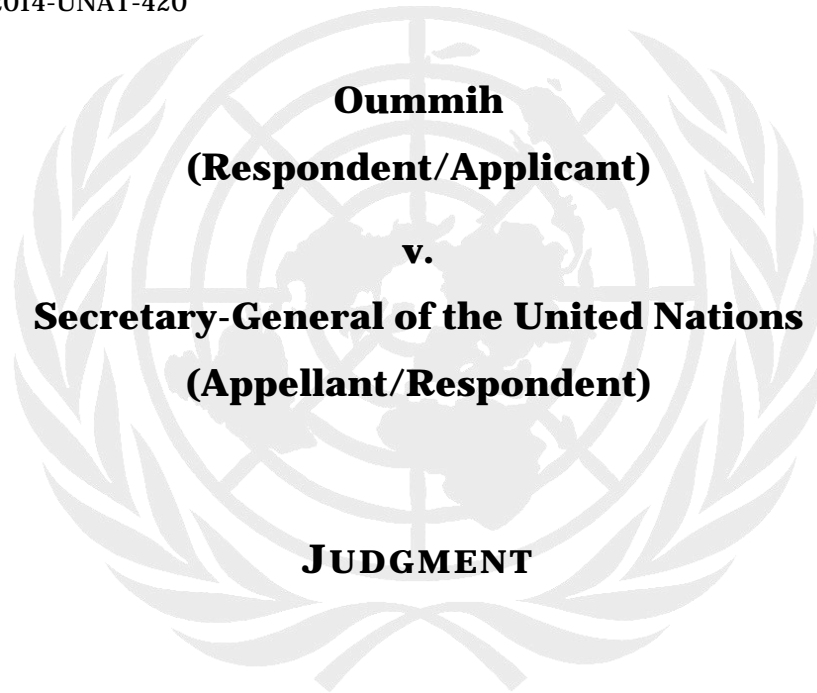




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2014-UNAT-420



**Oummih  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Luis María Simón, Presiding Judge Inés Weinberg de Roca Judge Rosalyn Chapman
Case No.:	2013-473
Date:	2 April 2014
Registrar:	Weicheng Lin

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Counsel for Respondent/Applicant: Not applicable

Counsel for Appellant /Respondent: Paul Oertly

**JUDGE LUIS MARÍA SIMÓN, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/044, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 8 March 2013, in the case of *Oummih v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 6 May 2013 and, on 4 July 2013, Ms. Oummih purported to file an answer and cross-appeal, which did not conform to the format and content requirements of Practice Direction No. 1 of the Appeals Tribunal. Following interaction between Ms. Oummih and the Registry of the Appeals Tribunal, she filed a motion seeking an extension of the time limit to perfect her filing or, in the alternative, a waiver of the format and content requirements. On 1 August 2013, the Appeals Tribunal issued Order No. 149 (2013), granting Ms. Oummih until 8 August 2013 to file her answer and cross-appeal, “provided said documents comply with UNAT Practice Direction No. 1”. Despite further correspondence, Ms. Oummih did not so file.

**Facts and Procedure**

2. The Dispute Tribunal made the following findings of fact, which are not contested by the Secretary-General:<sup>1</sup>

... The applicant was recruited effective 1 September 2009 as a Legal Officer at the Office of Staff Legal Assistance [(OSLA)].

... On 18 August 2011, the applicant signed by electronic means her performance evaluation for the period from 1 September 2009 to 31 March 2010.

... The applicant’s first and second reporting officers signed her evaluation report for the period from 1 September 2009 to 31 March 2010, on 22 and 23 August 2011, respectively, with the rating ‘does not meet performance expectations’.

... On 22 August 2011, the applicant’s first reporting officer, Mr. Brian Gorlick, Chief, [OSLA,] recommended that her appointment, expiring on 31 August 2011, should not be renewed on the grounds of professional inadequacy. Subsequently, her contract was renewed on several occasions ...

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<sup>1</sup> The following text is taken from the English translation of Judgment No. UNDT/2013/044, paras. 2-11. All other quotations from the UNDT Judgment contained herein are also taken from the English translation.

... On 28 October 2011, the applicant initiated a rebuttal process against her evaluation for the period from 1 September 2009 to 31 March 2010.

... On 18 November 2011, her first reporting officer signed the performance evaluation for the applicant for the period 2010-2011, and the second reporting officer signed it on 21 November 2011. The evaluation report for the period 2010-2011 contained the rating 'does not meet performance expectations'.

... On 19 December 2011, the applicant initiated a rebuttal process for the period 2010-2011. On 12 March 2012, the rebuttal panel rendered its report for the period 2010/11, noting that in the case at hand it could not fulfil its mandate under section 15.4 of ST/AI/2010/5[ of 30 April 2010, entitled "Performance management and development system"], namely to prepare a report setting forth the reasons why the original rating should or should not be maintained.

... The panel concluded that, in light of flagrant procedural irregularities, the evaluation report should be deemed null and void. On 26 March 2012, the Office of Human Resources Management [(OHRM)] requested the rebuttal panel to give its opinion as to the rating that should be accorded the applicant for the period 2010/11. On 28 March 2012, ... the rebuttal panel responded that it stood by the conclusions in its report of 12 March 2012, to the effect that the initial rating should not be maintained but should be raised to 'successfully meets performance expectations'. The applicant was informed on that same day that certain documents had been placed on her [Official Status File (OSF)], namely a copy of her rebuttal statement, a copy of the report of her first reporting officer in response to her rebuttal statement, a copy of a memorandum from the Executive Office of the Secretary-General [(EOSG)] to the president of the panel, a copy of a memorandum from [EOSG] to [OHRM] requesting instructions, the response of [OHRM] to that request, a copy of the letter from [EOSG] to the president of the panel dated 26 March 2012 transmitting the opinion of [OHRM], a copy of the report of the rebuttal panel dated 28 March 2012, and, lastly, a copy of her performance evaluation for the period 2010-2011.

... On 2 April 2012, the rebuttal panel rendered its report for the period 2009-2010 and awarded the rating 'fully successful performance', and on 3 April 2012, the applicant was informed that the panel report as well as other documents related to her evaluation by her supervisors were placed on her [OSF], namely the applicant's rebuttal statement with its annexes, the report dated 2 November 2011 of the first reporting officer on the rebuttal statement, the memorandum of [EOSG] to the rebuttal panel dated 21 November 2011 and the performance evaluation of the applicant for the period from 1 September 2009 to 31 March 2010.

... On 19 May 2012, the applicant requested a management review of the evaluation decisions concerning the periods 2009-2010 and 2010-2011 and the decisions of 28 March and 3 April 2012 to place on her file the documents relating to those evaluations. On 10 July 2012, the Under-Secretary-General for Management

responded to the request for a management review, specifying that the documents covering her original evaluations, the report of the rebuttal panel, the rebuttal statement and the responses of the supervisors would remain on her personal file. With respect to the other documents relating to her evaluations, he responded to her that [OHRM] would remove them from her file, if she so requested. He also informed the applicant that her request for damages had been rejected.

3. Ms. Oummih appealed to the UNDT, seeking annulment, in whole or in part, of her performance appraisals for 2009-2010 and 2010-2011.

4. With respect to receivability, the UNDT took note of the provisions of ST/AI/2002/3 of 20 March 2002, entitled "Performance Appraisal System" and ST/AI/2010/5 and, in particular, the fact that the rebuttal panel rating replaces the impugned initial rating. As such, it found Ms. Oummih was "not entitled to request annulment of an evaluation that has been replaced by the rating awarded by the panel" but that she was not, in any event, contesting those initial unsatisfactory ratings. Rather, the UNDT found that she has "requested only the annulment of the decisions mentioned in paragraph 1 of this judgement and compensation for the resulting damages". Paragraph 1 of UNDT/2013/044 reads, in full:

By application filed on 8 October 2012 with the Registrar of the United Nations Dispute Tribunal, the applicant:

(a) Contests her performance evaluations for the periods 2009-2010 and 2010-2011, as well as the decisions of 28 March 2012 and 3 April 2012 to place those evaluations on her official administrative file.

(b) She asks, first, that those evaluation reports be annulled in part and that the decisions to place them on her file be annulled; in addition, that the contested decisions be fully annulled, that the Secretary-General be ordered to pay her a sum corresponding to 12 months' salary as reparations for damages caused by the above-mentioned decisions; lastly, that her name not be mentioned in the published judgement.

5. Insofar as 2009-2010 was concerned, the UNDT held that ST/AI/2002/3 required the inclusion of "the brief written response of the head of department or office to the rebuttal statement submitted by the staff member, the evaluation report, and the panel report", whereas for 2010-2011, ST/AI/2010/5 specified "only that the rebuttal panel report and the original evaluation are to be placed on the file". Accordingly, the Dispute Tribunal found that Ms. Oummih was entitled to request that no other documents concerning her evaluation should be placed on her OSF. With respect to the two initial, unsatisfactory ratings, the

UNDT ordered their removal, together with related documents prepared by Ms. Oummih's supervisors, from her OSF, stating that only the rebuttal panel reports should remain, as the delays and irregularities in the procedure meant the initial appraisals had no legal existence.

6. The UNDT opined in respect of moral damages that the rebuttal panel's satisfactory ratings compensated Ms. Oummih in part, but that the uncertainty she was left with as to the quality of her work, and the resultant strain on her relationship with her first reporting officer, justified monetary compensation in the amount of USD 5,000.

7. On 26 April 2013, Ms. Oummih requested an extension of time to appeal Judgments No. UNDT/2013/043 and No. UNDT/2013/044. She argued that she had been on medical leave and also that she needed time to secure bilingual counsel. On 6 May 2013, the Appeals Tribunal issued Order No. 133 (2013), granting Ms. Oummih until 7 June 2013 to file her appeals. As set out in paragraph 1 above, she ultimately filed an appeal against only Judgment No. UNDT/2013/043. However, the Secretary-General appealed Judgment No. UNDT/2013/044.

### **Submissions**

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

8. The Secretary-General submits that the UNDT erred in fact and in law in Judgment No. UNDT/2013/044, when it considered the appraisal process, as its review of the case was limited to the placement of the appraisals on Ms. Oummih's OSF.

9. In the alternative, the Secretary-General argues that the UNDT erred in fact and in law with respect to alleged delays in the completion of Ms. Oummih's performance appraisals; in imputing full responsibility for delays to the Administration; and in finding that the delays nullified the juridical existence of the impugned appraisals.

10. He claims that the UNDT exceeded its competence and erred in law in voiding the appraisals and ordering their removal from Ms. Oummih's OSF, as it effectively created a new remedy which runs contrary to the legislative framework for performance appraisal.

11. The Secretary-General contends that the UNDT also erred in finding that Ms. Oummih suffered moral harm in the absence of any such evidence. Moreover, he recalls that the sole issue receivable by the Dispute Tribunal was the placement of the impugned appraisals on her OSF, and as this was obligatory for the Administration under the legislative framework in place, it cannot be construed as resulting in moral harm. Finally, he argues that the UNDT incorporated irrelevant and legally extraneous factors into its decision

12. The Secretary-General asks the Appeals Tribunal to vacate Judgment No. UNDT/2013/044 and to dismiss the underlying application in its entirety.

### **Considerations**

13. The staff member, a legally trained person, did not file her answer and cross appeal in accordance with Practice Direction No. 1 of the Appeals Tribunal, despite the opportunity given to her for that purpose. Consequently, the case before this Tribunal only refers to the appeal filed by the Secretary-General.

14. The sole issue received by the Dispute Tribunal was the placement of the impugned appraisals on the staff member's personnel file, a very restricted scope.

15. The Appeals Tribunal holds that the UNDT erred when it excluded documents from the OSF and ordered compensation for alleged damages not related to any established illegality.

16. Under the applicable legislative framework as set out in ST/AI/2002/3 and ST/AI/2010/5, it was mandatory for the Administration to keep in the personnel file both the impugned appraisal and reports, and the rebuttal outcome.

17. Even if the irregularities and delays in the appraisal procedure were "so serious that they render the ... evaluations meaningless, as was decided by the rebuttal panel which held these evaluations to be null and void", as determined by the UNDT, that circumstance does not mean that they should not be kept in the file. Rather, they, together with the corrective substitute reports or decisions, should all be kept, in order to explain the whole process. In most cases, the rebuttal conclusions or administrative decisions amending previous erroneous appraisals will not be comprehensible if they cannot be read together with the impugned evaluations.

18. The placement on the OSF of impugned evaluations which are subsequently declared illegal or vacated cannot harm a staff member, since the corrective and complementary rebuttal report is simultaneously filed. In so doing, the entire administrative history relating to the evaluation is set out chronologically.

19. Therefore, this Tribunal finds that the UNDT erred in excluding the initial evaluations from Ms. Oummih's OSF based on its conclusion that they did not legally exist, despite acknowledging that the applicable administrative instructions required their inclusion. The UNDT did not establish that the administrative instructions, which required the inclusion of the evaluation reports and documents prepared by supervisors, were in breach of higher norms. Thus, it should not have refused to apply them, and, as such, its decision to remove those reports and documents cannot be maintained.

20. As no illegality in the placement of documents in the staff member's file was found, there is no reason to award any compensation. As this Tribunal held in *Antaki v. Secretary-General of the United Nations*,<sup>2</sup>

... In the instant appeal, the Dispute Tribunal found that, despite the shortcomings in the process, the decision not to appoint Antaki was valid and lawful. In the particular circumstances of this case, such decision precludes the Dispute Tribunal from awarding any compensation to [the staff member].

... We empathize with the inevitable frustration, disappointment, and distress that [the staff member] might have experienced as a consequence of her failure during the selection process.

... However, we find that the Dispute Tribunal erred in law in awarding compensation to Antaki in the absence of any procedural errors in the selection process or a breach of her legal rights.

21. For the reasons set forth above, the Judgment under appeal will be vacated in its entirety.

### **Judgment**

22. The appeal is allowed and the UNDT's Judgment vacated in its entirety.

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<sup>2</sup> Judgment No. 2010-UNAT-095, para. 23 *et seq.*

Original and Authoritative Version: English

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

*(Signed)*

Judge Simón, Presiding

*(Signed)*

Judge Weinberg de Roca

*(Signed)*

Judge Chapman

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

*(Signed)*

Weicheng Lin, Registrar