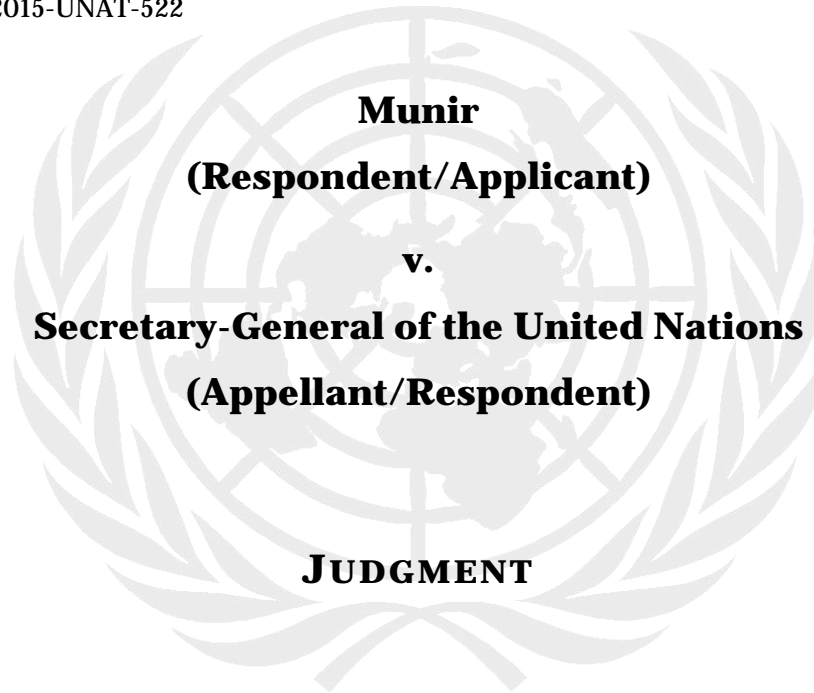




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2015-UNAT-522



**Munir  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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**Before:** Judge Sophia Adinyira, Presiding  
Judge Rosalyn Chapman  
Judge Deborah Thomas-Felix

**Case No:** 2014-599

**Date:** 26 February 2015

**Registrar:** Weicheng Lin

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**Counsel for Mr. Munir:** George G. Irving

**Counsel for Secretary-General:** John Stompor

**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/2014/020, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 17 February 2014 in the case of *Munir v. Secretary-General of the United Nations*. The Secretary-General appealed on 21 April 2014 and Mr. Badar Munir answered on 5 June 2014.

**Facts and Procedure**

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

... [Mr. Munir] was employed by [the United Nations Children's Fund (UNICEF)] from April 1997 until June 2009.

... [On] 14 May 2009, UNICEF agreed to release him on secondment basis to [the United Nations Development Programme (UNDP)] effective 1 July 2009 [to take up the position of Operations Manager [...] with the UNDP Country Office (CO) in Sudan].

... On 18 May 2009, [...] Human Resources at UNICEF [...] informed [Mr. Munir] that staff members on secondment or loan to other United Nations Agencies [...] were required to apply for suitable vacancies at least six months prior to the expiration of their secondment or loan should they intend to resume service with UNICEF.

... [Mr. Munir] began his secondment at UNDP on 1 July 2009 [and] was subsequently extended yearly until his separation in 2012.

... In reply to an email sent by [Mr. Munir] on 19 January 2012 [concerning possible extension of his secondment for a fourth year] Human Resources at UNICEF notified him that should UNDP request the extension of his services for another year, UNICEF senior management would need to grant approval.

... The email also indicated that the extension of [Mr. Munir's] secondment to UNDP through 30 June 2013 would bring it to the maximum four years allowed while away from UNICEF on secondment.

... On 29 February 2012, the UNDP Sudan CO Core Management Group [...] held a meeting in which one of the items on the agenda was the issue of contract extensions for international professional staff. [Mr. Munir] was present [...] in his capacity as the [Operations Manager] for the CO. A decision was taken at that meeting to extend the contracts of all the international staff members in the CO including [Mr. Munir's].

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<sup>1</sup> Impugned Judgment, paras. 4-22.

... On 2 March 2012, [...] the new Resident Representative [...] for UNDP Sudan [took up his duties].

