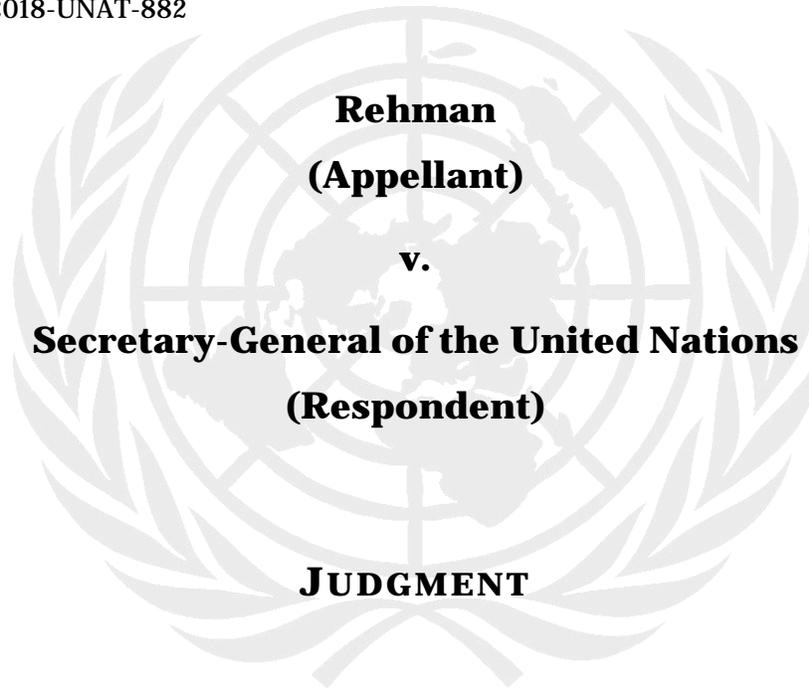




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-882



**Rehman
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Richard Lussick, Presiding Judge Sabine Knierim Judge Martha Halfeld
Case No.:	2018-1175
Date:	26 October 2018
Registrar:	Weicheng Lin

Counsel for Ms. Rehman:	Self-represented
Counsel for Secretary-General:	Not represented

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/031, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 28 February 2018, in the case of *Rehman v. Secretary-General of the United Nations*. Ms. Rafia Rehman filed the appeal on 1 June 2018.¹ The Secretary-General did not file an answer.

Facts and Procedure

2. The following facts are uncontested:²

... The Applicant joined [the United Nations International Children's Emergency Fund (UNICEF)], [Pakistan Country Office (PCO),] Islamabad on 1 November 2006 as a Project Assistant, GS-5, on a temporary appointment in the Construction Unit. Prior to joining UNICEF, the Applicant had worked for different United Nations agencies for more than 10 years in different capacities.

... She was later selected for the post of Program Assistant, GS-6, Construction Unit, UNICEF, PCO. This appointment expired on 31 December 2012. She was then granted [a fixed-term appointment (FTA)] as Programme Assistant, GS-6, UNICEF, Education Section, Islamabad, on 1 January 2013.

... The Applicant alleges that she faced hostility from and discrimination by her immediate supervisor, against whom she filed a complaint of harassment. The allegations of harassment are dealt with in the Applicant's case No. UNDT/GVA/2016/094.

... Additionally, the Applicant claims that the same supervisor engineered allegations of entitlement fraud against her, involving payments to a hotel during an Organization's workshop. An investigation was conducted into these allegations and the Applicant was cleared of all charges. This matter is also the subject of the Applicant's case No. UNDT/GVA/2016/094.

... On 7 October 2015, the Applicant was informed by the former UNICEF PCO Representative, that due to funding constraints, her contract would not be renewed upon its expiration on 31 December 2015. She was, accordingly, separated from service on that date.

¹ On 28 April 2018, Ms. Rehman requested an extension of the time limit to appeal until 20 days from the assignment of her case to counsel by the Office of Staff Legal Assistance. Following a request by Ms. Rehman that the Registry assist in securing legal assistance from OSLA, the Registrar advised on 23 May 2018 that the Registry was not in a position to assist a party in seeking legal representation and that her case would be considered closed, if she did not file her appeal by 1 June 2018.

² Impugned Judgment, paras. 10-16.

... The Applicant requested management evaluation of the non-renewal decision on 27 November 2015. She received a response on 23 December 2015 upholding the contested decision.

... On 30 March 2016, the Applicant filed her complete application contesting the non-renewal of her contract and the Respondent filed his reply on 5 May 2016.

3. On 28 February 2018, the UNDT issued Judgment No. UNDT/2018/031. The UNDT noted that during the course of the proceedings before it, the Secretary-General changed the reason that constituted the basis for the contested decision and as a result, Ms. Rehman was deprived of her due process right to properly prosecute her case and to have a fair hearing. Her case was premised on a reason provided by the Administration, a lack of funds in the Thematic Grant, which two years later it admitted it could not defend or support with evidence. The fact that the Secretary-General conceded that he could not demonstrate the lack of funds resulting in the non-renewal of Ms. Rehman's appointment led the UNDT to draw the negative inference that the UNICEF PCO's decision not to renew Ms. Rehman's appointment was based on other reasons that were neither disclosed to Ms. Rehman nor the UNDT.

