

... On 3 May 2010, two working days after her email of 29 April 2010, the Applicant was provided, for the first time in 2010 according to her, with monthly performance improvement evaluations containing critical comments. She alleges - and this has not been rebutted by the Respondent - that no discussions were held with her prior to the issuance of the performance improvement evaluations. She further alleges that the performance improvement evaluations were provided to her in hard copy and

not by email to conceal her supervisors' failure to issue them in line with the requirements of the performance improvement plan (i.e., with assessments "in the third week of each month so that reports can be finalized by the month end").

... On 3 and 4 May 2010, after receiving the performance improvement evaluations, the Applicant sent two emails to the Deputy Director of Operations and Chief, Human Resources, India Country Office. The Applicant stated that this was "the very first [performance improvement evaluations] for the current period ... and no discussion/evaluation happened prior to this throughout [her] current reporting period", although the performance improvement plan for January - June 2010 provided that such evaluations were supposed to be done each month. The Applicant stated that "none of the things mentioned in the [performance evaluation]" were correct and that it came "as a complete shock" to her. She stated that "she was absolutely unaware by whom and when" these performance improvement evaluations were prepared, particularly since one of her supervisors was away from the office. She stated that she was "upset and distressed (especially remembering the incidence during final PER 2009 which [she] shared ... earlier [i.e., by email of 21 December 2009]) to again go through the same gruelling session with [her second reporting officer]". The Applicant stated in her email of 3 May 2010, "I really do not want to go through the same kind of harassment once again. Please help". In her email of 4 May 2010, she stated, "I am lost and [am] unable to handle this kind of situation. Please I need your guidance".

... There is no record on file regarding any response to the Applicant's emails of 29 April and 3 - 4 May 2010. The Applicant however received an email on 27 May 2010 from the Chief of Human Resources, India Country Office, which is discussed further below.

Final performance evaluation for [January to June] 2010

... The Applicant's PER for January to June 2010 was finalized in late May 2010. In the final PER, the Applicant's supervisors rated her performance with respect to "technical knowledge"; "planning [and quality of work]"; "drive for results (quantity of work)" as "1 (met few expectations)". With respect to "team work" and "communication", she received "2 (met most expectations, however, there is room for improvement)". The Applicant's first reporting officer added critical comments regarding the Applicant's performance, including that she "still required additional support and orientation" and that "some of the core competencies such as technical knowledge, planning and setting standards and self-monitoring remained a concern". The first reporting officer commented that the Applicant "was given enough opportunity to perform and deliver the assigned tasks, however, over the years it has been observed/recorded that [the Applicant] could not perform to the desired expectations".

... In part 7 of the PER, the second reporting officer expressed her agreement with the first reporting officer's ratings and comments. She added that the Applicant's

“ratings have been consistent under five different supervisors since ... 2007”. The second reporting officer stated:

Contrary to [the Applicant’s] contention that no discussion took place during the reporting period, performance discussions including coaching and feedback by supervisors took place on 27 [January 2010] and 26 [February 2010]. On 29 [March 2010] Operations Officer discussed with [the Applicant] and, as agreed, daily monitoring has continued thereafter. April’s evaluation was ready for discussion on 23 [April 2010] but meeting was postponed due to [the Applicant’s] expressed reluctance to discuss without the presence of one supervisor who was away on emergency leave. Discussion took place on 3 [May 2010]. The final PER discussion was held on 20 [May 2010].

I observe that [the Applicant] has difficulty to accept feedback on her performance. Each performance discussion becomes a long drawn-out argument between her and whoever is the supervisor. I have personally witnessed such interactions.

... The Applicant marked in part 6 of the PER that she did not agree with the ratings and assessment of her performance. She stated that the performance evaluation process was not properly followed and that “no discussion/evaluation took place through my current reporting period despite clear guidance from the Deputy Director”. The Applicant further stated that her supervisors failed to provide her with monthly performance improvement evaluations, as was required by the performance improvement plan. She stated that the monthly performance improvement evaluations were provided to her only in early May 2010, in hard copy and not by email, to “conceal the actual dates” when they were issued. She added that, in her final PER for 2010, “[b]iased, concocted and non-measurable statements were made [by her supervisors] which [she] completely disagree[d] with”.

Applicant’s attempt to launch a formal rebuttal of the PER for 2010

... The Applicant’s PER contained part 8.2, which stated that staff members have a right to rebut the PER “only for the reasons listed in administrative instruction CF/AI/1994-002, paragraph 2.38”[UNICEF Administrative Instruction entitled “UNICEF’s Revised Performance Appraisal System]. This provision of CF/AI/1994-002 apparently sets out the grounds on which the PER can be rebutted (the Respondent did not provide a copy of the administrative instruction to the [Dispute] Tribunal).

... Prior to the signing of her PER for 2010, the Applicant sent an email on 26 May 2010 to the Deputy Director of Operations as well as the Chief, Human Resources, India Country Office, with the subject line “Request for relevant Administrative instruction for formal rebuttal”. The Applicant stated in her email, “I would like to go to formal rebuttal, but before I sign, I wanted to understand

CF/AI/1994-002, paragraph 2.38 (as mentioned in the PER)”. She stated that she could not locate the administrative instruction on the Intranet (UNICEF’s internal system) and requested that it be shared and explained to her.

... The Chief of the Human Resources, India Country Office, replied to the Applicant on 27 May 2010. Instead of providing her with a copy of the requested administrative instruction to enable the Applicant to exercise her right of rebuttal, the Chief stated that she should “proceed with signing the current PER to acknowledge that [she] received it”. The Chief of the Human Resources also commented on the substance of the Applicant’s complaint of harassment. Specifically, the email stated:

Both [the Deputy Director of Operations] and I have reviewed your correspondence. It is regrettable that I have not travelled to Kolkata yet, so that these issues could be discussed face to face with you and all your supervisors together. Notwithstanding, we are very concerned that you have not copied the Chief of Field Office in your “confidential” correspondence. There are two sides to every story and your claims of harassment cannot be substantiated. It is our understanding that your performance, as documented in prior and consecutive PERs has continued to be unsatisfactory. You have now shared with us the last page of your current PER and which once again indicates low performance and confirms with dates that performance discussions with your supervisors did take place during the reporting period. Each of your PERs has been assessed by a variety of supervisors independently. On this basis, our advice is that you proceed with signing the current PER to acknowledge that you have received it (part 8.1).

... The Applicant replied on 27 May 2010, stating, “I will follow your advi[ce] and hand over the signed PER”. She signed her PER for the period 1 January 2010 to 30 June 2010 on the same day.

4. In Judgment No. UNDT/2013/051, the Dispute Tribunal considered issues of Ms. Das’ separation, her PERs, and her complaints of harassment and abuse of authority. The UNDT found that Ms. Das’ contract was terminated on the grounds of unsatisfactory performance as the termination procedures had been put into effect, applied and completed, and that it was “inappropriate and impermissible [for UNICEF] to attempt to reverse the course of action *ex post facto*, after [Ms. Das] had left UNICEF”. The UNDT also found that no reliance could be placed on Ms. Das’ PER for 2010, on which UNICEF had relied in arriving at the termination decision, as she had been effectively deprived of a meaningful opportunity to rebut her PER for 2010. Consequently, the UNDT declared the termination of Ms. Das’ service as unlawful as the conditions for termination set forth in UNICEF’s CF/AI/2010-001 entitled “Separation from service” (requiring half or more PER ratings

below “3” over two consecutive reporting cycles) were not satisfied.² The UNDT stated that it would have reached the same conclusion even if Ms. Das’ contract had not been renewed on grounds of unsatisfactory performance. In respect of the handling of Ms. Das’ complaint of harassment and abuse of authority, the Dispute Tribunal found that UNICEF had failed to afford her complaints proper and timeous consideration and no proper investigation had taken place. Noting that Ms. Das filed a complaint of harassment and abuse of authority on 14 June 2010 and on 16 August 2010 UNICEF wrote to Ms. Das for clarification as to her specific allegations and the scope and grounds of her request, the Dispute Tribunal wondered how UNICEF could have possibly finished any proper investigation and closed the case “in June 2010”, when it was still seeking clarification of the nature, scope and grounds for Ms. Das’ allegations and claims in mid-August 2010. The Dispute Tribunal ordered that Ms. Das’ PER for 2010 be rescinded and removed from her personnel files, that she be paid a total of USD 20,000 (USD 10,000 for the unlawful termination of her service and USD 10,000 for the emotional distress caused by her unlawful termination and UNICEF’s failure to properly handle her complaint of harassment and abuse of authority), and that she be paid any outstanding termination benefits and entitlements with retroactive interest.

Submissions

Secretary-General’s Appeal

5. The Secretary-General submits that the UNDT erred in concluding that Ms. Das’ appointment had been terminated, rather than not renewed. He accepts that the contested decision was initially and erroneously described as a termination and her separation was processed as such. However, UNICEF lawfully corrected the error in August 2010. In fact, Ms. Das served out the full duration of her fixed-term appointment. Under the circumstances, her separation cannot be characterized in law as a termination. The Secretary-General maintains that UNICEF’s initially erroneous approach did not cause any adverse effect on

² Before 2010, Ms. Das received three PERs. For her PER for 2008, she received “2” (“met most expectations, however, there is room for improvement”) for the values and competencies of “technical knowledge”, “planning [and quality of work]”, “team work”, and “communication” and “1” (“met few expectations”) for “drive for results (quantity of work)”. She received two PERs in 2009. For her PER for the period from January to March 2009, she received “3” (“fully met expectations”) for “team work”, “2” for “technical knowledge”, “planning [and quality of work]” and “communication” and “1” for “drive for results (quantity of work)”. For her PER for the period from April to December 2009, Ms. Das received “2” for all these values and competencies. On 21 December 2009, Ms. Das complained about the manner in which her PER for April-December 2009 had been conducted. She did not, however, formally rebut that PER.

Ms. Das. On the contrary, it resulted in a material benefit to her over what her position would have been in a non-renewal context, in the form of an additional month of service.

6. The Secretary-General also submits that the Dispute Tribunal erred in holding that the non-renewal of Ms. Das' appointment was unlawful because her unsatisfactory performance had not been established. He notes that Ms. Das' PERs for 2008, 2009 and January to June 2010 had been duly completed and they documented her unsatisfactory performance. These PERs were not rebutted by Ms. Das, and they provided a sufficient basis for a conclusion of unsatisfactory performance for the 2010 performance period. The Secretary-General submits, in the alternative, that even if the 2010 PER could not be relied upon, the remaining records of unsatisfactory performance for the two consecutive years of 2008 and 2009 provide a sufficient basis to justify the non-renewal of her fixed-term appointment.

7. The Secretary-General further submits that the UNDT erred in fact and in law in concluding that the investigation into Ms. Das' complaint of harassment and abuse of authority was inadequate. Contrary to the UNDT's finding that the investigation had been concluded "in a matter of days if not hours", the Secretary-General notes that it was some three weeks after she had lodged a complaint that she was advised of the outcome of the investigation. The Secretary-General also notes that while the Administration decided to close the investigation, it offered Ms. Das an administrative avenue to pursue the substance of her complaint, namely, through the rebuttal process. In response to the UNDT's criticism that the Administration had failed to provide it with the investigation report, the Secretary-General clarifies that Ms. Das had not contested the adequacy of the investigation as an independent matter in her UNDT application and that the Administration would have provided the investigation report in question had the UNDT so requested or directed.

8. Regarding the remedies awarded, the Secretary-General submits that the Dispute Tribunal exceeded its competence and erred in law in ordering the rescission of Ms. Das' PER for 2010 and its removal from her personnel records. He also submits that the UNDT erred in its award of compensation for loss of employment opportunities and emotional distress, and in the totality of compensation awarded. The Secretary-General is of the view that the UNDT's award of economic damages paid insufficient regard to the Appeals Tribunal's guidance in the context of damages following non-renewal decisions. Even in cases where a non-renewal decision has been determined to be unlawful, the Appeals Tribunal has not calculated economic damages based on the duration of the staff member's last appointment.

Much less can it be appropriate to award almost double the duration of the last appointment. The Secretary-General maintains that the UNDT's award for emotional distress is necessarily and *ab initio* flawed on the basis of its erroneous conclusion about the unlawfulness of the termination and the inadequacy of the investigation. Moreover, the award for emotional distress has no basis in the absence of evidence of actual harm. The Secretary-General notes that the UNDT has awarded Ms. Das a total of USD 20,000 without identifying any factor to justify such an award at the very top end of the two-year scale. The Secretary-General requests that if an award is maintained, it be revised downward.

Ms. Das' Answer

9. Ms. Das submits that the Dispute Tribunal correctly concluded that her appointment had been terminated rather than not renewed. She states that the reversal of the course of action by the Administration *ex post facto* caused prejudice to her.

10. Ms. Das contends that her PER for 2010 was "deceitfully manipulated" and "tainted by the wrong motive to terminate her service", and she "was dissuaded and denied of" her right to rebut that PER during the process.

11. Ms. Das also submits that the UNDT correctly concluded that the investigation into her allegations of harassment and abuse of authority was inadequate. She was not provided with a summary of the findings and conclusions of the investigation.

12. Ms. Das finally submits that the UNDT did not exceed its competence and lawfully ordered rescission of her PER for 2010 and its removal from her personnel files. Furthermore the Dispute Tribunal did not make any error in the assessment of the quantum of compensation.

13. Ms. Das requests that this Tribunal dismiss the Secretary-General's appeal, with costs against him for having filed the "misconceived, meritless and abrasive" appeal, and award her further compensation in addition to that already ordered by the Dispute Tribunal.

Considerations

14. In the first instance, the issue for determination by the Appeals Tribunal is whether the Administration can correct an erroneous decision by changing the separation of Ms. Das from termination to non-renewal, after having completed the termination process.

15. Undoubtedly, in situations where the Administration finds that it has made an unlawful decision or an illegal commitment, it is entitled to remedy that situation;³ but it must be timely done.⁴

16. In *Cranfield* at paragraph 36, this Tribunal held that:

The interests of justice require that the Secretary-General should retain the discretion to correct erroneous decisions, as to deny such an entitlement would be contrary to both the interests of staff members and the Administration. How the Secretary-General's discretion should be exercised will necessarily depend on the circumstances of any given case. When responsibility lies with the Administration for the unlawful decision, it must take upon itself the responsibility therefor and act with due expedition once alerted to the unlawful act.

17. The Secretary-General concedes that the decision to separate Ms. Das was initially described as termination and her separation was processed as such. However, he submits that UNICEF corrected the error in August 2010.

18. In this particular case, the UNDT was of the view that:

Non-renewal and termination are two distinct procedures resulting in different implications and consequences for the affected staff member, including consequences relating to future employment. Once UNICEF put into effect, applied, and completed the termination procedures, including obtaining a CRB recommendation for termination, it was inappropriate and impermissible to attempt to reverse the course of action *ex post facto*, after the Applicant had left UNICEF

19. We find no reason to disturb this finding, as at the time UNICEF sought to make the correction Ms. Das was already separated from service and it was, therefore, too late to reverse the decision.

³ *Cranfield v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-367, para. 36

⁴ *Diara v. Secretary-General of the United Nations*, Judgment No UNDT/2011/062, para. 25.

20. The Secretary-General has urged upon us:

More importantly, however, [the Secretary-General's] initial mischaracterization of the separation cannot change its true character in law. Section 8.1(b) of UNICEF's Administrative Instruction on "Separation from service" (CF/AI/2010-001 of 10 March 2010) provides in unambiguous terms that, in relation to fixed-term appointments such as that of [Ms. Das], "[a] termination of appointment is separation service initiated by the organization ... for the purpose of: ... (b) ending the temporary or fixed-term appointment of a staff member *prior to the date of expiration* stipulated in the letter of appointment" (emphasis added.) In the present case, there was no separation prior to the date of expiration. Instead [Ms. Das] served out the full duration of her fixed-term appointment, in addition to a supplementary month of service that she was offered to provide her the requisite notice period initially understood to be owed. Having served out her appointment in full, her separation cannot be characterized in law as a termination.

21. It is erroneous for the Administration to refer to section 8.1(b) of CF/AI/2010-001 of 10 March 2010 and urge upon this Tribunal that, because Ms. Das served a full term, her separation cannot be characterized in law as termination. The Administration has discretion either to terminate the fixed-term appointment of a staff member prior to its expiration, (for good and stated reasons in accordance with the applicable provisions of the Staff Regulations and Rules and/or without improper motives), or not to renew it at the end of the term.

22. In this case, it is clear that, on referral from the India Country Office, the CRB made a unanimous recommendation to terminate Ms. Das' fixed term contract on 7 June 2010 with "immediate effect". It is also clear that this recommendation was approved in the termination letter dated 28 June 2010 which specifically stated that Ms. Das' contract was terminated based on her PERs for the period "2007 to 2010". The letter also set out her termination entitlements.

23. Under the terms of her fixed-term appointment, Ms Das was entitled to one month's notice prior to ending her appointment. In deciding to terminate Ms. Das' appointment prior to its expiration date, the Executive Director had discretion to either give Ms. Das one month notice or pay her a month's net base salary in lieu of notice as provided under Section 10.5 of CF/AI/2010-001. The Administration chose to serve her with a month's notice prior to the termination. Having done so, it is inappropriate for the Administration to turn around and say because Ms. Das served her full term her separation was not a termination.

24. This same argument was urged on the UNDT and was rejected. We affirm the finding of the Dispute Tribunal that Ms. Das' separation from UNICEF was a termination on the grounds of alleged unsatisfactory performance.

25. Here, the Administration's decision to reverse was untimely and therefore ineffective.

Did the UNDT err in concluding that the termination of Ms. Das' appointment was unlawful because her unsatisfactory performance was not established?

26. Given that Ms. Das' performance was the reason for the decision to terminate her appointment, the Administration was required to provide a performance-related justification for its decision.⁵

27. Section 10 of CF/AI/2010-001 entitled "Termination of appointment for unsatisfactory performance" provides:

10.1 The 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.

10.2 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; or

(b) in cases where the e-PAS is used,

(i) an overall rating for work plan outputs of "did not achieve outputs" or an overall rating of competency proficiency of "not proficient" in a given reporting cycle; or

(ii) an overall rating of work plan outputs below "fully achieved outputs" or an overall rating of competency proficiency below "proficient" in each reporting cycle, over two consecutive reporting cycles.

⁵ *Rees v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-266, para. 65.

28. The administrative instruction on termination of appointments gives the Administration the discretion in cases where the paper-based PER is relied upon to either use the ratings in a given cycle or over two consecutive reporting cycles.

29. The decision to terminate Ms. Das' appointment was "taken after an extensive review of [her] performance which has been consistently unsatisfactory, as documented in [her] PERs from 2007 to 2010". So in Ms. Das' case the Administration used the ratings in three reporting cycles.

30. The UNDT, in examining the PER of 2010, held that Ms. Das was not provided with meaningful access to an effective rebuttal mechanism with respect to her PER for 2010. We observe that the UNDT based this finding on Ms. Das' e-mail of 26 May 2010 requesting a copy of CF/AI/1994-002 and an explanation of the administrative instruction to enable her to rebut her PER. The Chief of Human Resource of UNICEF's India Country Office merely asked Ms. Das to sign the PER to acknowledge receipt, without attaching the administrative instruction.

31. On this issue, the Secretary-General submits that:

Even if the actual 2010 performance record document itself could not [be] taken into consideration in respect of [Ms. Das'] separation (which [the Secretary-General] rejects), [the Secretary-General] submits that the record shows sufficient other indicia upon which the Administration – and in turn the UNDT – could conclude that performance concerns had been appropriately advanced with [Ms. Das] in the course of 2010. The [Appeals Tribunal's] jurisprudence has accepted in this respect that performance-related concerns can be established absent a formal evaluation under limited circumstances where, "at the very least, the staff member had been given extensive notice of any performance concerns and the opportunity to provide written comments on those concerns". The [Appeals Tribunal] accepted in *Rees* that due process standards were satisfied where management "g[ave] an informal and continuing process of review by way of setting out specific tasks and analysing the outcome.

32. The Secretary-General contends that Ms. Das had received "formal notice that her performance was unsatisfactory through the conclusion, on 7 December 2009, of her un rebutted performance record for the April to December 2009 performance period". The Secretary-General then enumerated a series of meetings with Ms. Das addressing

performance concerns; setting and finalizing an improvement plan, providing feedback and allowing her to state her concerns.

33. The Secretary-General concluded:

Assessing all these steps in combination, the [Secretary-General] thus respectfully submits that the record of documented communication with [Ms. Das] over the course of 2010 meets the requirements articulated by the [Appeals Tribunal] in *Rees* and supports a conclusion of unsatisfactory performance, even if the [Appeals Tribunal] were to accept that the Administration could not rely on the 2010 performance record.

34. We note that the UNDT considered all these points alongside Ms. Das' complaints that her performance records had been manipulated and she was dissuaded from filing a rebuttal. The UNDT held that, as a result of Ms. Das being effectively deprived of a meaningful opportunity to rebut her PER for 2010, the Dispute Tribunal could not place any reliance on it.

35. We find no reason to reverse this finding as an effective rebuttal mechanism is an integral part of a performance evaluation process.

36. The Secretary-General submits further that, even if the 2010 PER could not be relied upon, the remaining records of unsatisfactory performance for the two consecutive years of 2008 and 2009 would remain a sufficient independent basis to justify the non-renewal of Ms. Das' fixed-term appointment.

37. We are not persuaded by this submission as Section 10.2(a)(ii) of CF/AI/2010-001 requires "two consecutive reporting cycles". Two consecutive reporting cycles should involve the most recent PERs, to protect staff against arbitrary selection of reporting cycles by their reporting officers. This is in line with Section 10.1 of CF/AI/2010-001 where Managers are required to record unsatisfactory performance and 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. It is in the reporting cycle immediately after this given opportunity that the performance of the staff member should be assessed to determine whether there has been an improvement. If the staff member does not fully meet expectations for the second time in succession, then the appointment may be terminated for unsatisfactory performance.

38. In the present case, the two consecutive reporting cycles are the 2009 and 2010 PERs. Since the 2010 PER cannot be relied on, we affirm the UNDT's finding that the termination of Ms. Das' appointment was unlawful because her unsatisfactory performance has not been established.

Did the UNDT err in concluding that the investigation into the allegation of harassment and abuse of authority was inadequate?

39. We take note that Ms. Das' complaints of harassment and abuse of authority were in relation to her PERs. The complaints going to the appropriateness of the performance records were allegations of procedural lapses or deficiencies which are routinely considered in rebuttal proceedings and which could be addressed in that forum. The UNDT appreciated this fact when it pointed out that an effective investigation could have been carried out in the context of an effective rebuttal process.

40. As previously held, Ms. Das was effectively deprived of a meaningful opportunity to rebut her PER for 2010. In the circumstances we confirm the UNDT's conclusion that no proper investigation into her complaints took place.

Appeal against Damages

41. We find no error in fact or law in the UNDT's decision that the circumstances of the present case merited a compensatory award. We therefore affirm the award of the sum of USD 10, 000 for unlawful termination of contract and for the emotional distress she suffered as a result.

42. We, however, do not see the complaint of harassment as a separate circumstance or claim. The UNDT therefore erred in awarding USD 10,000 for emotional distress as a result of the Administration's failure to properly consider and investigate her complaint of harassment and abuse of authority. We will allow the appeal on this ground, and set aside the award.

Rescission and Removal of 2010 PER from Personnel Record

43. The Secretary-General draws our attention to Section 2.38(a) and (b) of CF/AI/1994-02, which are to the effect that performance records are to be placed on a staff member's official status file whether or not they are subject to a rebuttal process.

44. In the absence of any provision for the rescission or removal of a PER in the Staff Regulations and Rules, the UNDT cannot order the removal of the 2010 PER from Ms. Das' official status file. The best remedy in these circumstances is to order that this Judgment be placed on her personnel file.

45. We accordingly set aside the orders of rescission and removal of the 2010 PER, and order that a copy of this Judgment be placed in Ms. Das' official records.

46. In the circumstances, the Judgment of UNDT is affirmed and damages varied.

Judgment

47. Subject to the variation in damages, the appeal is dismissed, and the UNDT Judgment is affirmed.

Original and Authoritative Version: English

Dated this 2nd day of April 2014 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Faherty

(Signed)

Judge Chapman

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

(Signed)

Weicheng Lin, Registrar