... On 23 March 2012, [the Resident Representative] went to [Mr. Munir's] office accompanied by four other officials. He handed [Mr. Munir] a letter placing him on administrative leave with immediate effect to pave way for investigations into allegations of misconduct. [Mr. Munir] was ordered out of the office by the [Resident Representative] and was escorted out by a Security Officer who had accompanied the [Resident Representative].

... On 25 March 2012, [...] the [then] Operations Manager for the UNDP Demobilization, Demilitarization and Reintegration (DDR) programme in Khartoum was asked to assume duties as the [Operations Manager] for the UNDP CO in Khartoum on a temporary basis to fill the position that had been vacated by [Mr. Munir] who was then on administrative leave.

... On 26 April 2012, [the Resident Representative informed Mr. Munir by letter] that his secondment from UNICEF to UNDP would expire upon completion of its third year on 30 June 2012. The letter also [informed Mr. Munir that while he would not ordinarily have been extended, he was being extended for three months, until 30 September 2012, solely to allow the completion of the on-going investigation, and that the three months should serve as sufficient notice for him to arrange his return to UNICEF].

... On 28 April 2012, [Mr. Munir] responded [...] and requested a year's extension [...] as opposed to the three month extension proposed.

... [The Resident Representative replied] on 2 May 2012 and reiterated his decision to extend [Mr. Munir's] contract by three months only for purposes of the on-going investigation, and not one year. He stated:

At a time when UNDP finds itself with staff members who need placement or legitimately look at their career progression, I am not in a position to consider the extension of your secondment for one further year. This would result in the Organization taking on yet additional liability.

... On 3 and 4 May 2012 an exchange of emails ensued between [Mr. Munir] and [the Resident Representative]. [Mr. Munir] insisted that he could not accept a three month extension of his secondment.

... [Mr. Munir] requested management review of the decision of the [Resident Representative to only extend him for three months] on 14 May 2012 by writing to [the] Administrator of UNDP in New York.

... [O]n 28 June 2012 [he was informed] that there was no factual or legal basis for overturning the [Resident Representative's] decision.

... [Mr. Munir's] term at UNDP came to an end on 30 June 2012. On the same date, he filed a complaint against [the Resident Representative] for harassment, discrimination and abuse of authority.

... On 17 July 2012, a vacancy announcement (VA) was prepared and approved for [Mr. Munir's] former post. The VA listed Arabic and English as the languages required for the post. The Applicant applied but was not shortlisted. [The former Operations Manager for the UNDP DDR programme] was subsequently appointed to this post and was reassigned from his previous position in the DDR programme.

3. On 28 August 2012, Mr. Munir filed an application with the UNDT challenging the decision of the Resident Representative not to request an additional one-year extension of his appointment.

4. On 24-25 July and 14-15 August 2013, the Dispute Tribunal held oral hearings at which it heard Mr. Munir, Mr. Munir's First Reporting Officer, a programme finance analyst who also served as head of the Management Support Unit and the Resident Representative, both called by the Secretary-General, and the Country Director for UNDP Sudan, who was called by the Dispute Tribunal. With the exception of the Resident Representative, all the witnesses had participated in the February 2012 Core Management Group meeting.

5. During the August 2013 hearings, the Dispute Tribunal requested a copy of the Investigation Report prepared by UNDP's Office of Audit and Investigations (OAI) concerning the allegations against Mr. Munir, and was informed it still had not been released.

6. At the time of writing its Judgment in January 2014, the Dispute Tribunal again requested a copy of the Investigation Report. On 29 January 2014, the Secretary-General filed a copy of the OAI Investigation Report, which had been finalised on 29 May 2013. The filing of the OAI Investigation Report was not brought to the attention of the Dispute Tribunal by the time it rendered its Judgment.

7. On 17 February 2014, the Dispute Tribunal handed down its Judgment. It found that as a result of the February 2012 decision of the Core Management Group, Mr. Munir had a legitimate expectation of a one-year extension of his contract. The Dispute Tribunal further considered that the Resident Representative in Sudan lacked the discretion to seek only a three-month extension and that the conduct of the Resident Representative involved discrimination against Mr. Munir insofar as the latter was marched out of his workplace by a security officer in full view of others. The additional language requirement which the Resident Representative inserted into the VA for the post of Operations Manager,

formerly encumbered by Mr. Munir, was also done in bad faith and sought to prevent Mr. Munir from competing for the said post. It noted that Mr. Munir was placed on administrative leave with “unnecessary force and drama” and found that Mr. Munir incurred harm by being placed under investigation beyond the six-month period envisaged by UNDP’s legal framework. Lastly, UNDP’s management evaluation, rather than offering an independent and impartial review, was conducted with a total lack of independence and only sought to justify the contested actions of the Resident Representative.

8. The Dispute Tribunal awarded Mr. Munir nine months’ base pay for his separation from service in breach of his legitimate expectation that he would be extended by one year, and USD 16,000 as compensation for moral damages occasioned by humiliation caused him in the workplace and the burden and consequences of a two-year old investigation. The UNDT also ordered that the OAI Investigation Report, which commenced in March 2012, be officially issued by or before 28 February 2014, and, pursuant to Article 10(8) of the UNDT Statute, referred the Resident Representative to the Administrator of UNDP for possible action.

9. On 20 February 2014, the Secretary-General informed the Registry that it had filed the OAI Investigation Report on 29 January 2014. On 24 February 2014, the Nairobi Registry of the Dispute Tribunal acknowledged this.

### **Submissions**

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

10. The Secretary-General submits that the UNDT erred in concluding that Mr. Munir had a legitimate expectation of a one-year extension of his secondment and renewal of his appointment. In particular, the UNDT erred in fact when it found that the Core Management Group made final decisions relating to the renewal of appointments at its February 2012 meeting; the meeting discussed the funding of international staff posts, but not the incumbents of those posts. Furthermore, there was no evidence that extension of Mr. Munir’s secondment was expressly discussed. The decisions made at the meeting were only recommendations which were nevertheless subject to the review and approval of the Resident Representative who, upon taking up his post on 1 March 2012, undertook the necessary review. In the circumstances, the UNDT

erred in finding that an express promise based on a firm commitment to renew had been made to extend Mr. Munir's secondment, as required by the Appeals Tribunal in *Ahmed*<sup>2</sup> and *Abdalla*.<sup>3</sup>

11. The UNDT also erred in finding that the decision not to seek a one-year extension of Mr. Munir's secondment was an unlawful exercise of discretion. The Resident Representative acted wholly within his discretionary authority in considering UNDP's funding difficulties and need to downsize some of its operations, including its DDR programme, when he concluded that Mr. Munir's post could be covered by the Operations Manager in the UNDP Country Office. The restructuring of departments or units was wholly within his responsibility. Insofar as the UNDT found that the Resident Representative acted in bad faith in adding the language requirement of Arabic to the post, such requirement was reasonable given that Arabic is the official language in Sudan and, citing the former Administrative Tribunal,<sup>4</sup> it is not for the UNDT to establish whether the criteria for the selection of a candidate should have been different. Further, given that the Inter-Organization Agreement shows that extension of a secondment requires the "agreement of all the parties concerned", Mr. Munir could not be said to have a right to have his secondment extended.

12. The UNDT also erred in finding that the interests of UNDP staff members could not take priority over those of Mr. Munir "who could be shown the door whenever other staff [...] were displaced or needed career progression". Staff Rule 13.1(d) clearly provides that preference is to be given to staff members with permanent appointments over those on all other types of appointments, including seconded staff on fixed-appointments, as was the case with Mr. Munir. Mr. Munir's post was ultimately filled by a long-standing UNDP staff member whose position had been abolished as a result of the reductions in the DDR Programme.

13. The UNDT exceeded its jurisdiction in reviewing and ordering remedies with regard to matters that had not been the subject of Mr. Munir's request for management evaluation, which was limited to contesting the decision of the Resident Representative to only seek a three-month extension rather than a one-year extension. The UNDT made findings as to the manner in which Mr. Munir was placed on administrative leave and awarded "moral damages occasioned by humiliation caused [...] in the workplace and the burden [...] of a two-year old investigation", neither of which had been the subject of prior management evaluation as required by the

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<sup>2</sup> *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153.