4. The UNDT found that the new *ex post facto* alleged reason for Ms. Rehman's non-renewal, namely that there was no longer a need for her position because her functions could be taken over by the new Global Shared Services Centre (GSSC) in Budapest and the Business Transaction Centre (BTC) in Islamabad and that the remainder of her former tasks were absorbed by a G-7 Programme Assistant, was not supported by any evidence. The UNDT found that there was no proof of a restructuring of the Education Section or UNICEF PCO as a result of the coming into force of the GSSC and BTC that affected Ms. Rehman's functions and, in the absence of any documentation of a restructuring exercise, the UNDT questioned, if in fact a restructuring exercise had taken place. The UNDT therefore concluded that Ms. Rehman's non-renewal was unlawful.

5. The UNDT ordered rescission of the decision not to renew Ms. Rehman's fixed-term appointment beyond 31 December 2015 and, in the alternative, compensation in the amount of one-year net base salary. In calculating the amount of in-lieu compensation, the UNDT took into account the fact that Ms. Rehman had served nine years in the Education Section of the UNICEF PCO and prior to that, ten years in different United Nations agencies and capacities; that her non-renewal could not be supported by the Secretary-General; that the Thematic Grant to which her salary was charged had available funds until December 2017 and specifically continued to be

used to charge the salaries of other staff members in the Education Section in the UNICEF PCO until 2016; and that Ms. Rehman had a reasonable expectation of renewal of her contract for one year. The UNDT also awarded moral damages in the amount of USD 5,000 based on Ms. Rehman's testimony that she was unemployed for one year after her separation from service and that the situation stressed her and put her in a state of anxiety.

Submissions

Ms. Rehman's Appeal

6. The UNDT "ignored its obligations" to refer her case to the Secretary-General pursuant to Article 10(8) of the UNDT Statute for possible enforcement of accountability measures.

7. The UNDT's award of in-lieu compensation in the amount of one-year net base salary is unfair and "cannot be justified on the rationale or legal grounds on the basis of the following aspects":

- The UNDT rescinded the decision not to renew Ms. Rehman's fixed-term appointment beyond 31 December 2015 through its Judgment of 28 February 2018, after a gap of 26 months from her separation from service. Ms. Rehman should therefore receive compensation in the amount of 26 months' net base salary.
- The UNDT erred in finding that Ms. Rehman had a reasonable expectancy of the renewal of her appointment for one year. The UNDT failed to consider that Ms. Rehman's post had been approved from 2013 to 2017 and that the Thematic Grant is the main programmatic grant of education programme funded by several tranches in a financial year by the donor and is still valid, even in 2018. Ms. Rehman had a reasonable expectancy of renewal of her contract until the end of 2017 and even afterwards.
- The UNDT failed to consider Ms. Rehman's economic and professional status while being a GS-6 (Step 8) Programme Assistant with UNICEF on a fixed-term appointment in a regular education programme versus working as a non-UN staff member on a SB3 junior level in a project in Peshawar city limited to one year and away from Ms. Rehman's home station Islamabad. As a non-UN staff member,

Ms. Rehman was not entitled to pension benefits, medical coverage or other UN staff member benefits.

8. Furthermore, the UNDT failed to consider the following facts and variations in UNICEF's stance about Ms. Rehman's post for the period 2015 to 2017:

- Ms. Rehman's post was kept vacant following her separation in December 2015 and only abolished mid-2017, almost one and a half years later.
- When Ms. Rehman was separated in 2015, UNICEF claimed in its management evaluation that the Education Section needed a Programme Assistant post at the GS-7 level and associated Ms. Rehman's functions and duties to the GS-7 post. That post, however, was subsequently converted to the GS-6 level without any new selection process which reveals that the GS-7 post was not necessary for the Education Section and was only kept to expel Ms. Rehman from UNICEF.
- Ms. Rehman was the only Programme Assistant in the Education Section who was awarded a two-year fixed-term appointment in 2013 which was further extended to 2015. Pursuant to the retention order in Chapter IX of the Staff Rules, in a case of abolition of posts, preference must be given to permanent and longer serving fixed-term staff over others. The abolition of Ms. Rehman's position was therefore unlawful, especially since the remaining post was also at the GS-6 level and comparable to Ms. Rehman's post.
- Ms. Rehman's right to challenge the abolition of her post was violated when it was kept vacant at the time of her separation; and in 2017, she was not able to challenge the decision in light of her separation in 2015.

9. Ms. Rehman requests that the Appeals Tribunal refer her case to the Secretary-General for possible action to enforce accountability, pursuant to Article 9(5) of the Appeals Tribunal Statute. She further requests that the Appeals Tribunal direct the Secretary-General for reinstatement of her fixed-term contract beyond 31 December 2015 or, alternatively, order in-lieu compensation to "reinstatement" in the amount of Ms. Rehman's net base salaries from 31 December 2015 until the issuance of the Appeals Tribunal Judgment, in addition to one year's net base salary pursuant to Article 9(1)(b) of the Appeals Tribunal Statute. Finally, Ms. Rehman requests moral damages in the amount of USD 20,000 for prolonged

unemployment depriving herself and her family of a decent social and economic standard, the fact that her separation tainted her professional career and status, the loss of national and international job opportunities which were limited to internal candidates, and the anxiety, depression and mental stress she suffered.

Considerations

10. Ms. Rehman requests the Appeals Tribunal to order the Secretary-General to reinstate her fixed-term appointment beyond 31 December 2015.

11. The UNDT, having found that the non-renewal of her contract was unlawful, ordered the rescission of that decision and set the amount that the Secretary-General may pay as an alternative to the rescission at one-year net base salary.

12. This order was made pursuant to its jurisdiction under Article 10(5) (a) of the UNDT Statute, which provides:

As part of its judgement, the Dispute Tribunal may only order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph.

13. This provision does not confer on the UNDT the power to enforce the reinstatement of a staff member's contract in a non-renewal case. The Appeals Tribunal is subject to the same legislative constraint by Article 9(1)(a) of its Statute, which corresponds in terms to Article 10(5) (a) of the UNDT Statute.

14. Therefore, Ms. Rehman's claim for an order for reinstatement must be rejected.

15. Ms. Rehman also claims "compensation of net base salaries for the period beyond 31 December 2015 from which the decision is rescinded by UNDT till the decision of Appeals Tribunal along with the addition of one year net base salary as compensation to the rescission of administrative decision according to UNAT Statute Article #9.1(b) for which the UNDT was also authorised according to Article 10.5(b) of the UNDT Statute".

16. She further claims that the UNDT compensation for moral damages is “not fair and unjust” and requests an award of USD 20,000.

17. Article 10(5) (b) of the UNDT Statute is in these terms:

As part of its judgement, the Dispute Tribunal may only order one or both of the following:

...

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years’ net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

The law on compensation for harm, as decided by the majority of the Appeals Tribunal in *Kallon*, a decision which is binding on the UNDT, is that “a staff member’s testimony alone is not sufficient to present evidence supporting harm under Article (...)10(5)(b) of the UNDT Statute”.³ Therefore, the testimony of an applicant in such circumstances needs the corroboration of independent evidence to support the contention that harm has occurred.⁴

18. The Appeals Tribunal’s decision in *Kallon* follows the amendment of the statutory law governing an award of compensation. In 2014, Article 10(5) (b) of the UNDT Statute and Article 9(1) (b) of the Appeals Tribunal Statute were amended by General Assembly resolution 69/203. They now provide, in relevant part, that the Dispute Tribunal and Appeals Tribunal may award compensation for harm only if such harm is “supported by evidence”.⁵ It is therefore incumbent on a claimant to submit specific evidence to sustain an award of moral damages.⁶

19. This is the current law on compensation for harm and it is the law which the UNDT must apply when it is contemplating such an award.

20. In the present case, there is no evidence of harm to support an award of compensation apart from Ms. Rehman’s own claims. Those claims must accordingly be rejected.

³ *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742, Concurring Opinion of Judge Knierim, para. 2.

⁴ *Langue v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-858, para. 18.

⁵ *Ibid.*, para. 14.

⁶ *Dahan v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-861, para. 23.

21. However, the UNDT's award of moral damages of USD 5,000, which is wrong in law as there was no evidence of harm to support it, will be allowed to stand. This is because it was not appealed by the Secretary-General and thus the jurisdiction of the Appeals Tribunal under Article 2(1) of its Statute was not invoked.

22. Finally, we reject Ms. Rehman's claim that the UNDT "ignored its obligations" to refer her case to the Secretary-General pursuant to Article 10(8) of the UNDT Statute. The Appeals Tribunal held in *Cohen* that the exercise of the power of referral for accountability must be exercised sparingly and only where the breach or conduct in question exhibits serious flaws.⁷ On the facts of this case, referral for accountability is not appropriate.

23. We find that Ms. Rehman has not established any error of law, fact or procedure which would entitle the Appeals Tribunal to interfere with the UNDT Judgment.

24. The appeal fails.

⁷ *Cohen v. Registrar of the International Court of Justice*, Judgment No. 2017-UNAT-716, para. 19.

Judgment

25. The appeal is dismissed and Judgment No. UNDT/2018/031 is affirmed.

Original and Authoritative Version: English

Dated this 26th day of October 2018 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Knierim

(Signed)

Judge Halfeld

Entered in the Register on this 20th day of December 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar