



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

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Judgment No. 2015-UNAT-571

**Weerasooriya  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Sophia Adinyira, Presiding Judge Luis María Simón Judge Mary Faherty
Case No.:	2014-663
Date:	30 October 2015
Registrar:	Weicheng Lin

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Counsel for Ms. Weerasooriya:	Yamuna Balasuriya
Counsel for Secretary-General:	John Stompor

**JUDGE SOPHIA ADINYIRA, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2014/110, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 6 August 2014 in the case of *Weerasooriya v. Secretary-General of the United Nations*. On 7 October 2014, the Secretary-General filed his appeal, and on 6 December 2014 Ms. Malathi Weerasooriya filed her answer.

**Facts and Procedure**

2. The following facts are uncontested:<sup>1</sup>

... The Applicant was appointed in 1991, as a locally recruited staff member at the National Officers (“NO”) category, level B, [with the United Nations Population Fund (UNFPA)] in Sri Lanka.

... In 2003, a Review Panel comprising of representatives from the United Nations Development Programme, the World Food Programme and UNFPA conducted a global Country Office typology exercise in order [to] achieve a realignment between the Country Office functional requirements and the competency profiles of staff through a so called job matching exercise. During this exercise, the Applicant expressed her interest to be confirmed on the post of Assistant Representative of the UNFPA Country Office in Sri Lanka at the level NO-C.

... On 26 September 2003, Ms. LB, UNFPA Country Representative signed a Note to File which contained, inter alia, the following recommendation:

Based on the interview and past performance and after careful consideration, the panel recommended:

- (i) SM [staff member (the Applicant)] requires improvements under several competency areas.
- (ii) Management and supervisory skills require attention.
- (iii) SM should make an effort to improve team work and dynamics.
- (iv) SM needs to provide better leadership and improve knowledge sharing.
- (v) It was decided that UNFPA should set performance benchmarks to allow SM to develop skills. Her performance and suitability for AR [Assistant Representative] post should be examined after one year as per guidelines.

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<sup>1</sup> Impugned Judgment, paras. 3-27 (emphasis in original).

... On 17 October 2003, Ms. LB provided the Applicant with a Mid-year Performance Appraisal Report (“PAR”) and feedback from the matching exercise, as follows:

As [the Applicant’s] supervisor, I informed her that I felt that she was capable of high quality work and respected her guidance in relation to the country situation and programme. I advised her that she did not however always apply herself and her performance had been quite uneven. I identified areas in her performance that needed attention[.]

...

The SM acknowledged my concerns mostly without comment. She noted that she had undergone considerable stress working under the former UNFPA Representative. ... Although, we had a discussion on this when I first took up my post, the SM explained that she had not fully recovered from the past situation and explained that her performance had suffered as a result of it. She noted that she would make every effort to address the concerns discussed.

I then informed her of the outcome of the matching exercise. The review panel had recommended that she be conditionally confirmed to the post of AR and assessed after a period of one year against meeting specific performance goals. Based on our discussion, I informed her of following specific goals:

...

... On 30 October 2003, Ms. LB sent a letter to the Applicant titled “Results of Job Matching Exercise”. The letter informed the Applicant that:

The [Review] Panel based its review on the following criteria: staff member performs only some of the new functions of the post however she has potential, with some short-term training to reach the required level of the post.

The Panel reviewed the new post profiles, the present job description and the IPP as well as the latest performance record and PAR history.

... [T]he Panel decided to conditionally confirm you in the post of Assistant Representative at the NOC level. Specific performance and development goals have been identified for 2004 and a follow-up review will be conducted in due time to asses[s] if these goals have been met.

*2004 PAD*

... On 1 September 2004, the Applicant finalized the Performance Planning for her 2004 Performance Appraisal and Development (“PAD”). The mid-year progress review was signed off by both the Applicant and her supervisor on 30 September 2004,

without either one of them entering any comments. On 20 May 2005, the Applicant and her supervisor signed-off on her year-end 2004 appraisal. The Applicant was provided with the following overall ratings: “Partially Achieved Outputs” for the section “Work Plan Outputs[”]; “Developing Proficiency” for the section [“]Core Competencies”; “Developing Proficiency” for the section “Functional Competencies[”]; and “Partially Achieved Output” for the section [“]Development Outputs”. The Management Review Group (“MRG”) signed-off on the PAD on 10 October 2006.

... The Applicant filed a rebuttal of her 2004 PAD. On 8 September 2006, the Rebuttal Panel recommended that:

2. The MRG statement that “the staff member did not appear to take the feedback she has received over the years as seriously as warranted...” should be [struck] and reworded to state “the staff member did not appear to take the feedback she has received over the past 2 years as seriously as warranted...”
3. In view of adequate documentation of the staff member’s performance issues with the supervisor the Panel does not agree that the alleged poor performance rating was beyond the staff member’s control.

*2005 PAD*

... On 8 February 2006, the Applicant finalized the Performance Planning for her PAD for the 2005 performance period. The mid-year progress review was signed off by both the Applicant and her supervisor on 30 September 2005, without either one of them entering any comments. On 9 and 10 April 2006, the Applicant and her supervisor signed-off on her year-end appraisal. The Applicant was provided with the overall ratings of “Partially Achieved Outputs” for the section “Work Plan Outputs”; “Developing Proficiency” for the section “Core Competencies”; “Developing Proficiency” for the section “Functional Competencies”; and “Partially Achieved Output” for the section [“]Development Outputs”. The MRG signed off on the PAD on 22 June 2006.

*2006 PAD*

... On 10 April 2006, the Applicant finalized the Performance Planning for her PAD for the 2006 performance period. The mid-year progress review was signed off by both the Applicant and her supervisor on 27 September 2006, with both of them entering comments. On 31 March and 2 April 2007, the Applicant and her supervisor signed-off on her year-end appraisal. The Applicant was provided with the overall ratings of “Partially Achieved Outputs” for the section “Work Plan Outputs”; “Developing Proficiency” for the section “Core Competencies”; “Developing Proficiency” for the section “Functional Competencies[”]; and “Fully Achieved Output”

for the section “Development Outputs[”]. The MRG signed off on the PAD on 21 May 2007.

*2007 PAD*

... On 29 June and 10 July 2007, the Applicant and her supervisor finalized the Performance Planning for her PAD for the 2007 performance period. The mid-year progress review was not-signed-off on by either the Applicant or her supervisor. Similarly, neither party signed off on her year-end appraisal which provided her with the overall ratings of “Partially Achieved Outputs” for the section “Work Plan Outputs”; “Not Proficient” for the section “Core Competencies”; “Developing Proficiency” for the section “Functional Competencies”; and “Partially Achieved Output” for the section “Development Outputs”.

*2008 PAD*

... On 11 April 2008 and 3 July 2008, the Applicant and her supervisor, respectively, finalized the Performance Planning for her PAD for the 2008 performance period. The mid-year progress review was signed off by both of them on 13 and 14 October 2008, with both their comments. On 6 and 9 April 2009, they signed off on the year-end appraisal. The Applicant was provided with the overall ratings of “Did Not Achieve Outputs” for the section “Work Plan Outputs”; “Not Proficient” for the section “Core Competencies”; “Developing Proficiency” for the section “Functional Competencies”; and “Did Not Achieve Outputs” for the section “Development Outputs”.

... On 11 July 2009, the Applicant filed a rebuttal of her 2008 PAD. On 16 February 2010, the Rebuttal Panel issued its report which stated:

**A. Decision**

...the supervisor’s overall ratings for workplan outputs and on core and functional competencies have been substantiated mainly through feedback provided by the multiple reports and discussions between [the Di[vis]ion for Human Resources] and Management of the Asia and Pacific Division. In light of this information the Rebuttal Panel decided that:

**The Overall rating for workplan outputs is maintained as [“]Did Not Achieve” the Overall Rating for core competencies is maintained as “Not Proficient[”] and the Overall rating for Functional competencies as “Developing Proficiency”.**

...

**D. Conclusion**

1. ...the Rebuttal Panel is of the opinion that the Overall Ratings of the PAD are well substantiated.

...

**4. The Overall Ratings made by the supervisor are maintained by the rebuttal panel.**

*Separation from service*

... On 16 March 2010, the Director of the Division for Human Resources (“DDHR”) prepared a document entitled “Determination of Unsatisfactory Performance” regarding the Applicant’s service with UNFPA. The memorandum included a review of the applicable policies; the Applicant’s performance appraisals for the years 1996 through 2008; the rebuttals against the 2004 and 2008 performance appraisals; the procedures followed in preparing the 2004 through 2008 performance appraisals and the following final determination:

**I. Applicable policy provision:**

1. The UNFPA Separation policy of 25 July 2006, [Section] 10.3.7, provides:

...the Director, DHR, may determine that the performance of any staff member is “unsatisfactory” if the staff member received combined performance ratings as follows:

(a) Performance is appraised *in two consecutive intervals* as not achieved/non proficient regarding at least one combined performance rating;

(b) Performance is appraised in *three consecutive intervals* as partially achieved/developing proficiency regarding at least one combined performance rating.

**II. Does the staff member fall within the scope of [Section] 10.3.7 of the UNFPA Separation policy?**

2. Since the promulgation of the UNFPA Separation policy of 25 July 2006, [the Applicant’s] performance has been appraised in PAD by her supervisors as follows:

For 2006: (i) partially achieved outputs; (ii) developing core competency proficiency; (iii) developing functional competency proficiency;

For 2007: (i) partially achieved outputs; (ii) not proficient in core competency; (iii) developing functional competency proficiency;

For 2008: (i) did not achieve outputs; (ii) not proficient in core competency; (iii) developing functional competency proficiency.

3. On the basis of the above, [the Applicant] falls within the scope of both sub-paragraphs (a) and (b) of [Section] 10.3.7 of the UNFPA Separation policy.

...

**VI. PAD Procedure:**

...I conclude that there are no material procedural defects in the PADs in question.

**VII. Determination**

On the basis of the above considerations, I conclude that since 2004, [the Applicant] has failed to meet the competency profile applicable to her post, and has not produced the work plan outputs annually required under her post and agreed upon with her supervisors, although she received reasonable opportunities and time for improvement.

As a result, I determine, in accordance with [Section] 10.3.7 of the UNFPA Separation policy, that her performance as an Assistant Representative of UNFPA is unsatisfactory.

... By memorandum dated 1 April 2010, the DDHR, informed the Executive Director of his determination regarding the Applicant's unsatisfactory performance and recommended that, in accordance with [Section] 10.2 of the UNFPA Separation policy, the Applicant's service be terminated. The memorandum added that any consideration as to whether to terminate the Applicant's service should be taken "following due consideration by the Compliance Review Board ("CRB")["]. That same day, the DDHR, sent a memorandum to the Chairperson, CRB, requesting a review of the recommendation to terminate the permanent appointment of the Applicant.

... On 4 June 2010, the Chairperson of the CRB informed the Executive Director that

The CRB members have concluded that due process [has] been followed and that the recommendation and submission of the [DDHR] has been taken in compliance with UNFPA preset policies and procedures. As such, the CRB members endorse the recommendation of the termination of [the Applicant's] services based on unsatisfactory performance.

... On 11 June 2010, the Chief, Office of the Executive Director, informed the Applicant that, on 16 March 2010, the DDHR had determined that her performance was unsatisfactory and had, on 1 April 2010, recommended the Applicant's termination from service. As required, this recommendation was referred to the CRB who, on 4 June 2010, endorsed the DDHR's recommendation. This memorandum attached the DDHR's 16 March 2010, 1 April 2010 and 4 June 2010 memoranda.

... On 29 June 2010, the Applicant sent a letter to the Executive Director, UNFPA in response to a request that she provide any observations regarding the recommendation that her appointment be terminated.

... On 15 July 2010, the Executive Director addressed a letter to the Applicant entitled "Termination of your permanent appointment" where he concluded that the Applicant's appointment was being terminated subject to the conditions stipulated in the letter.

... On 23 July 2010, the Applicant was called into a meeting with the Chief, Security Advisor, United Nations Department for Safety and Security and a Representative of UNFPA for the purpose of providing her the 15 July 2010 termination letter. Prior to the meeting, the Applicant informed the participants that her lawyer had advised her to only participate in the meeting if it was being recorded. Due to the conditions set by the Applicant, the meeting ended with the Applicant "refus[ing] to accept the letter or have any further discussion ...". That same day, the DDHR sent an email to the Applicant whereby he stated that "UNFPA will count .... Friday, 23 July 2010, as the day on which [she received the Executive Director's letter dated 15 July 2010". The email included a scanned copy of the letter.

... On 20 September 2010, the Applicant addressed a letter to the Secretary-General of the United Nations requesting management evaluation of the decision to separate her from service. This letter was transmitted to the Executive Director, UNFPA three days later.

... On 27 October 2010, the Executive Director informed the Applicant that he had concluded that the decision to terminate her contract did not violate the terms of her appointment.

...

... On 15 February 2011, the application was filed and, on 17 March 2011, the Respondent filed his reply.

3. On 6 August 2014, the UNDT issued its Judgment. The UNDT concluded that: (a) the provisions of the UNFPA Separation Policy on additional actions in cases of sub-standard performance contravened the ones in the Secretariat's Administrative Instruction ST/AI/2002/3 (Performance Management and Development System); (b) the UNFPA Administration unlawfully considered Ms. Weerasooriya's performance appraisals for 2006, 2007, and 2008 rather than her performance appraisals for 2007, 2008, and 2009; (c) Ms. Weerasooriya's response to the recommendation that her appointment be terminated for unsatisfactory service constituted the initiation of a rebuttal process of her performance appraisal for 2009 and a complaint of abuse of power and harassment against her supervisor for the period 2008-2009, and it was unlawful that these matters were not resolved prior to

the decision to terminate her appointment; and (d) interim measures with regard to Ms. Weerasooriya's unsatisfactory performance should have been taken before a decision on termination.

4. In view of these conclusions, the UNDT ordered the rescission of the contested decision and Ms. Weerasooriya's reinstatement from 15 July 2010 to 31 April 2011; and compensation for her loss of earnings (net base salary and entitlements) for this period minus the termination indemnity she received. As an alternative to the rescission, the UNDT ordered payment of USD 5,000 plus the loss of earnings (net base salary and entitlements) for the period 24 July 2010 to 31 April 2011, minus the termination indemnity she received. The UNDT further ordered that Ms. Weerasooriya "is to be considered retired as of 1 May 2011 (early retirement after 20 years of service) and the [Secretary-General] is to make all necessary arrangements within 30 days for her to receive her pension awards retroactively as of 1 May 2011, including a letter of appreciation to be sent for the Executive Director's signature".<sup>2</sup>

### **Submissions**

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

5. The UNDT erred in law in finding that the UNFPA Separation Policy unlawfully contravened ST/AI/2002/3. UNFPA is a separately administered fund of the United Nations and pursuant to Section 2.3 of Secretary-General's Bulletin ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances), the United Nations Secretariat's administrative issuances do not apply to separately administered funds, unless otherwise stated therein or unless their applicability is expressly accepted. ST/AI/2002/3 does not contain any text stating that it applied to UNFPA and UNFPA has not promulgated any administrative issuance incorporating ST/AI/2002/3. The UNFPA Separation Policy simply reiterates the applicability of the Staff Regulations and Rules. In this regard, Staff Regulation 9.3(a)(ii) and Staff Rule 9.6(c)(ii) and (h) provide that a staff member's appointment may be terminated for unsatisfactory service. Thus, UNFPA had the discretion to promulgate its own policies and procedures regarding the termination of its staff for unsatisfactory service pursuant to the UNFPA Separation Policy.

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<sup>2</sup> Impugned Judgment, para. 177.

6. The UNDT further erred in law and fact in concluding that it was unlawful to terminate Ms. Weerasooriya's appointment based on her performance appraisals for 2006, 2007 and 2008. Contrary to the UNDT's conclusion, the fact that Ms. Weerasooriya's 2009 performance appraisal was finalized on 4 May 2010, before the decision to terminate her appointment was taken (on 15 July 2010), did not require the Administration to initiate a new procedure based on a new period of reference.

7. The UNDT also erred in basing its conclusion on the Appeals Tribunal's ruling in *Das* that "[t]wo consecutive reporting cycles should involve the most recent [performance evaluation reports], to protect staff against arbitrary selection of reporting cycles by their reporting officers",<sup>3</sup> since the *Das* case can be distinguished in two respects.

8. The UNDT erred in law and fact in concluding that Ms. Weerasooriya's letter dated 29 June 2010 also contained a rebuttal of her 2009 performance appraisal and a complaint of harassment against her supervisor, and that it was unlawful that these were not resolved before the separation decision was issued. With regard to the rebuttal of her performance appraisal, the Secretary-General recalls that in the present case, Ms. Weerasooriya's letter did not fulfill the formal requirements for a rebuttal of a performance appraisal as set out in the UNFPA Policies and Procedures Manual: Human Resources, Rebuttal and Related Remedies Regarding Performance Appraisal and Development Policy (UNFPA Rebuttal Policy), in effect at the time of Ms. Weerasooriya's letter dated 29 June 2010.

9. Similarly, the 29 June 2010 letter failed to conform to the requirements for the initiation of a formal grievance process regarding allegations of harassment, sexual harassment or abuse of authority as set forth in UNFPA Policies and Procedures Manual: Human Resources, Harassment, Sexual Harassment and Abuse of Authority Policy (UNFPA Harassment Policy), in effect at the time of Ms. Weerasooriya's letter dated 29 June 2010.

10. The UNDT erred in law and fact in concluding that the UNFPA Administration failed to take the appropriate interim measures pursuant to Section 10.3.15 of the UNFPA Separation Policy, which allows for the withholding of a within-grade salary increment in case of poor performance. The UNDT also erred in concluding that "the most appropriate measure to be applied even if it is not clearly recommended, was a transfer to another post or

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<sup>3</sup> *Das v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-421, para. 37.

function”.<sup>4</sup> Pursuant to the UNFPA Separation Policy, the measure of withholding a within-grade salary increment in the case of poor performance is optional and is not a mandatory step that is required to be exhausted prior to the termination of the appointment of a staff member for unsatisfactory service. With regard to a transfer to another post or function, there was no commensurate post to which Ms. Weerasooriya could have been transferred at her duty station, and as a locally-recruited staff member appointed to a national officer post, there was no option to assign her to a post or function at another duty station.

11. Finally, for the reasons set forth above, the decision of the Executive Director to terminate Ms. Weerasooriya’s appointment for unsatisfactory service constituted a reasonable and lawful exercise of her discretion and, accordingly, there is no legal basis for the UNDT’s orders of specific performance and compensation. The Appellant requests the Appeals Tribunal to vacate the Judgment and to dismiss Ms. Weerasooriya’s UNDT application in its entirety.

**Ms. Weerasooriya’s Answer**

12. The UNDT Judgment is “valid in law and just in principle”. The Secretary-General merely repeats and restates the arguments he presented before the UNDT. He has not provided any evidence to establish UNFPA’s impartiality and lack of professionalism in dealing with Ms. Weerasooriya’s case.

13. From 2008, Ms. Weerasooriya began to be “unfairly singled out for unjustified adverse criticism from the UNFPA Country Representative” and finally an investigation was launched against her for alleged personal travel amounting to USD 271 over a three-year period of time. Soon after these charges were dropped, the Country Representative initiated the process leading to the termination of her contract for unsatisfactory service.

14. Throughout the investigation and the subsequent termination process, Ms. Weerasooriya clearly pointed out “the repeated violations of the principles of natural justice and the clear conflict of interest of both the UNFPA Country Representative in Sri Lanka as well as the DHR/UNFPA”, but her grievances were not addressed.

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<sup>4</sup> Impugned Judgment, para. 144.

15. While the PAD system seeks to offer a fair process and opportunity for staff members to be assessed annually, in Ms. Weerasooriya's case, these procedures were breached, resulting in serious flaws. The flawed PADs were used to recommend the termination of her appointment. Ms. Weerasooriya's excellent performance was recognized by both national counterparts and her colleagues within Sri Lanka and other countries, but this was not taken into account by either the DDHR or her supervisor.

16. "Victimization, harassment and public humiliation of [Ms. Weerasooriya] did not stop with the termination of her services, but included treating her like a common criminal by displaying a public notice at the entrance of the [United Nations] compound barring her from accessing the [United Nations] compound on 26 July 2010." Such measures deprived her of her rights to meet with the Staff Association and subjected her to public humiliation.

17. As a result of the victimization and humiliation she endured during the last few years of her service with UNFPA, she decided to seek early retirement on completion of 20 years of service in April 2011 although she had more than four years left to reach full retirement and, given her personal circumstances, it was essential that she continued to be employed. However, due to the "public humiliation and shame she was subjected to and the consequent adverse publicity generated", it was difficult for her to seek employment with other United Nations, international or national development agencies.

18. Ms. Weerasooriya reiterates her submissions made before the UNDT and seeks the redress sought and granted in the impugned Judgment.

### **Considerations**

#### *The application of ST/AI/2002/3*

19. UNFPA is a separately administered fund of the United Nations and has promulgated its own separation policy. The UNDT, in considering the application of the UNFPA Separation Policy to Ms. Weerasooriya, held that the provisions of the UNFPA Separation Policy on additional actions in cases of sub-standard performance contravened the ones in the ST/AI/2002/3 and the latter should therefore apply.

20. The Secretary-General correctly submits that this finding is an error of law and fact as ST/AI/2002/3 is not applicable to UNFPA. Secretary-General's Bulletin ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances) expressly provides in Section 2.3 that "[a]dministrative issuances shall not apply to the separately administered funds, organs and programmes of the United Nations, unless otherwise stated therein, or unless the separately administered funds, organs and programmes have expressly accepted their applicability". Accordingly, administrative issuances do not apply to UNFPA, unless their applicability is expressly provided for in the administrative issuance or expressly accepted by UNFPA being a separately administered fund.<sup>5</sup> We note that UNFPA has not promulgated any administrative issuance incorporating ST/AI/2002/3 or accepting its applicability.

21. The UNDT's reliance on Section 3 of the UNFPA Separation Policy to come to the conclusion that it contravened ST/AI/2002/3 is misplaced as the section refers specifically to the Staff Regulations and Rules as well as the Regulations of the United Nations Joint Staff Pension Fund which are applicable to UNFPA staff members, but there is no reference to administrative issuances. Section 3 states:

Should the terms of this policy contravene any terms contained in the United Nations Staff Regulations, Staff Rules or the Regulations of the United Nations Joint Staff Pension Fund, the terms of those Regulations and Rules shall prevail over the terms of this policy.

22. Contrary to the UNDT's findings, we hold that Section 3 of the UNFPA Separation Policy did not incorporate ST/AI/2002/3, but simply reiterated the applicability of Staff Regulation 9.3(a)(ii) and Staff Rule 9.6(c)(ii) and (h), which provide that a staff member's appointment may be terminated for unsatisfactory service.

23. Consequently, we uphold this ground of appeal.

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<sup>5</sup> See *Mashhour v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-483 (where the Appeals Tribunal held that UNICEF had not promulgated any administrative issuance incorporating ST/AI/2002/3 and therefore the UNDT erred on a question of law and fact by concluding that ST/AI/2002/3 applied to UNICEF).

*Did the UNDT err in law and fact in concluding that it was unlawful to terminate Ms. Weerasooriya's appointment based on her performance appraisals for 2006, 2007, and 2008?*

24. Section 10.3.7 of the UNFPA Separation Policy provides:<sup>6</sup>

[... T]he Director, DHR, may determine that the performance of any staff member is "unsatisfactory" if the staff member received combined performance ratings as follows:

(a) Performance is appraised *in two consecutive intervals* as not achieved/non proficient regarding at least one combined performance rating;

(b) Performance is appraised *in three consecutive intervals* as partially achieved/developing proficiency regarding at least one combined performance rating.

25. Ms. Weerasooriya's performances as appraised in her PADs were as follows:

2006: (i) "work plan outputs" - "partially achieved"; (ii) "core competencies" - "developing proficiency"; (iii) "functional competencies" - "developing proficiency"; and (iv) "development outputs" - "fully achieved";

2007: (i) "work plan outputs" - "partially achieved"; (ii) "core competencies" - "not proficient"; (iii) "functional competencies" - "developing proficiency"; and (iv) "developmental outputs" - "partially achieved"; and

2008: (i) "work plan outputs" - "did not achieve"; (ii) "core competencies" - "not proficient"; (iii) "functional competencies" - "developing proficiency"; and (iv) "development plan outputs" - "did not achieve".

26. Based on these performance appraisals, Ms. Weerasooriya was considered to fall within the scope of both paragraphs (a) and (b) of Section 10.3.7 of the UNFPA Separation Policy and accordingly her performance as an Assistant Representative of UNFPA was found unsatisfactory and her permanent appointment was terminated.

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<sup>6</sup> Emphasis in original.

27. The UNDT, relying on *Das*,<sup>7</sup> held that the contested administrative decision to terminate Ms. Weerasooriya's appointment for unsatisfactory performance was unlawful because the Administration failed to consider her 2009 PAD which was her most recent PAD. Accordingly, the three consecutive intervals of poor performance should have been for the years 2007, 2008, and 2009.

28. The Secretary-General correctly submits that the ruling in *Das* is distinguishable. In *Das*, the Administration relied on the ratings in three reporting cycles, from 2007 to 2010, as a sufficient basis for a conclusion of unsatisfactory performance to terminate the staff member's appointment. The staff member expressed an interest in rebutting her 2010 performance appraisal report, which was her most recent one, but the Administration effectively deprived her of that opportunity by terminating her appointment before she could initiate the process. The UNDT held that, as a result of Ms. Das being effectively deprived of a meaningful opportunity to rebut her performance appraisal report for 2010, no reliance could be placed on it.

29. By contrast, in the present case, the UNFPA Administration waited until Ms. Weerasooriya's rebuttal of her 2008 performance appraisal was completed in February 2010 before it initiated the process in March 2010 to determine whether her performance was unsatisfactory and whether a recommendation of termination of appointment was warranted.

30. The UNDT held that since the administrative decision to terminate Ms. Weerasooriya's permanent contract for unsatisfactory service was not taken by the Executive Director before the 4 May 2010 finalization of her 2009 PAD report, but only on 15 July 2010, a new procedure should have been initiated by the DDHR based on the new period of reference, which was to be considered in accordance with Section 10.3.7(a) of the UNFPA Separation Policy for the 2008 and 2009 cycles or Section 10.3.7(b) for the 2007, 2008, and 2009 cycles.

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<sup>7</sup> *Das v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-421, para. 37 (where the Appeals Tribunal held that "[t]wo consecutive reporting cycles should involve the most recent [performance appraisal reports], to protect staff against arbitrary selection of reporting cycles by their reporting officers").

31. We reject this finding by the UNDT. At the time the termination process was started on 16 March 2010,<sup>8</sup> the three most recent consecutive appraisals were those for 2006, 2007, and 2008. The Appeals Tribunal finds it unreasonable to require the Administration to restart the termination process if a new performance appraisal is completed before a final termination decision is taken. Otherwise, it would potentially place the Administration in an endless cycle whereby it could never be in a position to terminate the appointment of a staff member.

32. Furthermore, legal certainty requires administrative issuances to be applied in a predictable manner and once the procedure foreseen in the UNFPA Separation Policy is initiated, it should be followed through.

33. From the foregoing, the appeal on this ground succeeds.

*Did the UNDT err in law and fact in finding that the separation was unlawful when Ms. Weerasooriya's complaint of discrimination and her rebuttal of the 2009 PAD report were not resolved before the separation decision was issued?*

34. The UNFPA Rebuttal Policy in effect at the time of Ms. Weerasooriya's letter dated 29 June 2010 set out the formal requirements for a rebuttal of a performance appraisal through the submission of a rebuttal statement. In the present case, Ms. Weerasooriya's letter did not fulfill these requirements. The letter merely conveyed Ms. Weerasooriya's response to the UNFPA Administration's invitation to submit her views on the recommendation to terminate her appointment for unsatisfactory service. At no point in this letter did she indicate that she wished to avail herself of the rebuttal process with regard to her performance appraisal for 2009.

35. Similarly with regard to the filing of a complaint of harassment by a UNFPA staff member, the UNFPA Harassment Policy in effect at the time of Ms. Weerasooriya letter dated 29 June 2010 provided for the initiation of a formal grievance process regarding allegations of harassment, sexual harassment or abuse of authority and set forth requirements with respect to a written complaint, to which the 29 June 2010 letter failed to conform. Ms. Weerasooriya did not indicate that she wished to initiate a formal grievance process regarding allegations of harassment, sexual harassment or abuse of authority. The

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<sup>8</sup> Impugned Judgment, para. 15.

policy also set forth requirements with respect to a written complaint and its filing. In the present case, the 29 June 2010 letter failed to conform to these requirements.

36. In view of the foregoing, we hold that the UNDT erred in finding that the separation was unlawful as there was no formal request for rebuttal or formal report of harassment to be resolved.

*Did the UNDT err in law and fact in concluding that the UNFPA Administration failed to take the appropriate interim measures pursuant to Section 10.3.15 of the UNFPA Separation Policy?*

37. As much as we agree with the Secretary-General that such interim measures are optional and not mandatory, we expect that poor or unsatisfactory work performance by a staff member is addressed through evaluations, the setting of performance benchmarks and improvement developmental plans assisting the staff member to improve his or her performance before any action is finally taken by the Administration.

38. In the present case, Ms. Weerasooriya was given a reasonable opportunity to improve her performance but she failed to do so. Her combined performance ratings for the three consecutive years from 2006 to 2008 fell within the scope of Section 10.3.7 of the UNFPA Separation Policy and justified her separation from service by UNFPA.

39. In the circumstances, the decision of the Executive Director to terminate Ms. Weerasooriya's unsatisfactory service constituted a reasonable and lawful exercise of her discretion in accordance with the UNFPA Separation Policy. It is not open to the UNDT to substitute its opinion for that of the Administration<sup>9</sup> by stating that the Administration should have withheld her within-grade salary increment or to transfer her to another post.

40. The duty of the UNDT in this case was to consider whether UNFPA followed the procedure set out in its Separation Policy for terminating the appointment of a staff member for unsatisfactory performance. Our evaluation of the record shows that the separation of Ms. Weerasooriya was based on her unsatisfactory performance appraisal in three consecutive intervals warranting her separation from UNFPA, and due process was adhered to by the Administration.

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<sup>9</sup> *Said v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-500, para. 32.

41. From the foregoing, we hold that Ms. Weerasooriya's separation from UNFPA was lawful and the UNDT erred in rescinding the termination of her appointment and awarding compensation.

42. Consequently, the appeal succeeds.

**Judgment**

43. The appeal is allowed and the Judgment of the UNDT is vacated.

Original and Authoritative Version: English

Dated this 30<sup>th</sup> day of October 2015 in New York, United States.

*(Signed)*

Judge Adinyira, Presiding

*(Signed)*

Judge Simón

*(Signed)*

Judge Faherty

Entered in the Register on this 18<sup>th</sup> day of December 2015 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar