



**Before:** Judge Vinod Boolell  
**Registry:** Nairobi  
**Registrar:** Abena Kwakye-Berko

ASSALE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON LIABILITY AND  
RELIEF**

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**Counsel for the Applicant:**  
Alexandre Tavadian, OSLA

**Counsel for the Respondent:**  
Stephan Grieb, UNICEF  
Tamara Shockley, UNICEF

## **Introduction**

1. The Applicant is a former staff member of the United Nations Children's Fund (UNICEF). He filed the current application with the Registry of the United Nations Dispute Tribunal (the Tribunal) in Nairobi on 5 December 2011 to contest the administrative decision not to renew his fixed-term appointment beyond 31 January 2011.

## **Procedural history**

2. The Respondent filed a Reply to the Application on 5 January 2012.

3. By Order No. 025 (NBI/2012), dated 8 February 2012, the Tribunal sought the views of the parties on the need for a hearing and other matters.

4. On 14 February 2012, the Parties informed the Tribunal that they would not submit any further evidence/supplementary documents and that they did not consider a hearing to be necessary. The Applicant, however, sought leave to file additional submissions in response to the Respondent's Reply. The Respondent objected to the Applicant's motion but requested leave to respond to the Applicant's rejoinder in the event that the Tribunal acceded to the Applicant's request.

5. By Order No. 185 (NBI/2013), dated 21 August 2013, the Tribunal granted the Applicant leave to file a rejoinder and informed the parties that the matter would be adjudicated based on the documentary evidence in the record.

6. The Applicant complied with Order No. 185 on 3 September 2013.

## **Facts**

7. The facts set out below are based on the Application in view of the Respondent's confirmation<sup>1</sup> that the factual background set out therein is not in dispute.

8. The Applicant joined UNICEF on 5 January 2010 at the P-4 level as Chief of the Child Protection Section in the UNICEF Chad Country Office (UNICEF Chad).

9. The Applicant signed off on his individual performance work plan under UNICEF's e-Performance Appraisal System (e-PAS) on 21 May 2010. His supervisor, Mr. Jean Baptiste Ndikumana, Deputy Representative, UNICEF Chad, signed off on 23 May 2010.

10. On 23 September 2010, the Applicant signed off on his mid-term review after indicating that he was "progressing as planned" in his work and developmental plans. Mr. Ndikumana did not sign the mid-term review but he commented that in two out of the three performance areas under review, he had identified weaknesses in the Applicant's performance.

11. By a memorandum dated 27 October 2010, Mr. Ndikumana recommended the non-renewal of the Applicant's appointment beyond 31 January 2011 on the basis of poor performance. This recommendation was endorsed by Dr. Marzio Babilie, Representative, UNICEF Chad, on 29 October 2010.

12. The Applicant filed a formal complaint of harassment and abuse of authority against Mr. Babilie on 6 November 2010 and on 29 November 2010, Mr. Babilie informed him that based on discussions with his supervisor, his appointment would not be renewed upon its expiration on 31 January 2011.

13. On 3 January 2011, the Applicant requested management evaluation of the decision not to renew his appointment and on 17 January 2011, he requested that

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<sup>1</sup> Respondent's Reply.

UNICEF suspend his separation until the management evaluation was completed. On 21 January 2011, the Applicant's appointment was extended for one month so that the investigation into his harassment complaint could be completed.

14. In a memorandum dated 28 February 2011, Mr. Martin Mogwanja, the Deputy Executive Director of UNICEF, informed the Applicant that even though his request for management evaluation was still pending, it was not considered "in the best interest of the Organization to further renew [his] contract".

15. The Applicant was separated from service on 28 February 2011. His e-PAS was finalized on 31 March 2011.

16. On 12 July 2011, the Office of Audit and Investigations (OAI) issued its report on the Applicant's complaint of harassment and abuse of authority. OAI concluded that his claims were not substantiated but that Mr. Babilie exercised poor judgment in the way he communicated his dissatisfaction with the Applicant's performance.

17. On 6 September 2011, the Applicant received the final decision on his request for management evaluation from the Deputy Executive Director. Mr. Mogwanja informed him that Mr. Babilie properly exercised his discretionary authority in deciding not to renew his contract. Mr. Mogwanja further informed him that since his performance did not fully meet their expectations, it was "in the best interest of the Organization" not to renew his contract.

### **Preliminary matters**

#### *Requests for rejoinders*

18. On the issue of the Applicant's request for a rejoinder, the Tribunal took note of the Respondent's submissions that: (a) the General Assembly created the new system of internal justice with a view to expediting the resolution of cases in a fair, professional and efficient manner and for this reason, the General Assembly

eliminated the practice of filing rejoinders to the Respondent's Reply and then comments on the Applicant's rejoinder; and (b) there is no need to continue arguing "ad nauseam" at the expense of the expeditious management of the proceedings.

19. The Tribunal wholeheartedly accepted these submissions and found that there was no need for the Respondent to also comment on the Applicant's rejoinder. Consequently, the Respondent's request to submit comments on the Applicant's rejoinder was rejected.

*The Investigation Report of OAI*

20. By Order No. 016 (NBI/2014), the Tribunal requested that the Respondent communicate to the Registry a copy of the findings of OAI on a confidential basis. In regard to confidential documents, parties may request that the Tribunal impose measures to preserve the confidentiality of evidence on account of security measures or other exceptional circumstances as provided for by art. 18.4 of the UNDT Rules of Procedure. In reviewing the request and making a determination on it the Tribunal's duty is to consider all the facts and the circumstances. A request to impose measures in the interest of security or otherwise is not granted for the mere asking. The Rules are silent on whether the Tribunal can on its own volition impose confidentiality measures if the circumstances so warrant. However, the Tribunal can in the exercise of its powers under art. 36.1 of the Rules of Procedure<sup>2</sup>, make an order for confidentiality.

21. The Tribunal has taken cognizance of the findings and will make use of it in two respects namely failure to comply with UNICEF's rules on performance and the work environment where the Applicant was operating. The Tribunal wants to make it clear that the document has not and will not be shared with the Applicant or any other individual not entitled to have access to it.

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<sup>2</sup> Article 36.1 reads: All matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by article 7 of its statute.

## **Issues**

22. The issues for determination by the Tribunal are as follows:
- a) Whether the Respondent complied with the rules governing performance appraisal and if not, the impact the non-compliance had on the Applicant;
  - b) Was the decision not to renew the Applicant's appointment beyond 31 January 2011 a lawful exercise of the discretion conferred upon the Respondent or was it tainted by extraneous factors/motives?
  - c) Did the Respondent abuse his discretionary authority by separating the Applicant prior to the completion of the investigation into his harassment complaint?

**Did the Respondent comply with the rules governing performance appraisal and if not, what impact did the non-compliance have on the Applicant?**

### *Applicant's submissions*

23. The Applicant submits that his performance was not "unsatisfactory" for the purposes of CF/AI/2010-001 (Separation from service). He received one e-PAS and even though his supervisor identified weaknesses, the overall ratings on work plan outputs and competency were better than "did not achieve outputs" and/or "not proficient". Additionally, his supervisor indicated that his proficiencies were developing but that there was "potential for improvement". Consequently, UNICEF had sufficient cause to proceed to renew his appointment.

24. The Applicant asserts that pursuant to section 5.2 of CF/AI/2010-001, insofar as it concerned performance alone, UNICEF had sufficient cause to renew his appointment notwithstanding the fact that his appointment did not confer an expectation of renewal.

25. Further, the recommendation not to renew his appointment and the approval thereof were made prior to the completion of his e-PAS and prior to the completion of the reporting period.

***Respondent's submissions***

26. The Respondent submits that the Applicant's performance was evaluated in accordance with the established procedures. His performance shortcomings were identified early by his supervisor and noted in writing on 27 October 2010. However, these shortcomings were not strong enough to warrant a termination of the contract prior to its expiration. Instead, his supervisor recommended non-renewal considering that several competencies had to be reinforced if the Applicant were to maintain the same level of responsibility.

27. The Contested Decision was in the best interest of the Organization. This was a discretionary decision that was carefully considered, thoroughly reviewed and legitimately made.

***Considerations***

28. Section 5.1 of CF/AI/2011-001, which was promulgated on 17 January 2011 and is therefore applicable to this matter, sets out the guiding principles on performance and evaluation of UNICEF staff members and the measures that need to be taken to address any failings in performance. It reads as follows:

During the performance cycle, the supervisor should continuously evaluate performance. When a performance shortcoming is identified during the performance cycle, the supervisor should, to the extent possible, assist the staff member to remedy his/her performance shortcomings. Such measures may include counseling, assignment of more suitable tasks, additional training and/or the institution of a time-bound improvement plan, which should include clear targets for performance improvement, provision for coaching, and supervision in conjunction with regular performance discussions.

29. Section 5.2 of CF/AI/2011-001 stipulates that:

If the performance shortcoming is not rectified following the remedial actions indicated in paragraph 5.1 above, a number of administrative actions may ensue, including the withholding of a within-grade salary increment, the non-renewal of an appointment or the termination of an appointment for unsatisfactory service in accordance with United Nations staff regulation 9.3 (see also CF/AI/2010-001 on Separation from Service particularly sections 5 and 20).

30. Further, the purpose behind the rules and principles governing performance was highlighted in *Nogueira* UNDT-2009-088:

From a reading of the relevant provisions relating to the PAS, it cannot be disputed that this mechanism exists in the interest of staff members, management and of the Organisation. For staff members, PAS procedures ensure that the members of the staff are rated fairly, guided in case of shortcomings and have an opportunity of challenging a rating that they do not agree with. For Management, PAS procedures enable it to enhance the work of its respective departments or sections by placing on them the onus of devising a work plan and making sure that the highest standard of efficiency is achieved through guidance and dialogue. For the Organisation, PAS procedures ensure that the aim and purpose of the Organisation as set out in Article 101(3) of the Charter is complied with.

31. The general rule is that when a staff member is found to exhibit failings in his/her performance it is the duty of the Administration to take measures to remedy the situation. A non-performing staff member should not be jettisoned overboard in an arbitrary manner. In *Nogueira* this Tribunal held:

The purposes of performance appraisal, as laid down in the relevant Administrative Instruction of the Organization, are meant to pinpoint the strengths and weaknesses of the staff member and to seek remedial action where that is required.



32. In a case decided in 2005 the Administrative Tribunal of the International Labour Organization (ILOAT)<sup>3</sup> made the following observations, which this Tribunal considers very pertinent to the present matter:

A staff member whose service is not considered satisfactory is entitled to be informed in a timely manner as to the unsatisfactory aspects of his or her service so that steps can be taken to remedy the situation. Moreover he or she is entitled to have objectives set in advance so that he or she will know the yardstick by which future performance will be assessed. These are fundamental aspects of the duty of an international Organization to act in good faith towards its staff members and to respect their dignity.

33. In the present matter, the Applicant assumed his duties with UNICEF Chad on 5 January 2010. He finalized his individual performance work plan on 21 May 2010 and his supervisor, Mr. Ndikumana, approved the work plan on 23 May 2010. Approximately 4 months later, on 23 September 2010, the Applicant positively reviewed his performance and signed off on the mid-year review. Mr. Ndikumana on the other hand was very critical of the Applicant's performance at this stage. He indicated that the Applicant had weak management skills and frequently delayed in delivering donor reports and project agreements with partners. With respect to competencies, Mr. Ndikumana stated that the Applicant was weak in leading and supervising staff and that he had a tendency to "keep alive conflicts instead of promoting harmonious work relations in his section". The Tribunal notes that Mr. Ndikumana's comments on the mid-year review were neither signed nor dated.

34. The e-PAS was finalized on 31 March 2011 although the Applicant had been separated from service with UNICEF Chad a month earlier, on 28 February 2011. His year-end appraisal included ratings on core competencies that involved "Communication"; "Working with People" and "Drive for Results". He was found to be "proficient" by his supervisor in the first two core competencies and "developing proficiency" in the third one. He was also rated on "Functional Competencies" that comprised the following: "Deciding and Initiating Action"; "Leading and

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<sup>3</sup> ILOAT Judgment No. 2414 (2005).

Supervising”; “Relating and Networking”; “Persuading and Influencing”; “Analyzing; Formulating Strategies and Concepts”. He was rated as “Developing Competency” for all these functional competencies except for “Relating and Networking” for which he was given a “Proficient” rating. The overall rating on the competencies was “Developing Proficiency with potential for improvement”.

35. The Tribunal holds that once Mr. Ndikumana identified weaknesses in the Applicant’s performance, he was obliged to employ one or more of the remedial measures detailed in section 5.1 of CF/AI/2011-001 (counseling, additional training, the institution of a time-bound improvement plan with clear targets for performance improvement, or regular performance discussions) to assist the Applicant in improving his performance shortcomings. Did this happen?

36. When asked by OAI whether he gave the Applicant any training or coaching Mr. Ndikumana “responded that he did not do that because the Chad CO [Country Office] was busy in the process of preparing strategy papers for the country programme”<sup>4</sup>. In addition Ms. LD, Human Resources Officer, told the OAI that when Mr. Ndikumana informed her that the Applicant’s contract would not be renewed for poor performance, she pointed out to him that “the full cycle of the ePAS process was not completed in October and that consideration should be taken to extend [the Applicant’s] contract for three months beyond the expiration date to complete the performance evaluation and to consider giving [the Applicant] training and coaching so that he may be given a chance to improve his performance”<sup>5</sup>.

37. Mr. Ndikumana, who became the designated coaching and mentoring officer for UNICEF Chad after having attended a course at the Regional Office in February 2010 training as a mentor/coach, told OAI that “he was unable to mentor or coach [the Applicant] because there was no time for it”. Mr. Ndikumana added that “on an ad hoc basis, when he arrived in the office in the morning, he would pass by each

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<sup>4</sup> OAI Investigation Report p.17.

<sup>5</sup> OAI Investigation Report p.17.

staff office, including heads of sections, and ask what is new, and if there were any problems they would discuss them and try to find a solution. He also took advantage of the weekly programme meetings held on Fridays to discuss any problem that may have arisen”<sup>6</sup>.

38. The Tribunal also refers to the account given to OAI by Ms. JL, Chief of Operations. Ms. JL stated that on 26 April 2010 during a “Front Desk” meeting where she was present with Messrs. Babilie and Ndikumana; Mr. Babilie discussed the Applicant’s poor performance and asked her if “there was a way of terminating to (sic) his contract prior to its expiration date”. Ms. JL told Mr. Babilie that she would review the relevant human resources rule and advise him<sup>7</sup>. On 27 April 2010, Ms. JL sent an email to Mr. Babilie as follows: “in the case we discussed, administrative leave is not a viable option. However, mutually agreed termination or, termination based on unsatisfactory performance are possible provided organizational procedures outlined in HR Manual Chapter are followed”<sup>8</sup>.

39. The evidence clearly shows that even before performance objectives had been set and Mr. Ndikumana had approved the Applicant’s individual performance work plan in May 2010, Mr. Babilie had been trying, at least since April 2010, to find a way to terminate the Applicant’s appointment. The Tribunal holds that it was unreasonable and inappropriate for the Applicant’s performance to be measured against outputs and performance indicators that had neither been defined nor approved by his supervisors.

40. Further, there is no evidence that the Applicant was informed of his shortcomings earlier than 23 September 2010. This however did not stop Mr. Ndikumana from sending a scathing interoffice memorandum to Mr. Babilie on 27 October 2010, only a month after the mid-year review, indicating that he could not recommend renewal of the Applicant’s appointment beyond its expiry of 31 January

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<sup>6</sup> OAI Investigation Report p.17

<sup>7</sup> OAI Investigation Report p.17

<sup>8</sup> OAI Investigation Report p.17

2011 due to poor performance. Mr. Babilie endorsed the non-renewal recommendation on 29 October. Apparently, a firm decision was made by the senior managers of UNICEF Chad not to renew the Applicant's contract a mere month after his mid-year e-PAS review. Once this decision had been made, the Tribunal fails to appreciate how the Applicant could possibly have received a fair year-end appraisal from Mr. Ndikumana who was resolute in his campaign to push out the Applicant due to what he categorized as the Applicant's failure to adapt and deliver after nine months with UNICEF Chad.

41. In spite of the expert advice of two officers, Ms. LD from Human Resources and Ms. JL, Chief of Operations, both Mr. Ndikumana and Mr. Babilie opted for a solution that consisted of flouting the e-PAS rules and separating the Applicant from service for non-performance. This was indeed an abuse of power and authority and a blatant exhibition of poor judgment. What makes the situation worse is the fact that the Applicant was separated before his e-PAS was finalized. The Tribunal finds that the failure of both the UNICEF Representative and his Deputy to follow UNICEF's rules on performance was sheer managerial mischief. The Applicant was denied due process on account of this unacceptable managerial behaviour and was denied the right to file a meaningful rebuttal against the evaluation.

42. The reason invoked by Mr. Ndikumana to justify an absence of mentoring and coaching was a lack of time. To try and excuse a flouting of established rules in regard to performance by pleading a lack of time is simply untenable. There is nothing in the UNICEF rules on performance that would suggest that a staff member is deemed to have expressly or impliedly waived his/her right to be governed by the United Nations Regulations and Rules and UNICEF rules governing performance just because his supervisor did not have time to comply with them. The Administration, led by Mr. Ndikumana and Mr. Babilie, was cognizant of the fact that it would end up in a legal quagmire if the Applicant's appointment was suddenly terminated on the grounds of unsatisfactory performance. Thus, UNICEF Chad's senior management resorted to the delay tactic of separating him at the end of his fixed-term contract in

the belief that it could escape scot free from scrutiny for not having complied with the Organization's rules on performance appraisal.

43. The Respondent's Reply to the Application on the issue of termination vis-à-vis non-renewal is very confusing to say the least. Firstly, the Respondent submits that the "Applicant's performance was not as unsatisfactory as to warrant the termination of his appointment however it was not considered satisfactory enough to be renewed"<sup>9</sup>. Secondly, the Respondent submits that a distinction must be made between separation upon expiration of an appointment and a termination. The Respondent avers that: a "separation upon expiration of appointment is not regarded as a termination" under section 5.1, Part 1 of CF/AI/2010-001<sup>10</sup>. The Applicant was therefore not terminated but separated from service at the expiry of his fixed-term appointment.

44. The distinction relied on by the Respondent is not justifiable. Section 2 of CF/AI/2010-001 defines a separation from service as including a termination of employment as defined in sections 8 to 13 under Part II of the CF/AI2010/001. And a termination for non-performance is explained in detail in section 10 of CF/AI/2010-001. So when a staff member is terminated for non-performance, this is a separation from service and, depending on the circumstances of the case, that staff member may or may not be entitled to compensation.

45. Section 5.1 of CF/AI/2010-001 reads: "Separation upon expiration of an appointment is not regarded as a termination of appointment". That may be so but a staff member is not without any remedy in such a situation. The non-renewal decision must still be based on cogent reasons.

46. When a fixed-term appointment comes to an end, though the staff member expects it to be renewed, that renewal depends on a number of factors, namely the availability of the position, whether funds are available, whether the staff has

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<sup>9</sup> Para 23 of Respondent's Reply, 5 January 2011.

<sup>10</sup> Para. 9 of Respondents' Reply, 5 January 2011.

performed well and the interest of the Organization in renewing or not. In addition if a promise, express or implied has been made, this would create a legitimate expectation for renewal. A non-renewal must obviously not be motivated by discrimination or some other improper ground. But when a contract is not renewed it is obviously terminated. The myth that a fixed-term appointment comes to an end automatically without the Administration having to give any reason must be laid to rest. The Administration keeps relying on that vague defence to justify any situation of non-renewal of a fixed-term appointment.

47. A fixed-term appointment or permanent appointment can also be terminated before its expiry for the following reasons: non-performance or poor performance; misconduct; abolition of post which is well reasoned or justified; incapacity of the staff member to perform his/her duties by reason of health. The reason for the termination must be rationally explained and it must be completely justified. This is comprehensively provided for in section 8 of CF/AI/2010-001.

48. In the present matter, the Respondent found himself in an invidious position for the simple reason that he was faced with a situation where he was relying heavily on the non-performance of the Applicant to separate him from service and at the same time invoking the natural death of the contract at its expiry. The Tribunal can well understand the predicament of the Respondent. Having concluded that the Applicant was not performing and having failed to follow the rules of UNICEF on performance in that the Applicant was not given a chance to improve under the guidance of his supervisor, the Respondent obviously had no leg to stand on other than the fiction of automatic expiration of the contract. In so doing he sought refuge in the distinction between separation from service and a termination.

49. The Tribunal holds that the Respondent failed to comply with the rules governing performance appraisal and as a result of this non-compliance, the Applicant was separated from service unfairly and prematurely.

**Was the decision not to renew the Applicant's appointment beyond 31 January 2011 a lawful exercise of the discretion conferred upon the Respondent or was it tainted by extraneous factors/motives?**

*Applicant's submissions*

50. The Dispute Tribunal and the United Nations Appeals Tribunals (UNAT) have held that when the Administration chooses to provide reasons for a decision not to renew a fixed-term appointment, the validity and acceptability of these reasons are subject to judicial review and must be supported by the facts<sup>11</sup>. In view of the fact that his performance was not "unsatisfactory" as alleged by the Respondent, the impugned decision should be rescinded.

*Considerations*

51. OAI recorded three incidents where Mr. Babilie either shouted or raised his voice or was aggressive towards the Applicant. According to the Applicant, on 5 May 2010 in the presence of Ms. MN and Mr. DM, both Child Protection Officers, Mr. Babilie shouted at him while querying him about matters relating to child soldiers<sup>12</sup>. Ms. MN could not recall that Mr. Babilie shouted at the Applicant while Mr. DM "considered the tone and demeanor of Mr. Babilie as being aggressive towards Mr. Assale"<sup>13</sup>. In the course of Mr. Babilie's (MB) testimony before the OAI Panel the following exchange took place<sup>14</sup>:

KC [Panel Member]: Can you understand how [the Applicant] [felt] when you-let's say you chastised him. From the sound of it I don't [think] you'll disagree with that because there were things that you expected of him that he [has not] done and you were saying to him and the team that things have to improve...

MB: Yes.

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<sup>11</sup> *Larkin* UNDT/2010/018 and *Asaad* 2010-UNAT-020.

<sup>12</sup> OAI Investigation Report p.5.

<sup>13</sup> OAI Investigation Report p.6.

<sup>14</sup> OAI Investigation Report p.6.

KC: And would you understand if he felt humiliated in front of his team and...

MB: Yes I would.

KC: And if he did do you think that that was justifiable?

MB: No, I don't think so. In all truth my complaint was a managerial complaint. Okay? And it was not loud. Obviously I was not happy. I was very disappointed.

52. On 25 May 2010, Mr. Babilie summoned the Applicant to inquire about the delivery of some documents to a Minister for a conference. Mr. Babilie also called Ms. JL to his office. He expressed disappointment at the manner in which the Applicant had handled that issue. Ms. JL, who had not been informed of the nature of the meeting beforehand, added that Mr. Babilie “started accusing [the Applicant] for problems related to the conference because [the Minister] had not received any documents and was not aware of the conference”<sup>15</sup>. Ms. JL went on to add that each time the Applicant tried to “interject” he was “cut short” by Mr. Babilie<sup>16</sup>. Ms. JL also stated that “she was taken aback” by this but did not say anything during the meeting. The Applicant was never given a chance to offer any explanation<sup>17</sup>. In regard to that incident the following exchange took place<sup>18</sup>:

KC: ...but it seems you did shout and you were aggressive.

MB: I probably was aggressive because - I didn't shout. I can deny that very firmly, Mr. [C]. If I am shouting now, this is the tone of voice that I have that day. Now it's about perceiving. If you perceive that I'm shouting, well okay...

53. Mr. Babilie conceded that he used “very tough words without disrespect”<sup>19</sup>.

54. It is clear from the above that the Applicant was operating in an environment that was not conducive to a good working relationship. The hostile environment in which the Applicant found himself is revealed by the facts that emerged before OAI.

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<sup>15</sup> OAI Investigation Report p.7.

<sup>16</sup> OAI Investigation Report p.7.

<sup>17</sup> OAI Investigation Report p.7.

<sup>18</sup> OAI Investigation Report p.8.

<sup>19</sup> OAI Investigation Report p.8.



Though OAI did not find harassment, the Tribunal is concerned that it merely brushed aside the evidence of the Applicant, Ms. JL, and Mr. DM. What is more disturbing is the fact that OAI did not consider the admissions of Mr. Babilie that he was either aggressive or using a loud tone of voice thus humiliating the Applicant.

55. Instead of Mr. Babilie engaging with the Applicant in compliance with the rules of the Organization, he chose to use a shouting crusade against the Applicant. This is evidence of how Mr. Babilie was trying to humiliate and demean the Applicant not only as an individual but as a staff member in front of his colleagues.

56. In this context the Tribunal will refer to paragraph 15 of ST/SGB/2002/13, which provides that:

Managers and supervisors are in a position of leadership and it is their responsibility to ensure a harmonious workplace based on mutual respect; they should be open to all views and opinions and make sure that the merits of staff are properly recognized. They need to provide support to them; this is particularly important when they are subject to criticism arising from carrying out their duties.

57. In *Mashour* UNDT-2013-133, this Tribunal observed:

Whatever the supervisor's views were on the manner in which the Applicant was working and her performance she nonetheless had the duty to ensure that the work environment which she managed was conducive to the needs of all the staff members in her section, including the Applicant. The evidence on record shows judgment on the part of Ms. Z as a manager to have been both poor and objectionable.

58. The Tribunal endorses the above for the purposes of this case. Given the attitude of Mr. Babilie, he could not have exercised objective judgment on the performance of the Applicant and thus quickly rubber stamped the recommendation of Mr. Ndikumana not to renew the Applicant's appointment. The whole exercise was flawed by his attitude.

59. In view of the foregoing, the Tribunal concludes that the decision not to renew the Applicant's appointment beyond 31 January 2011 was tainted by extraneous motives and was therefore not a lawful exercise of the discretion conferred upon the Respondent.

**Did the Respondent abuse his discretionary authority by separating the Applicant prior to the completion of the investigation into his harassment complaint?**

60. The Applicant had filed a complaint of harassment against his supervisor with OAI and before OAI had submitted its findings the Applicant was separated from service. That was an injudicious decision taken in haste. Though OAI did not find any substance in the complaint nonetheless its finding was that the supervisor had exercised poor judgment in the way he communicated his dissatisfaction with the Applicant's performance.

61. Without entering into the realm of speculation or conjecture, the question may be asked whether the non-renewal decision could have been revised if the Administration had been patient enough to wait for the findings of OAI. In the case of *Arigi-Oikelomen* UNDT-2013-036, the Applicant had filed a rebuttal process against her performance evaluation. The Administration did not wait for the finding of the Rebuttal Panel before terminating the Applicant. The Honourable Izuako J. observed as follows on that procedure:

UNON therefore had an obligation to defer the non-renewal decision until the rebuttal process had been completed. It is at the point of completion of the rebuttal process that the final decision as to the performance rating is made. It will thereafter be left then to the Administration to decide to review the matter as needed on the basis of the rebuttal result. In other words, a review or decision-making negatively impacting a staff member cannot be done when the Rebuttal Process has not been finalized as this would not comply with the requisite due process rights of the staff member.

62. Admittedly there was no rebuttal process but when a staff member files a complaint against a manager who is the person who plays an active role in his/her performance evaluation, common sense and reason require that the Administration stalls any final decision in the case of that staff member. The Tribunal therefore holds that by rushing to judgment on the decision to separate the Applicant before being in presence of the OAI findings, the Respondent flouted the basic fundamental rights of the Applicant and abused his discretionary authority.

### **Referral to the Secretary-General**

63. The Tribunal concludes that Messrs. Ndikumana and Babilie openly, consciously and deliberately flouted the basic rules of the Organization in regard to: (a) the evaluation of the performance of a staff member; and (b) the prohibition against creating a hostile work environment; and (c) abuse of authority.

64. In light of the foregoing, the Tribunal finds it necessary to refer both of these senior managers to the Executive Director of UNICEF, in accordance with art. 10.8 of the UNDT Statute, for action to enforce accountability.

65. The Tribunal would respectfully request that the Executive Director inform the Tribunal in confidence of the outcome of the process on accountability. The Tribunal is fully conscious that there is no provision in the UNDT Statute for the Secretary-General or the executive head of a separately administered United Nations fund or programme to inform the Tribunal. However, since it is the Tribunal that initiates the accountability process it is only fair and logical that the Tribunal be apprised of the outcome of the accountability process.

### **Decision**

66. Just as the Tribunal concluded in *Said* UNDT/2013/150, all elementary rules of fairness in regard to performance and a conducive work environment were simply ignored by the Respondent in the present case, which resulted in the Applicant being separated from service unlawfully. Consequently, the overall impression that is

garnered is that the only aim of the senior managers of UNICEF Chad was to hurriedly bundle up the Applicant and banish him into redundancy without having to comply with any rules.

67. Pursuant to art. 10 of its Statute, the Tribunal may rescind a contested administrative decision and order specific performance. In cases of appointment, promotion or termination it must set an amount of compensation the Respondent may pay in lieu of rescission or specific performance. Article 10.5(b) provides for an order of compensation which, in exceptional cases, may exceed the equivalent of two years net base salary.

68. Based on the findings above and in view of the fact that the Applicant was initially granted a one year appointment, the Respondent is ordered to pay the Applicant the equivalent of one year's net base salary, at the level he was entitled to before he was separated from service.

69. Pursuant to art. 10.5 of the Statute of the Dispute Tribunal, the total sum of compensation is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Interest Rate applicable as at that date shall apply. If the total sum is not paid within the 60-day period, an additional five per cent interest shall be added to the US Prime Rate until the date of payment.

*(Signed)*

Judge Vinod Boolell  
Dated this 25<sup>th</sup> day of March 2014

Entered in the Register on this 25<sup>th</sup> day of March 2014

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi