



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

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Judgment No. 2013-UNAT-301

**Osman  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Richard Lussick, Presiding Judge Inés Weinberg de Roca Judge Mary Faherty
Case No.:	2012-333
Date:	28 March 2013
Registrar:	Weicheng Lin

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Counsel for Appellant:	George Irving
Counsel for Respondent:	Wambui Mwangi

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Tariq Osman against Judgment No. UNDT/2012/057, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 19 April 2012. Mr. Osman appealed on 14 June 2012, and the Secretary-General filed his answer on 21 August 2012.

### **Facts and Procedure**

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

... The Applicant joined the United Nations in October 1991. He served in various peacekeeping missions and, on 19 February 2007, started serving at UNAMI [United Nations Assistance Mission for Iraq], as a Fuel Supply Assistant at the FS-3 level under a fixed-term appointment. His contract, which was initially for six months, was renewed on several occasions.

... On 19 March 2008, a performance improvement plan was made for the Applicant.

... By memorandum dated 20 October 2008, the Chief of Mission Support, UNAMI, informed the Applicant that his function was being abolished in the budget for 2009 and that he would be reassigned, together with his post, to the Movement Control Unit, in Baghdad, Iraq.

... On 28 August 2008, another performance improvement plan was prepared for the Applicant.

... On 9 December 2008, the Applicant's supervisor sent him an email raising shortcomings in his performance. In addition, the Applicant's team leader recorded in an email dated 27 January 2009 that his performance for the previous three months had been inadequate. In a memorandum dated 29 January 2009, the Administration noted that the Applicant had acknowledged his shortfalls and showed interest in being part of the team. On 17 March 2009, a performance improvement plan was again put into place for the Applicant.

... In accordance with the rotation plan for April 2009 of the Baghdad International Airport, where the Applicant was discharging his duties, he was due to leave Iraq for rest and recreation ("R&R") in the second half of the month, with a

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<sup>1</sup> The facts are taken from Judgment No. UNDT/2012/057, paragraphs 3–34.

return date on 30 April 2009. On 14 April 2009, the Applicant made a request through the matrix system for R&R from 23 to 30 April 2009 and annual leave from 1 to 4 May 2009.

... This request was approved by the Applicant's direct supervisor, but refused, on 15 April 2009, by his second reporting officer, i.e., the Chief Aviation Officer, on the ground that the Applicant was required to make progress on his special performance monitoring and associated training programme.

... The Applicant wrote to the Chief Aviation Officer stressing that he had requested annual leave in order to attend to his mother, who was in a serious medical condition. In reply, the Chief Aviation Officer reiterated, on 16 April 2009, that he would not approve the leave request as submitted, while stating that the Applicant would receive full cooperation if he wished to use some of the uncertified sick leave balance available for compassionate purposes, as provided for in former staff rule 106.2(c). He advised the Applicant to consult with the Human Resources Section for this matter.

... The Applicant did not do so; he took his leave as planned, with the concurrence of his first reporting officer. He decided to relocate his mother to Karthoum on 23 April 2009, after she had spent two months in Amman awaiting to undergo surgery. The Applicant returned to work on 5 May 2009.

... On 25 May 2009, the Applicant was called to Kuwait by his supervisor to discuss his performance. On the same date, his e-PAS for the period 2007-2008 was finalized, rating his performance as "partially meets performance expectations", and on the following days some discussions took place between the Applicant and his hierarchy on performance matters. He returned to Baghdad on 31 May.

... On 3 June 2009, the Chief Aviation Officer informed the Applicant that he would be transferred to Kuwait. On 7 June, he travelled to Amman for his last R&R.

... The Applicant was informed, by memorandum from the Chief of Mission Support, dated 9 June 2009, that his contract, which was to expire on 18 July 2009, would not be extended due to unsatisfactory performance. It was pointed out that efforts had been exerted to absorb the Applicant after his initial post had been declared redundant, but he had not cooperated to perform satisfactorily.

... The Applicant's mother died on 14 June 2009. As he learnt it upon his arrival to Kuwait on 15 June, he intended to obtain uncertified sick leave for family-related emergencies in order to travel for the burial; however, he could not travel as his passport had expired and he had to wait until 21 June for it to be renewed. He was on

annual leave until that date and eventually left for Sudan on 22 June 2009. He was placed on sick leave until 28 June.

... By memorandum dated 17 June 2009, the Applicant advised UNAMI that he wished to rebut his e-PAS for 2007-2008.

... On 13 July 2009, the Applicant's appointment was extended until 18 August 2009 on humanitarian grounds.

... On 23 July 2009, as the Applicant was making attempts to be transferred to a position as Movement Control Assistant in Nairobi with the United Nations Operations in Somalia ("UNOSOM"), he had a meeting with his hierarchy, at which he was informed that his supervisor had been in contact with the Head of the Movement Control Unit of UNOSOM. Also, during this meeting, a discussion was engaged on the Applicant's terms of reference, his supervisors being of the opinion that they should be reduced. The foregoing was qualified by the Applicant as an attempt to block his efforts to move to a different mission.

... By email of 23 July 2009 to the Chief of Mission Support, he reiterated his intention to rebut his 2007-2008 e-PAS.

... On 2 August 2009, the Applicant requested management evaluation of the decision not to renew his appointment beyond 18 August 2009.

... On 3 August 2009, the Applicant submitted to the Dispute Tribunal a request for suspension of action, during the pendency of management evaluation, regarding the decision not to renew his contract, which was granted by order dated 13 August 2009 (UNDT/2009/008).

... The Applicant's contract was extended several times for short periods through 30 June 2010.

... On 17 August 2009, the Applicant initiated the rebuttal of his e-PAS for 2008-2009, which had been issued two weeks earlier, rating his performance as "partially meets performance expectations".

... On 14 September 2009, the rebuttal panel rendered its final report regarding the Applicant's e-PAS for 2007-2008, concluding, inter alia, that the Applicant "could not exactly understand or totally agree with work expectations from the [first reporting officer] due perhaps partly to his new arrival in UNAMI ...". His rating was upgraded to "fully satisfactory performance".

... On 17 September 2009, the same panel issued the final report on the Applicant's rebuttal of his 2008-2009 e-PAS, which stressed that the Applicant had benefited from performance improvement plans in a timely manner for the reporting period, as well as from support and guidance by both his first and second reporting officers; it concluded that the Applicant should have been reasonably aware of what was expected from him in terms of performance. The rating "partially meets performance expectations" was maintained.

... By letter dated 5 October 2009, the Applicant was notified of the result of the management evaluation concerning the non-renewal decision, i.e., that his request had become moot in view of the successive renewals of his appointment.

... By memorandum dated 6 October 2009 from the Officer-in-Charge of Mission Support, the Applicant was reassigned back to his initial functions as Fuel Supply Assistant effective 11 October 2009, and for that purpose a post was loaned from another section. He was advised that his supervisor had been instructed to draw up a work plan for him.

... On 9 June 2010, the Applicant sent to the Under-Secretary-General for Field Support, at United Nations Headquarters, a formal complaint of harassment and abuse of authority against the Chief Aviation Officer and the former Chief of Mission Support, UNAMI, under the Secretary-General's bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) and requested that a formal investigation be conducted.

... After he obtained a fully satisfactory evaluation for the period from January to March 2010, dated 27 April 2010, on 30 June 2010 the Applicant's appointment was renewed for one year.

... By memorandum dated 1 July 2010, the Special Representative of the Secretary-General for Iraq replied to the Applicant's complaint [of] harassment and discrimination stating that his allegations were not substantiated.

... On 5 July 2010, the Applicant referred his complaint under ST/SGB/2008/5 to the Assistant Secretary-General for Human Resources Management and renewed his request for an independent investigation.

... On 16 July 2010, the Officer-in-Charge, Office of Human Resources Management at United Nations Headquarters advised the Applicant that further inquiries were being made regarding the points he had raised. On 3 August 2010, the Assistant Secretary-General for Human Resources Management replied that, after such further inquiries, there was no reason to suggest that the decision by the

Special Representative of the Secretary-General for Iraq was unreasonable or made without due inquiry into, and consideration of, all relevant facts.

... On 30 August 2010, the Applicant lodged a request for management evaluation of the rejection of his two requests for formal investigation into his allegations of harassment. As communicated to the Applicant by letter of 2 November 2010, the Management Evaluation Unit found “no basis to conclude that the ... decision [of the Special Representative of the Secretary-General] was unreasonable or taken without consideration of all relevant facts”.

... On 28 January 2011, the Applicant filed [an] application with the Geneva Registry of the Dispute Tribunal. The Respondent submitted his reply on 4 March 2011.

3. The UNDT issued Judgment No. UNDT/2012/057 on 19 April 2012, dismissing Mr. Osman’s application. The UNDT found no meaningful indicia of harassment and concluded that Mr. Osman had not offered sufficient grounds warranting an investigation into his complaint. It found that the conduct at stake did not point to any kind of prohibited conduct under ST/SGB/2008/5. While some of the actions of Mr. Osman’s supervisor were not favourable to Mr. Osman, the UNDT did not find them to be arbitrary or unreasonable, but, to the contrary, found that they reflected a sincere intention to accommodate Mr. Osman’s circumstances. The UNDT concluded that the decision not to undertake further enquiries was not in breach of Mr. Osman’s terms of employment.

### **Submissions**

#### **Mr. Osman’s Appeal**

4. Mr. Osman submits that he received no performance evaluation for the period 2008 to 2009, during which time he was assigned to the Aviation Section and received the notice of non-renewal of his appointment based on performance. Furthermore, he received no performance evaluation for the period 2009-2010 and the officials who failed to evaluate him were the same as those who took the non-renewal decision. The UNDT failed to consider these due process violations which, in Mr. Osman’s view, were evidence of harassment.

5. Mr. Osman submits that the non-renewal decision was taken before the rebuttal process had been completed and in the absence of any performance evaluation for the period immediately preceding said decision. These procedural irregularities call into question the Organization's motive behind the decision not to renew his appointment.

6. Mr. Osman contends that the UNDT misinterpreted several facts and, as a consequence, erred in finding that the Chief Aviation Officer's refusal to grant annual leave was not arbitrary and capricious. The UNDT erred in accepting that the Chief Aviation Officer's suggestion that Mr. Osman use uncertified sick leave due to his family emergency was a viable option. Mr. Osman submits that the Dispute Tribunal misunderstood the policy and how it applied to Mr. Osman's circumstances. In his view, while one can use uncertified sick leave for emergencies, the rules for uncertified sick leave still apply excluding its use for more than two consecutive days. The Chief Aviation Officer's suggestion was, therefore, misleading, as it would not have helped Mr. Osman's situation.

7. The UNDT also erred in accepting, on the facts, that there was a legitimate programmatic rationale for the Chief Aviation Officer's refusal to grant Mr. Osman's annual leave request. While taking leave is subject to the exigencies of service, Mr. Osman's supervisor, who was best placed to assess the requirements of his section, did approve the request. The relevant attendance records also reflect that there was sufficient staffing within Mr. Osman's section at the material time. Nonetheless, and even though the Chief Aviation Officer was not one of Mr. Osman's designated reporting officers, he interfered.

8. Mr. Osman has a record of 18 years of satisfactory service with the Organization; he had an exemplary record of service prior to the events giving rise to this case and, similarly, has received positive appraisals since 2010. In the absence of an investigation, the factors leading to the situation are not being addressed.

9. Mr. Osman requests that the Appeals Tribunal overturn the UNDT Judgment; order the Secretary-General to conduct an investigation into his allegations of harassment and abuse of authority; order the completion of his 2009-2010 e-PAS; and compensate him for the violation of his due process rights.

**Secretary-General's Answer**

10. The Secretary-General contends that Mr. Osman has not established that the UNDT erred in fact warranting a reversal of the UNDT Judgment. Contrary to Mr. Osman's contention, the decision not to renew his appointment was based on his performance as a Fuel Supply Assistant prior to his reassignment to the Aviation Section in October 2008. The UNDT therefore appropriately limited its evaluation of Mr. Osman's performance appraisals to the period in which he served as a Fuel Supply Assistant which formed the basis of the decision not to renew his appointment.

11. The Secretary-General submits that the UNDT did not overlook any alleged due process violations in connection with Mr. Osman's performance evaluations. The UNDT noted that the 2007-2008 and 2008-2009 performance appraisals both evidenced concerns regarding Mr. Osman's performance. In view of his identifiable shortcomings, appropriate performance improvement measures to rectify the situation were taken in consultation with Mr. Osman. However, his performance during the appraisal periods in question did not improve. The UNDT also noted that it was the delay by Mr. Osman to commence the 2008-2009 performance appraisal that led to a situation where that performance appraisal was not completed before the non-renewal decision was taken. The UNDT had ample basis to conclude that there was no indication that the non-renewal decision was an act of harassment.

12. Mr. Osman's contention that the non-renewal decision was made prior to the completion of the rebuttal process and called into question the motive behind his non-renewal is without merit. Contrary to Mr. Osman's contention, it was only on 17 June 2009 that he indicated his intention to rebut the 2007-2008 performance appraisal - eight days after the non-renewal decision had been taken upon the conclusion of the appraisal.

13. The Secretary-General submits that the UNDT made no errors in law warranting a reversal of the UNDT Judgment. The UNDT record reveals that Mr. Osman's second reporting officer reviewed Mr. Osman's request and concluded that his absence on annual leave following his occasional recuperation break (ORB) would cause disruption to the operational requirements of his office. The second reporting officer provided plausible reasons for his denial, and acted within his sphere of competence in accordance with Staff Rule 105.1(b)(iii) applicable at the relevant time. In his capacity as Chief of the Aviation Section, he was responsible for the approval of annual leave of those under his overall supervision.



14. The UNDT correctly applied the policy on the use of uncertified sick leave. Under Staff Rule 106.2(c), part or all of uncertified sick leave entitlements may be used to attend family-related emergencies in which case the limitation of three consecutive working days does not apply.

15. The Secretary-General submits that, contrary to Mr. Osman's contention, ST/AI/2000/21 does provide for the possibility to combine ORB with family-related emergencies at the discretion of the Secretary-General. The Chief Aviation Officer's suggestion that Mr. Osman seek advice with respect to the use of uncertified sick leave was not misleading.

16. The Secretary-General submits that the UNDT examined the incidents referred to in the allegations and correctly concluded that the alleged instances of harassment, discrimination or abuse of authority offered insufficient grounds to conduct an investigation.

17. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss the appeal in its entirety.

### **Considerations**

18. Mr. Osman appeals the UNDT decision rejecting his request for an investigation into his allegations of harassment, discriminatory treatment and abuse of authority. He claims that the UNDT erred on a number of factual issues resulting in a manifestly unreasonable decision and that its conclusions of law are not consistent with the facts as properly established. Mr. Osman asks the Appeals Tribunal to rescind the UNDT Judgment, order the Respondent to carry out a good faith investigation into his allegations, order the completion of his ePAS for the period 2009– 2010 as a Movement Control Assistant and order payment of compensation for violation of his due process rights.

19. We agree with the Respondent that Mr. Osman's submissions in this appeal are primarily a reiteration of his arguments before the UNDT. Mr. Osman's submissions on appeal are in relation to issues which were very thoroughly considered by the UNDT. Mr. Osman appears not to appreciate that the UNDT was examining his work performance and other work-related issues, not in their own right, but as indicia of harassment.

20. It was not necessary for the UNDT to consider the significance of Mr. Osman not receiving an ePAS for 2009-2010. In considering Mr. Osman's claim of harassment by not having his appointment renewed in June 2009, the UNDT Judge examined the history of his work performance, including his ePAS for 2007-2008 and 2008-2009. The UNDT Judge found "no indication that the non-renewal decision was an act of harassment against the Applicant; all the more since the Applicant was finally kept employed and once the said shortcomings were overcome, his appointment was again renewed for a full year".

21. The UNDT Judge stressed the importance of the definition of harassment in Section 1.2 of ST/SGB/2008/5. He referred particularly to the last sentence of the definition, which reads: "Disagreement on work performance or on other work-related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management."

22. The UNDT Judge, while observing that this provision did not necessarily exclude disagreements on performance and other work-related issues from the ambit of harassment, noted that

the key consideration in ascertaining if a given set of facts constitutes harassment remains whether those facts amount to an "improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation" and whether it tends to "annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment".

In Mr. Osman's case, the UNDT Judge, being satisfied that the issues were work-related, found that there was no indication that the non-renewal decision was an act of harassment. The UNDT Judge made similar findings in relation to other incidents which, Mr. Osman claimed, amounted to harassment, namely, his reassignments, the refusal to approve his annual leave and the negative assessment given to prospective supervisors when Mr. Osman was seeking to move to another peacekeeping mission. In our view, the Judge's findings were fully in accordance with the law and the facts of the case.

23. We find that the UNDT Judge did not err when he concluded that

in the instant case, even considering together and in context the entire set of events reported by the Applicant, no meaningful indicia of harassment could be found. Some of the supervisors' actions, such as the (later overturned) non-renewal of appointment, were

not favourable to the Applicant; yet they are not to be regarded as arbitrary or unreasonable. Others, on the contrary, showed a true intention to accommodate the Applicant's interest and preferences, like his third and last reassignment or the advice that he take uncertified sick leave to stay in Amman at the beginning of May 2009. In any case, the behaviours at stake do not point to any kind of prohibited conduct in the sense of ST/SGB/2008/5.

24. Mr. Osman challenges the UNDT's finding in respect of the advice given to him to take uncertified sick leave. He claims that the UNDT erred on a question of law by misunderstanding the policy for the use of uncertified sick leave and how it applied in the present case. He argues that "[w]hile one can use uncertified sick leave for family emergencies, the rules for uncertified sick leave still apply excluding its use for more than 2 consecutive days".

25. There is no merit in Mr. Osman's submission. The UNDT Judge made no error in determining that the use of uncertified sick leave was governed by former Staff Rule 106.2, which was applicable at the time. The Rule provides as follows:

*Uncertified sick leave:*

c) A staff member may take uncertified sick leave of not more than three consecutive working days at a time, for up to seven working days in an annual cycle starting 1 April of each year, when incapacitated for the performance of his or her duties by illness or injury. *Part or all of this entitlement may be used to attend to family-related emergencies, in which case the limitation of three consecutive working days shall not apply.* (Emphasis added).

26. The UNDT Judge's findings that the advice given to Mr. Osman by his second reporting officer regarding uncertified sick leave was correct, and that it was Mr. Osman's choice not to take advantage of that advice cannot be faulted. The Judge correctly pointed out that "former staff rule 106.2(c) does provide for the use of the uncertified sick leave entitlement 'to attend to family-related emergencies' ". The Judge did not err on a question of law.

27. Mr. Osman's allegation that the decision not to approve his annual leave request was "arbitrary and capricious" has no foundation whatsoever. This issue was dealt with thoroughly by the UNDT Judge who, in our view, came to the correct conclusion that "this incident does not yield any sign of bad faith or harmful intention on the part of the Applicant's second reporting officer". Mr. Osman now claims that the Officer concerned was not one of his designated reporting officers. He contradicts himself here, because his appeal annexes a document signed

by himself in which he describes the said officer as “my Second Reporting Officer”.<sup>2</sup> His submission in this regard therefore lacks credence as well as merit.

28. We find that the UNDT Judge correctly applied the criteria for launching a fact-finding investigation. Mr. Osman has not demonstrated that there was any error in the Judge’s finding that the Special Representative’s decision that there were not sufficient grounds to warrant a fact-finding investigation into Mr. Osman’s allegations was not tainted by any procedural flaw.

29. Mr. Osman has not established that the UNDT overlooked violations of his due process rights. In our view, the UNDT Judge was quite meticulous in his consideration of the facts and the law. We find that he did not fall into error in either area.

30. Mr. Osman has not demonstrated any error in the UNDT’s finding that he had not been subjected to harassment and that the decision not to undertake further enquiries was not in breach of his terms of appointment.

### **Judgment**

31. There is no merit in this appeal and it is accordingly dismissed. We affirm the UNDT Judgment.

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<sup>2</sup> Appeal, Annex 2, page 2.

Original and Authoritative Version: English

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

*(Signed)*

Judge Lussick, Presiding

*(Signed)*

Judge Weinberg de Roca

*(Signed)*

Judge Faherty

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

*(Signed)*

Weicheng Lin, Registrar