<sup>3</sup> *Abdalla v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-138.

<sup>4</sup> Former Administrative Tribunal Judgment No. 828, *Shamapande* (1997), para. XI.

Appeals Tribunal's jurisprudence, and were consequently not before the UNDT for its review. Further, not only did the UNDT have no jurisdiction to order the issuance of the OAI Investigation Report, but its finding that Mr. Munir had been subjected to an "unending" investigation was factually erroneous, insofar as the OAI Investigation Report had been completed eight months prior to the UNDT Judgment.

14. The UNDT also exceeded its jurisdiction and erred in referring the Resident Representative to the Administrator of UNDP by reason of his conduct in the lead up to the non-renewal of Mr. Munir's appointment. Given that the UNDT had no jurisdiction to consider the placement of Mr. Munir on administrative leave, it also had no basis to refer the matter pursuant to Article 10(8) of the UNDT Statute. Insofar as the UNDT also found that the Resident Representative acted unlawfully in overturning the decision of the Core Management Group, the decision was a reasonable and lawful exercise of his discretion. Thus, the UNDT also erred in fact in referring the Resident Representative to the Administrator of UNDP for accountability.

15. As the decision of the Resident Representative not to extend Mr. Munir's appointment constituted a reasonable and lawful exercise of his discretion, there is no legal basis for the award of pecuniary damages. Accordingly, the Secretary-General requests this Tribunal to annul the UNDT Judgment in its entirety.

### **Mr. Munir's Answer**

16. Mr. Munir contends that the Secretary-General's appeal is an abuse of process as he is merely rearguing the merits of the case on appeal.

17. The Secretary-General's contention that the decision of the Core Management Group depended on funding is false and misrepresents evidence on the record. The issue was addressed before the UNDT and the evidence showed that funding for the CO staff, including Mr. Munir's post, was stable; the conditional issue of funding only concerned project staff. The Core Management Group routinely decided matters of contract renewal and the minutes of the February 2012 meeting recorded its decisions to support contract renewal. The subsequent review conducted by the new Resident Representative resulted in the renewal of all the contracts of the CO staff, with the exception of Mr. Munir. The review by the Resident Representative only targeted Mr. Munir and the record evidences that the Resident Representative told the country director that he did not want Pakistanis and that Mr. Munir would not be renewed regardless of

the outcome of the recently initiated investigation. Contrary to the claim that the non-renewal decision was justified by programmatic necessity, the post held by the other Operations Manager was not abolished, and Mr. Munir's replacement was not a permanent UNDP staff member, but project staff with a contract of limited duration. Consequently, he had no priority over Mr. Munir as the Secretary-General contends.

18. The Secretary-General's argument that the Resident Representative had discretionary authority to arrange his office as he saw fit was already considered by the Dispute Tribunal and assessed against the facts. The UNDT nevertheless found that the actions of the Resident Representative were unfair and discriminatory and not founded on any programmatic reasons.

19. The issue of Mr. Munir's secondment was also irrelevant to his continuation with UNDP; it was only relevant for the purpose of reserving to Mr. Munir the right to return to UNICEF. The renewal of Mr. Munir's contract was not contingent upon renewal of his secondment as, even if UNICEF would have declined to extend Mr. Munir's secondment, independently from such refusal, Mr. Munir's appointment with UNDP could have been renewed.

20. The issue of the conduct of the Resident Representative was also squarely before the UNDT since it was clearly raised in Mr. Munir's request for management evaluation, which alleged that the Resident Representative's conduct constituted discriminatory and harassing behaviour. Consequently, the UNDT was correct to review Mr. Munir's claim that the actions of the Resident Representative were improperly motivated.

21. The UNDT was also correct to find that Mr. Munir was subjected to an unending investigation since the OAI Investigation Report filed with the Dispute Tribunal is still the draft version which has never been finalized.

22. Accordingly, the UNDT's award for compensation is valid and warranted and the Secretary-General has failed to show it was unreasonable. Mr. Munir submits that the Secretary-General's appeal should be dismissed in its entirety.

### **Considerations**

23. The Secretary-General appeals the decision of the UNDT on grounds of error of law and facts and for exceeding its jurisdiction.



24. It is well established that a party to a fixed-term appointment has no expectation of renewal of that contract.<sup>5</sup> In order for a staff member's claim of legitimate expectation of a renewal of appointment to be sustained, it must not be based on mere verbal assertion, but on a firm commitment to renewal revealed by the circumstances of the case.<sup>6</sup>

25. The Secretary-General submits that the UNDT erred in concluding that Mr. Munir had a legitimate expectation of a one-year extension of his secondment and renewal of his appointment with UNDP. The Secretary-General also submits that the decision that was taken to extend Mr. Munir's appointment at the February 2012 Core Management Group meeting did not constitute an "official" or "firm commitment" to Mr. Munir with regards to his contract extension, but a mere recommendation.

26. The Secretary-General submits further that this recommendation was subject to the review and approval of the Resident Representative who, upon taking up his post on 1 March 2012, undertook the necessary review.

27. The UNDT heard five witnesses, including the Resident Representative. With the exception of the Resident Representative, who had not yet taken up his role at the time, all the witnesses agreed that a CO Core Management Group meeting took place in the Sudan CO on 29 February 2012, two days before the new Resident Representative came on board. All four witnesses agreed that personnel issues were discussed at the meeting and it was decided that the contracts of all international staff would be extended for one year, including that of Mr. Munir who was present when the decision was taken. According to one witness, the decision-making process had started months before 29 February 2012. The minutes and notes on this meeting were in evidence.

28. Upon these findings, the UNDT held that:<sup>7</sup>

[T]he decision taken at a regular and proper CO [Core Management Group] meeting to extend the contract of a staff member, which decision is embodied in open recorded meetings and accessible to staff members, carry [sic] far greater weight than any

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<sup>5</sup> *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-411; *Badawi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2012-UNAT-261; *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153.

<sup>6</sup> *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153; *Abdalla v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-138.

<sup>7</sup> Impugned Judgment, para. 80.

'express promise' that can be made to the said staff member about extending his contract. (original emphasis)

29. Finding that "it was not just a case of a promise by a [First Reporting Officer], but a decision [...] which only remained to be implemented," the UNDT therefore concluded that Mr. Munir had a legitimate expectation that his contract would be extended for one year.<sup>8</sup>

30. We find no reason to reverse this finding as, in the instant case, a legitimate expectation was unequivocally created by virtue of the decision taken at the CO Core Management Group meeting.

31. The Secretary-General submits that the Resident Representative acted wholly within his discretionary authority in considering UNDP's funding difficulties and the need to downsize some of its operations, including its DDR programme, to conclude that Mr. Munir's post could be covered by the Operations Manager in the UNDP Country Office. The restructuring of departments or units was wholly within his responsibility.

32. The Secretary-General submits further that given that the Inter-Organization Agreement shows that extension of a secondment requires the "agreement of all the parties concerned", Mr. Munir could not be said to have a right to have his secondment extended.

33. The above submissions are mere repetition of arguments made before the UNDT. We recall that a party must demonstrate that the UNDT has committed an error of fact or law warranting the intervention of the Appeals Tribunal. A party cannot merely repeat on appeal arguments that did not succeed before the UNDT.<sup>9</sup>

34. Though it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Administration, nevertheless the Tribunal has to determine if the administrative decision under challenge is reasonable, fair, legal, rational, procedurally correct and proportionate.<sup>10</sup>

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<sup>8</sup> Impugned Judgment, paras. 81-82 (original emphasis).

<sup>9</sup> *Azzouz v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-432, para. 16; *Dannan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-340, para. 14; *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, para. 27.

<sup>10</sup> *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40; *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, para. 26.

35. The discretion of the Administration is not unfettered and the justification given by the Administration for the exercise of its discretion in the non-extension was not borne out by the facts, as the jurisprudence of the Appeals Tribunal prescribes.<sup>11</sup>

36. We note that it was not the case of the Secretary-General that the Core Management Group in taking decisions at its meeting of 29 February 2012 had acted wrongfully or irregularly.<sup>12</sup>

37. The UNDT found the reasons given by the Resident Representative, namely that there were UNDP staff who needed to be placed and took priority, not valid, given that Mr. Munir held a UNDP appointment and that although the DDR programme had been scaled down, it was still operational as of January 2014, at the time of its Judgment. Furthermore, the Appeals Tribunal agrees with Mr. Munir that the question of whether UNICEF would approve extension of his secondment to UNDP is irrelevant to the issue of whether to renew Mr. Munir's contract with UNDP; Mr. Munir's secondment from UNICEF was only relevant for the purposes of Mr. Munir's contractual relationship with, and right of return to, UNICEF, and was separate and wholly distinct from his relationship with UNDP.

38. We find no reason to reverse the UNDT finding. We therefore affirm the UNDT decision that Mr. Munir had a legitimate expectation and the decision of the Resident Representative not to seek a one-year renewal of Mr. Munir's UNDP contract was an unlawful exercise of discretion.

39. On the award of pecuniary damages to Mr. Munir, the Secretary-General simply submits that as the decision of the Resident Representative not to extend Mr. Munir's appointment constituted a reasonable and lawful exercise of his discretion, there is no legal basis for the award of pecuniary damages.

40. The Secretary-General has not demonstrated that the compensation is unreasonable.

41. The Appeals Tribunal affirms the decision of the UNDT that the non-extension decision was an unlawful exercise of discretion. We, therefore, find a basis for the award of nine months' net base pay for the separation from service as a result of the unilateral decision of the Resident Representative to overrule the earlier decision of the CO Core Management Group to extend Mr. Munir's appointment by one year.

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<sup>11</sup> *Islam v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-115, para. 29.

<sup>12</sup> Impugned Judgment, para 70.

42. The Secretary-General appeals further on the ground that the UNDT exceeded its jurisdiction in reviewing and ordering remedies with regard to matters that had not been the subject of any management evaluation. The Secretary-General submits that the placement of Mr. Munir on administrative leave and the investigation into allegations against him were never the subject of a request for management evaluation and, thus, were not properly before the UNDT for adjudication.

43. The Appeals Tribunal has repeatedly held that requesting management evaluation is a mandatory first step in the appeal process.<sup>13</sup> We note that Mr. Munir's request for management evaluation in May 2012 principally related to the decision not to extend his appointment for one year. While he alleged therein that "the actions by the [Resident Representative in not extending him] form[ed] a pattern of harassing, humiliating, discriminating behavior", his request did not touch on the manner in which he was treated when he was placed on administrative leave in March 2012, the ongoing nature of the OAI investigation, which at the time of his request for management evaluation in May 2012 had been underway for four months, or the allegedly discriminatory nature of the additional language requirement in the VA for his own post, which only arose subsequently. Consequently, the contested decision before the UNDT was limited to the Resident Representative's non-extension decision.

44. The UNDT therefore erred in law and exceeded its jurisdiction in reviewing the additional complaints concerning the conduct of the Resident Representative and making findings reaching the merits in connection with these matters.

45. Consequently, the UNDT erred by awarding moral damages and in referring the conduct of the Resident Representative in relation to these matters to the UNDP Administrator.

46. We hereby set aside the award for moral damages, and the referral of the case to the Administrator of UNDP under Article 10(8) of the Statute of the Dispute Tribunal.

47. Furthermore, the UNDT has no jurisdiction to order the issuance of the OAI Investigation Report.<sup>14</sup>

48. The appeal succeeds on this ground.

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<sup>13</sup> *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-293, paras. 25-26, 28; *Crichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035.

<sup>14</sup> *Koda v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-130, para. 41.

49. From the foregoing, the appeal succeeds, in part.

**Judgment**

50. The appeal succeeds, in part. We affirm the UNDT Judgment insofar as it relates to the issue of non-renewal of Mr. Munir's appointment and the award of nine months' base pay.

51. We set aside part of the UNDT Judgment in respect of the placement of Mr. Munir on administrative leave and the ensuing investigation, as well as the award in the sum of USD 16,000 as compensation for moral damages. We also set aside the order of referral.

Original and Authoritative Version: English

Dated this 26<sup>th</sup> day of February 2015 in New York, United States.

*(Signed)*

Judge Adinyira, Presiding

*(Signed)*

Judge Chapman

*(Signed)*

Judge Thomas-Felix

Entered in the Register on this 17<sup>th</sup> day of April 2015 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar