



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

Judgment No. 2022-UNAT-1213

**Sandra Hilaire-Madsen
(Respondent/Appellant on Cross-Appeal)**

v.

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

JUDGMENT

Before: Judge Dimitrios Raikos, Presiding
Judge John Raymond Murphy
Judge Sabine Knierim

Case No.: 2021-1561

Date: 18 March 2022

Registrar: Weicheng Lin

Counsel for Ms. Hilaire-Madsen: Robbie Leighton

Counsel for the Secretary-General: Angélique Trouche

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The Secretary-General has appealed against Judgment No. UNDT/2021/032, by which the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) partially granted Ms. Hilaire-Madsen's application challenging the administrative decision, dated 31 January 2019, not to renew her fixed-term appointment (FTA) at the G-5 level with the United Nations Population Fund (UNFPA), and awarded her compensation for material damages in the amount of three month's net base salary.
2. In turn, Ms. Hilaire-Madsen has cross-appealed against the UNDT Judgment, to the extent that the UNDT failed to rescind the above decision and award alternative compensation as well as compensation for moral damages requested by her.
3. On appeal, the United Nations Appeals Tribunal (Appeals Tribunal or UNAT) grants the appeal and dismisses the cross-appeal.

Facts and Procedure

4. Ms. Hilaire-Madsen joined the Procurement Services Branch (PSB), UNFPA, on 1 April 2012 as a procurement assistant at the G-5 level on a two-year FTA, based in Copenhagen, Denmark.
5. A Procurement Specialist was Ms. Hilaire-Madsen's supervisor, and he completed her Performance Appraisal and Development reports (PADs) for 2014 and 2015. They showed improvement in Ms. Hilaire-Madsen's performance over time. For instance, she received a "Developing Proficiency" rating for the "Achieving results" and "Working in teams/managing ourselves and relationships" competencies in 2014, but a "Fully Proficient" rating for them in 2015. Her overall rating for core and functional competencies was "Fully Proficient" for both years. Nevertheless, the supervisor noted a need for Ms. Hilaire-Madsen to improve in areas of work such as timely management of requisitions and timely response to feedback requests. Consequently, after the mid-year review in 2015, he and Ms. Hilaire-Madsen drew up a Performance Improvement Plan (PIP) and Ms. Hilaire-Madsen achieved some improvement in the areas of shortfall. Her FTA was further renewed from April 2016 through 31 March 2018.
6. In July 2016, Ms. L. P. became Ms. Hilaire-Madsen's direct supervisor. She placed Ms. Hilaire-Madsen on a second PIP for the months of November and December 2016. On 24 April 2017, Ms. Hilaire-Madsen sent an e-mail to the Deputy Chief, PSB, regarding her

difficulties with Ms. L. P. and sought a change of supervisor. But her request was not accepted, and Ms. L. P. remained her supervisor.

7. Ms. L. P. completed Ms. Hilaire-Madsen's 2016 PAD on 1 May 2017, in which Ms. Hilaire-Madsen received a "Developing Proficiency" rating for all core and functional competencies, with the exception of "Value" (Exceptional Proficiency) and "Communicating for impact" (Fully Proficient).

8. Subsequently, the third PIP was put in place from June to December 2017. Ms. L. P. noted improvement in Ms. Hilaire-Madsen's performance in some areas but also recorded her concerns about the mistakes, delays and non-cooperation on the part of Ms. Hilaire-Madsen in other areas of work.

9. On 7 December 2017, Ms. Hilaire-Madsen sent an e-mail request, via a colleague, to the Chief of PSB, for her direct supervisor to be changed. But that request was refused.

10. On 16 January 2018, Ms. Hilaire-Madsen went on sick leave. At her request, the completion of her 2017 PAD was deferred until after her return from the sick leave. Meanwhile, her FTA, which expired on 31 March 2018, was initially extended through 28 September 2018.

11. Effective 27 August 2018, Ms. Hilaire-Madsen resumed duties on a half-time basis thanks to an improvement in her condition. She was asked to complete all mandatory trainings, read the revised procurement procedures and finalize her 2017 PAD.

12. In an e-mail dated 11 September 2018 to Ms. L. P. and Ms. M. L., another Procurement Specialist in charge of the Haiti census project, the Deputy Chief, PSB, announced the reassignment of Ms. Hilaire-Madsen to the Haiti census project because the staff member assisting Haiti would go on maternity leave in mid-October 2018 and "Haiti needs a lot of support". The Deputy Chief, PSB, clarified that Ms. Hilaire-Madsen "[would] be assigned to the Haiti census project under [Ms. M. L.'s] supervision for the remainder of the year".

13. On 12 September 2018, the Deputy Chief, PSB, invited Ms. Hilaire-Madsen for a "quick meeting" because she wanted to share some news which Ms. Hilaire-Madsen would like, presumably about latter's reassignment to the Haiti census project.

14. The next step for the completion of Ms. Hilaire-Madsen's 2017 PAD was her self-appraisal. In an e-mail dated 19 September 2018 to the Deputy Chief, PSB, Ms. Hilaire-Madsen expressed her disagreement with the overall PAD rating and questioned the accuracy of some of the PAD comments, all of which had been entered by Ms. L. P. Ms. Hilaire-Madsen requested an extension of time to 26 September 2018 to finalize her 2017 PAD.

15. The Deputy Chief, PSB, forwarded Ms. Hilaire-Madsen's message to *inter alia* Ms. L. P. and the Chief of PSB and asked them for their views on Ms. Hilaire-Madsen's one-week extension request. The Deputy Chief, PSB, continued:¹

As it is SO much in our interest that she does NOT rebut (as this will take a lot of time and energy from all of us – including most likely from myself even if I am no longer with UNFPA at that stage), **I think we should grant her this one week extension.**

If we grant her one week extension, there is a small chance that she will not rebut. In this case, her contract does not have to be renewed after 26 October (i. e. 30 days after she finalized her PAD).

If we grant her one week extension and if she still re-butts, we will have lost one week. In my opinion, this is not a long time to have lost considering the enormous time efforts that have gone into this process until now, ***i. e. the price to pay of one week's delay for the possibility that she will not rebut, is a good risk to take in my opinion.***

If we do not grant her one week extension, I think it is almost certain that she will rebut and we will have to invest a lot of time and extend her contract until the rebuttal process is over.

After Ms. L. P. had agreed, on 19 September 2018, the Deputy Chief, PSB, advised Ms. Hilaire-Madsen of the one-week extension of the deadline for the PAD finalization. In sending her e-mail message to Ms. Hilaire-Madsen, the Deputy Chief, PSB, inadvertently included her earlier e-mail exchanges with Ms. L. P. and the Chief of PSB quoted above in the e-mail stream.

16. On 28 September 2018, Ms. L. P. completed Ms. Hilaire-Madsen's 2017 PAD, giving an overall rating of "Did Not Achieve Outputs" for the latter's performance, and a "Developing Proficiency" rating for all core and functional competencies.

¹ Capital letters, bold, italic and underline in original.

17. Ms. Hilaire-Madsen resumed full time duties on 1 October 2018. By letter dated 8 October 2018, the Director, a. i., Division for Human Resources (DHR), UNFPA, informed Ms. Hilaire-Madsen that her FTA would not be renewed beyond 30 November 2018 “because of unsatisfactory service”.

18. Ms. Hilaire-Madsen sought rebuttal of her 2017 PAD, and her FTA was extended on a monthly basis, eventually to 31 January 2019 to allow for completion of the rebuttal process. The PAD rebuttal panel upheld the 2017 PAD on 21 December 2018.

19. By letter dated 27 December 2018, the Director, a. i., DHR/UNFPA advised Ms. Hilaire-Madsen that her FTA would not be renewed beyond 31 January 2019 “because of unsatisfactory service”.

20. Ms. Hilaire-Madsen was separated from service at the end of January 2019.

21. On 17 February 2019, Ms. M. L. completed Ms. Hilaire-Madsen’s 2018 PAD, giving a “Fully Achieved Outputs” overall rating to the latter’s four-month performance at the Haiti census project, with an “Exceptional Proficiency” rating for a core competency and a “Fully Proficient” rating for the other seven core or functional competencies. Ms. M. L. made the following comments:

[Ms. Hilaire-Madsen] showed professionalism and motivation in handling her responsibilities with the orders for the census project in Haiti, as well as the other projects that she was requested to complete. Sandra integrated very well to the team dynamics and was an asset to the team as she showed her knowledge and how to find solutions to difficult procurement requests.

22. On 17 April 2019, Ms. Hilaire-Madsen appealed the non-renewal of her FTA beyond 31 January 2019 to the Dispute Tribunal. In Judgment No. UNDT/2021/032 dated 29 March 2021, the UNDT found for Ms. Hilaire-Madsen, in part.

23. The Dispute Tribunal was not persuaded that Ms. Hilaire-Madsen had established that her assignment to Ms. M. L. was a remedial measure or that improper motives had minimized the usefulness of the PADs that Ms. L. P. had completed in justifying the non-renewal decision.

24. However, the UNDT found that there was merit in Ms. Hilaire-Madsen’s contention that UNFPA ought to have awaited and considered Ms. M. L.’s appraisal of her performance for the four months in 2018 and 2019 at the Haiti census project, as “[c]onsideration of the PAD for the most recently applicable year is not only mandated by the regulatory framework but would have been reasonable in the circumstances that unfolded”,² and “it would have been reasonable to consider improvements on return from leave”,³ before UNFPA made the second non-renewal decision at the end of December 2018. In that regard, the UNDT was not persuaded that Ms. Hilaire-Madsen’s “FTA renewals beyond 31 March 2018 were solely for purposes of completing her 2017 PAD”.⁴ Having reviewed the pertinent regulatory framework, the UNDT determined that “there is no provision in the regulatory framework indicating that the appraisal for a shorter period of work during a particular year can be ignored or is not to be considered”.⁵ The Dispute Tribunal concluded that the decision not to renew Ms. Hilaire-Madsen’s FTA “was neither rational nor fair, since there was a failure to consider relevant factors”⁶ including the timing and circumstances of her appraisals, sick leave taken, the nature of her four-month assignment in 2018 and 2019, her assignment to a new supervisor, the preparation of a new work-plan, the continued need for her service in the new assignment, and the documented improvement in her performance.

25. As remedies, the Dispute Tribunal decided to award Ms. Hilaire-Madsen material damages. In its view, given her last FTA was for a two-year period, she could be awarded two years’ salary. But as she remained employed with UNFPA for approximately one year through January 2019, there was no evidence of Ms. Hilaire-Madsen seeking alternate employment to mitigate her loss, and it was possible for her contract not to be renewed even if her four-month 2018 PAD had been considered, the Dispute Tribunal decided to award Ms. Hilaire-Madsen three months’ salary as material damages.

26. On 28 May 2021, the Secretary-General appealed the above UNDT Judgment to the Appeals Tribunal. Ms. Hilaire-Madsen filed an answer on 30 July 2021. On the same date, she filed a cross-appeal, to which the Secretary-General filed an answer on 1 October 2021.

² Impugned Judgment, para. 36.

³ *Ibid.*, para. 48.

⁴ *Ibid.*, para. 44.

⁵ *Ibid.*, para. 48.

⁶ *Ibid.*, para. 49.

Submissions

The Secretary-General's Appeal

27. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment and uphold the contested non-renewal decision. Alternatively, if UNAT agrees with the UNDT that Ms. Hilaire-Madsen's FTA was unlawfully not renewed, he requests that the Appeals Tribunal vacate UNDT's award of compensation.

28. The Secretary-General submits that the UNDT erred in fact and law in finding that the non-renewal decision was unlawful for not considering the 2018 PAD as a relevant factor. At the time of the contested decision, the 2018 PAD did not exist, and only the 2016 and 2017 PADs were available. It was within the Administration's discretion to take the decision based on the unsatisfactory performance clearly recorded for several years in her PADs (2014– 2017). No internal rule requires the Administration to take the non-existent 2018 PAD into account.

29. The Secretary-General also submits that it was an error in law and an excess of jurisdiction for the UNDT to require the Administration to renew Ms. Hilaire-Madsen's FTA for the purpose of finalizing her 2018 PAD so that it could be taken into account. This new obligation and financial burden would potentially place the Administration in an endless cycle of renewals of Ms. Hilaire-Madsen's FTA in contradiction of Staff Regulation 4.5(c) and Staff Rule 4.13(c).

30. The Secretary-General further submits that the UNDT erred in finding that Ms. Hilaire-Madsen had been given a new opportunity to be appraised by a different supervisor to "see whether there was improvement",⁷ in contradiction of its earlier rejection of Ms. Hilaire-Madsen's claim that her assignment to a new supervisor was a remedial measure. The short renewals of her FTA in 2018 showed that UNFPA did not intend her work in 2018 to be a new opportunity. UNFPA announced the non-renewal of Ms. Hilaire-Madsen's FTA on 8 October 2018 after she had just returned to full-time duties.

31. The Secretary-General maintains that the UNDT exceeded its jurisdiction in concluding that failure to take Ms. Hilaire-Madsen's 2018 PAD into account rendered the non-renewal decision unlawful. First, the UNFPA Separation from Service Policy only says that when an

⁷ *Ibid.*, para. 46.

FTA expires between 1 July and 31 December of any given year, the year-end PAD appraisal should be completed as a matter of discretion. Secondly, her 2018 PAD covered a limited period of time and narrower tasks than those normally assigned to a G-5 procurement assistant.

32. The Secretary-General also maintains that the UNDT erred in fact and law in awarding three months' material damages to Ms. Hilaire-Madsen. Its reasoning is inconsistent, as the UNDT considered, on the one hand, that if her 2018 PAD had been taken into account, Ms. Hilaire-Madsen could have been afforded at least a short renewal of her FTA to continue her satisfactory work, but found, on the other, that even if her 2018 PAD had been taken into account, it was possible for her FTA to not have been renewed. Its reasoning is also speculative, as there is no evidence to suggest that her FTA would have been renewed for two years, or even for one year. Her FTA in 2018 was renewed on a monthly basis. Moreover, there was no evidence of pecuniary loss. Consequently, the UNDT's award of three months' material damages was arbitrary in the absence of any evidence of actual harm.

Ms. Hilaire-Madsen's Answer

33. Ms. Hilaire-Madsen requests that the Appeals Tribunal affirm the UNDT findings on the substance.

34. Ms. Hilaire-Madsen submits that the UNDT has jurisdiction to review the Administration's exercise of discretion and it did not err in fact or in law when determining that her 2018 PAD was a relevant consideration in the circumstances. It is only logic and fair to require that her performance immediately before the separation decision be a relevant consideration before separating her for performance reasons, especially in the particular circumstances of her case.

35. Ms. Hilaire-Madsen also submits that UNFPA's own legal framework indicates a presumption that a PAD ought to be completed for the most recent performance and such a PAD is relevant to the separation decision, though service during an extension for rebuttal review does not give rise to an obligation to create a further performance evaluation. Having taken the trouble to place her 2018 work within the performance framework under a new supervisor it must have represented a relevant factor for the separation decision. The failure by UNFPA to do so vitiates the exercise of discretion.

36. Ms. Hilaire-Madsen further submits that the UNDT correctly identified that the usual compensable period would be the period of last appointment, which in her case was a period of two years. It provided a full explanation of the reasoning on remedy and did not indicate that its award was impacted by the assumption of a short renewal.

Ms. Hilaire-Madsen's Cross-Appeal

37. Ms. Hilaire-Madsen requests that the Appeals Tribunal vacate the remedies awarded by the UNDT and replace them with an order for rescission and an alternative Article 10(5)(a) compensation as well as an Article 10(5)(b) award for pecuniary losses and moral damages. Specifically, she requests that the Appeals Tribunal award her two years' alternative compensation in view of her two-years' FTA renewals, or alternatively, one year's net base salary in light of such awards regularly made in similar non-renewal cases.

38. Ms. Hilaire-Madsen submits that the UNDT erred in fact, law and failed to exercise jurisdiction by not ordering rescission and alternative compensation as if she had never sought those remedies, leading to a manifestly unreasonable decision. Contrary to the UNDT's finding, she sought rescission of the non-renewal decision or alternative compensation in her UNDT application and her comments on the reply. The Secretary-General did not claim that she had not sought the rescission or alternative compensation under Article 10(5)(a) of the UNDT Statute, or that the circumstances of the present case prevented such an award.

39. In this regard, Ms. Hilaire-Madsen maintains that the requirement to demonstrate harm does not apply to alternative compensation, as it is not compensatory damages based on economic loss, and moreover, that salary paid to a staff member for work performed when his or her contract is extended beyond the envisaged separation date should not be considered as compensation, that, for the Article 10(5)(a) compensation in separation cases, there is no need to show mitigation of loss, and that earnings following separation are irrelevant to the calculation of alternative compensation.

40. Ms. Hilaire-Madsen also submits that it was manifestly unreasonable for the UNDT to criticize her for failing to show evidence of efforts to mitigate loss, without informing the parties that the UNDT was looking exclusively at compensation under Article 10(5)(b), or seeking pleadings from the parties as to what might have been UNFPA's decision had the relevant factor of her good performance in 2018 been considered.

41. Ms. Hilaire-Madsen further submits that the UNDT erred in law in its award for pecuniary loss. She had completed almost seven years' continuous service and was on a renewal cycle of two years, but she was awarded the same compensation as a temporary staff member who had worked for three months and who could have hoped to work for additional three months. It was an error in law for the UNDT to reduce the award for pecuniary loss by the period she was on paid sick leave and in paid employment.

42. Ms. Hilaire-Madsen further submits that the UNDT erred in fact and law by finding that no evidence supported her claim for moral damages. She had filed with the UNDT three medical certificates showing an anxiety disorder caused by the issue subject to litigation, specifically in order to establish her claim for moral damages with clear evidence of harm.

The Secretary-General's Answer to Cross-Appeal

43. The Secretary-General requests that the Appeals Tribunal dismiss the cross-appeal in its entirety.

44. The Secretary-General submits that it was correct for the UNDT not to order the rescission of the non-renewal decision pursuant to Article 10(5)(a) of the UNDT Statute, in line with the UNAT's case law. The UNDT did consider Ms. Hilaire-Madsen's claims for remedy, but it awarded compensation pursuant to Article 10(5)(b), and not Article 10(5)(a), of the UNDT Statute, and explained its reasons for it. As her former post was subsumed from G-5 to G-6 and was filled through the roster, rescission and reinstatement by the UNDT were unwarranted. Her request for alternative compensation was also unwarranted, as her chances of renewal were low, even if the Administration had taken into account her 2018 PAD, which reflected performance over a limited period of work and for restricted tasks, and which did not erase several years of documented unsatisfactory performance. In this regard, the Secretary-General stresses that, contrary to Ms. Hilaire-Madsen's assertion, the Appeals Tribunal holds that, for the purpose of alternative compensation, expected renewal should not be more than the length of the staff member's latest appointments. Her FTA was renewed on a monthly basis in the last part of 2018, and not for periods of two years as she claims and the UNDT erroneously found. While she included a request for rescission and in-lieu compensation, Ms. Hilaire-Madsen did not develop further, or specify, it. If the Appeals Tribunal should consider rescission and alternative compensation to be warranted in

the present case, such compensation could not go beyond a month's net base salary, in line with the latest renewals of her FTA.

45. The Secretary-General also submits that Ms. Hilaire-Madsen has failed to demonstrate that the UNDT erred in declining to award her moral damages and in awarding her compensation for pecuniary loss that she considers too low. The Secretary-General maintains that the UNDT was correct to find that there was no evidence on record to justify an award of moral damages. He notes, in this regard, that the three notes by a psychiatrist that Ms. Hilaire-Madsen provided to the UNDT were not sufficient evidence, when no medical bills or other evidence were produced. In addition, they were not relevant for assessing the moral harm resulting from the non-renewal decision, as they were anterior by several months to her separation on 31 January 2019. Moreover, one note, dated 18 October 2018, was unsigned and therefore had no probative value.

Considerations

46. The issues for consideration and determination in the appeal and cross-appeal are related to the lawfulness of the contested administrative decision and the remedies. We will examine these issues in turn.

Whether the UNDT erred in concluding the non-renewal decision was unlawful

47. The primary issue on appeal is whether the UNDT erred when it concluded that the decision not to renew Ms. Hilaire-Madsen's fixed-term appointment was not a lawful and justified exercise of the Administration's discretion.

48. The starting point is the well-established principle that fixed-term appointments or appointments of limited duration carry no expectation of renewal or conversion to another type of appointment.⁸

49. Even the renewal of the appointment of a staff member on successive appointments does not, in and of itself, give grounds for an expectancy of renewal, unless the Administration has made an express promise that gives the staff member an expectancy that his or her

⁸ *Nouinou v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-902, para. 44; *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 25; *He v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-825, para. 40; *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 25.

appointment will be extended, or there is a firm commitment to renewal revealed by the circumstances of the case.⁹ The jurisprudence requires this promise at least be in writing.¹⁰

50. As provided in Staff Regulation 4.5(c) and Staff Rule 4.13(c), respectively, “[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service”, and “[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service ...”.

51. Poor or unsatisfactory performance may properly be the basis for the non-renewal of a fixed-term appointment.¹¹

52. As the Appeals Tribunal stated in *Said*:¹²

... There is no need for the Appeals Tribunal to define the term “poor performance”. This Tribunal has already determined that a [performance evaluation report (PER)] does *not* need to rate a staff member as “unsatisfactory” in order to support an agency’s decision not to renew an appointment for poor performance. We have also held that a staff member whose performance was rated as “partially meeting performance expectations” had no legitimate expectancy of renewal of his contract and the non-renewal of another staff member with a similar performance rating was lawful.

53. Nevertheless, an administrative decision not to renew a fixed-term appointment can be challenged on the grounds that the Administration has not acted fairly, justly or transparently with the staff member or was motivated by bias, prejudice or improper motive.¹³ The staff member has the burden of proving such factors played a role in the decision.¹⁴

⁹ *Kalil v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-580, para. 67; *Munir v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-522, para. 24.

¹⁰ *Nouinou* Judgment, *op cit.*, para. 45; *He* Judgment, *op cit.*, para. 41, citing *Muwambi* Judgment, *op cit.*, para. 25, in turn citing *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-411, para. 26.

¹¹ *Assale v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-534, para. 30; *Said v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-500, para. 34, citing *Morsy v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-298, and *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153.

¹² *Said*, *ibid.*, para. 41 (emphasis in original; internal citations omitted).

¹³ *He* Judgment, *op cit.*, para. 43 citing *Muwambi* Judgment, *op cit.*, para. 27, in turn citing *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para. 33 and *Ahmed* Judgment, *op cit.*, paras. 45-46.

¹⁴ *Nouinou* Judgment, *op cit.*, para. 47; *He* Judgment, *op cit.*, para. 43; *Muwambi* Judgment, *op cit.*, para. 27.

54. The Appeals Tribunal has consistently held that:¹⁵

When judging the validity of the Secretary-General’s exercise of discretion in administrative matters, as in the case of a non-renewal decision, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The UNDT can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Dispute Tribunal to substitute its own decision for that of the Secretary-General.

55. The UNFPA’s Personnel Policies and Procedures on Separation from Service (UNFPA Separation from Service Policy) provide in relevant parts:

Reason for decision not to renew appointment:

5.12 There may be various reasons for a decision not to renew an appointment, including, for example:

Reason of unsatisfactory performance:

5.13 Where reasons of unsatisfactory performance account for the decision not to renew the fixed term appointment, the departures from the required standards of performance should be reflected in “Performance Appraisal and Development” (PAD), UNFPA’s performance management system. However, while the PAD is aligned with the calendar year, the expiration dates of fixed term appointments are mostly not so aligned. (For example, a fixed term appointment might expire in the month of August, whereas the regular year-end appraisal in PAD for the year in question may be due only on 31 December.) Therefore:

- (a) If a fixed term appointment expires between 1 January and 30 June of any given year, it is not necessary to issue a year-end appraisal. In this case, the organization may rely on (a) previous year-end appraisal(s);
- (b) If a fixed term appointment expires between 1 July and 31 December of any given year, the year-end appraisal in PAD should be completed. The appraisal concerned may be performed prior to the Fund-wide year-end appraisal phase in PAD. Line Managers should contact LCMB/DHR to obtain access to the year-end appraisal section in the PAD internet application earlier in the year if the year-end appraisal section is not already accessible. The staff member may be

¹⁵ *Nouinou, ibid.*, para. 48; *He, ibid.*, para. 44; *Muwambi, ibid.*, para. 28; *Said Judgment, op cit.*, para. 40 and cites therein.

assigned deadlines to complete his or her part in the PAD. Should the staff member fail to do his or her part, the appraisal shall nevertheless proceed.

5.14 In the event that a staff member has submitted a statement of rebuttal in respect of the year-end appraisal relied upon by the organization for the administrative decision not to renew the fixed term appointment, the rebuttal should be reviewed by the UNFPA Rebuttal Panel prior to implementation of separation from service. [...]

56. In the present case, Ms. Hilaire-Madsen was advised, initially, on 8 October 2018, that her FTA would not be renewed beyond 30 November 2018 because of her unsatisfactory performance. Her FTA, however, was extended until 31 December 2018, and later to 31 January 2019, to allow her to exercise her right to rebuttal and to allow for the thirty-day notice of non-renewal, as argued by the Secretary-General. Subsequently, on 27 December 2018—while the year 2018 had not ended and her 2018 PAD was therefore not finalized, her 2018 PAD was finalized on 17 February 2019—Ms. Hilaire-Madsen was again informed that her FTA would not be renewed beyond 31 January 2019, following which she was separated from service on that date. As it was clearly stated in the administrative decision the non-extension of Ms. Hilaire-Madsen’s FTA was the result of her unsatisfactory performance, which, as per the evidence on file, was reflected, at the material time of the non-renewal decision, more recently in her 2016 and 2017 PADs. Performance shortfalls had also been recorded in her 2014 and 2015 PADs.

57. The UNDT held that the contested administrative decision not to renew Ms. Hilaire-Madsen’s FTA on the ground of unsatisfactory performance was unlawful because the Administration had failed to consider her 2018 PAD which was her most recent PAD.¹⁶

58. Specifically, in the beginning, the UNDT took the correct interpretative approach that “the provision for taking into account the most recent PAD [referring to 5.13 of the UNFPA Separation from Service Policy) is directive and not mandatory. The words ‘should be completed’ in relation to the year-end PAD can be construed as meaning that this can be done as a matter of discretion”.¹⁷ Then, the Dispute Tribunal opined that: “[f]rom 30 November 2018 to the end of 2018, the Applicant’s FTA was only renewed for purposes of completing a rebuttal of her 2017 PAD. Although on a literal reading of 5.14 of the UNFPA [Separation from Service] Policy set out above, the rebuttal of a PAD for a prior year is not contemplated, this forms part

¹⁶ Impugned Judgment, para. 40.

¹⁷ *Ibid*, para. 41.

of the circumstances to be considered in deciding whether it was reasonable not to take into account an appraisal for the year ending 2018”.¹⁸

59. Next, the UNDT proceeded with the findings that, by the first time that Ms. Hilaire-Madsen was informed of a non-renewal decision on 8 October 2018, she had been actively on duty for almost six weeks and had been assigned to a new supervisor with a new work-plan; there were indications that her service was needed in the new assignment because of a heavy workload in Haiti. The re-assigned supervisor and workplan were inputted to the PAD system; Ms. Hilaire-Madsen then made significant strides in proving her abilities. It was evident that both Ms. Hilaire-Madsen and her new supervisor intended that the new opportunity, under different supervision, would be appraised to see whether there was improvement.¹⁹

60. On the basis of those findings, the UNDT came to the ultimate conclusion that it would have been reasonable for the Organization to have followed through on this constructive approach by taking into account Ms. Hilaire-Madsen’s PAD for the full four months she had worked in 2018, before making the second non-renewal decision at the end of December 2018, and, accordingly, “the non-renewal decision was neither rational nor fair, since there was a failure to consider relevant factors”.²⁰

61. The Secretary-General submits that the UNDT erred in fact and law in concluding that the decision not to renew Ms. Hilaire-Madsen’s fixed-term appointment was unlawful. Specifically, he argues that Ms. Hilaire-Madsen had several years of documented underperformance despite extensive efforts to assist her, as documented in several PIPs, and, thus, it was within the Organization’s discretion to make the non-renewal decision based on the available PADs in compliance with the UNFPA legal framework on separation from service. The UNDT, therefore, erred in law in finding that Ms. Hilaire-Madsen’s 2018 PAD, which did not exist at the time of the non-renewal decision, had to be taken into account even though no internal rule establishing such an obligation was in existence. The Secretary-General asserts that the UNDT also exceeded its jurisdiction by improperly placing itself in the role of the

¹⁸ *Ibid*, para. 42.

¹⁹ *Ibid*, paras. 44-46.

²⁰ *Ibid*, paras. 47-49.

decision-maker and usurping his role by finding that it would have been “reasonable” to take Ms. Hilaire-Madsen’s 2018 PAD into consideration for deciding on the renewal of her FTA.

62. We agree with the Secretary-General that Ms. Hilaire-Madsen’s PAD ratings for the years 2014-2017 as well as the relevant PIPs detailed serious deficiencies and weaknesses in her progress towards achieving her work plan, outputs and competency, all of which are essential for a Procurement Assistant to be successful. As noted, in 2014-2015, Ms. Hilaire-Madsen’s overall rating was “fully meets outputs” but there were less than satisfactory ratings for two core competencies concerning achieving results and teamwork. She was then placed on a PIP in 2015 and achieved some improvement in the areas of shortfall. However, those two competencies remained with low ratings. While in her 2016 PAD shortfalls were recorded, not only regarding the two core competencies that were deficient in 2015 but also four others, and, finally, in her 2017 PAD her performance was further downgraded. In light of this situation, the reasons proffered by the Administration for not renewing Ms. Hilaire-Madsen’s fixed-term appointment beyond 31 January 2019 for poor performance were valid ones.

63. We also agree with the Secretary-General that the Administration was under no legal obligation to take into consideration Ms. Hilaire-Madsen’s 2018 PAD, which, anyway, did not exist at the time of the non-renewal decision, or wait for its finalization before separating her from service based on her poor performance recorded for several years in her PADs, as the UNFPA Separation from Service Policy, Sections 5.13(b) and 5.14, do not prescribe a mandatory requirement to that effect.

64. Under these specific circumstances, at the material time of the contested non-renewal decision at the end of December 2018, from the point of view of a fair-minded objective observer, with the information available at the time of making the decision²¹ and given Ms. Hilaire-Madsen’s poor performance for the years 2014-2017, the decision of the Administration not to renew her FTA, based on the available recent PADs (2016-2017), especially that of 2017, in which Ms. Hilaire-Madsen’s performance was further downgraded, was reasonable. As already noted, the Administration was not under an obligation to take into consideration in the balancing exercise of its discretionary authority Ms. Hilaire-Madsen’s performance from September to December 2018, by waiting for the 2018 PAD. Anyway, the

²¹ *Comp. Nouinou Judgment, op cit.*, para. 64; *He Judgment, op cit.*, para. 49.

fact that her appointment was renewed until the end of 2018 did not bring her case within the parameters of Article 5.13(b) of the UNFPA Separation from Service Policy as this was only done to enable Ms. Hilaire-Madsen to provide her comments to the 2017 PAD and undertake the rebuttal procedure. Nor did the failure of the Administration to follow through on the above constructive approach, before reaching the non-renewal decision on 27 December 2018, render it irrational or unfair, as incorrectly found the UNDT. The Administration was fully aware of this information and lawfully made its choice to proceed with taking its final non-renewal decision based on the already existing material and the PADs for the years 2014-2017 that demonstrated a continuous and significant pattern of poor performance on the part of Ms. Hilaire-Madsen.

65. Put it another way, in view of the aforesaid abundant evidentiary material showing the aforementioned deficiencies and weaknesses in Ms. Hilaire-Madsen's performance in terms of the competences which were essential for a Procurement Assistant to be successful, it would be unreasonable to require the Administration to have completed and considered her 2018 PAD prior to reaching the non-renewal decision on 27 December 2018, as this would amount to "requiring an everlasting cycle of performance evaluations", whereby it could never be in a position to terminate an appointment of a staff member.

66. Furthermore, legal certainty requires administrative issuances to be applied in a predictable manner and once the procedure foreseen in the UNFPA Separation from Service Policy is initiated, it should be followed through.²² Hence, the UNDT erred in law by finding otherwise.

Whether the UNDT erred on the remedies

67. Article 10 of the UNDT's Statute provides in relevant parts:

5. 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

²² *Weerasooriya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-571, para. 32.

of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(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.

68. As per the plain reading of the applicable provisions, the UNDT therefore has the statutory discretion to order remedies under sub-paragraph (5)(a) or (5)(b) of Article 10 or both, so that, for example, the compensation referred to in sub-paragraph (5)(b) can represent an additional remedy to rescission/specific performance (or mandatory compensation in lieu thereof where the issue relates to appointment, promotion or termination) ordered pursuant to sub-paragraph (5)(a). Yet again, compensation under Article 10(5)(b) can constitute the independent sole remedy where the UNDT decides rescission or specific performance of a contested administrative decision is not appropriate or merited. Equally, rescission or specific performance can constitute the sole remedy awarded save the mandatory requirement to set an alternative compensation under Article 10(5)(a). The decision on remedy is quintessentially a matter for the first instance Tribunal, having regard to the circumstances of each particular case and the constraints imposed by its governing Statute. The UNDT's discretion under Article 10(5)(a) is constrained by the mandatory requirement to set an amount of compensation (no greater than that provided for in Article 10(5)(b)) as an alternative to an order rescinding a decision on appointment, promotion or termination.²³

69. In her Application to the UNDT, Ms. Hilaire-Madsen claimed that she had suffered illegality and clearly requested, by way of relief, besides an award of compensation for harm, the rescission of the contested decision and alternative compensation, pursuant to the UNDT Statute.

70. Nevertheless, in its Judgment on Remedies, the UNDT stated: “[t]he Applicant seeks only an award of compensation for moral and material damages. The Tribunal is authorized to make such an award pursuant to art. 10.5(b) of its Statute.”²⁴

²³ *Comp. Rantisi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-528, paras. 53-54.

²⁴ Impugned Judgment, para. 50.

71. Ms. Hilaire-Madsen submits that the UNDT erred in law and failed to exercise its jurisdiction in that, though it found that the contested administrative decision was unlawful, it failed to rescind the decision and order compensation in lieu of rescission.

72. We agree. The UNDT fell into error, both factually and legally, when, based on its erroneous consideration of the statement of Application, it disregarded Ms. Hilaire-Madsen's specific claims to the afore-mentioned reliefs and proceeded with awarding compensation for harm to her. However, this error does not assist Ms. Hilaire-Madsen. Our finding that the contested non-renewal decision was lawful renders unnecessary the examination of the issue as to whether the UNDT should have exercised its discretion under Article 10(5) and determined, after a careful consideration of all the facts of the instant case, whether rescission or compensation in lieu should have been an effective remedy to arrive at.

73. Further, since no illegality was found, there was no justification for the award of any compensation. As this Tribunal has stated before, "compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair".²⁵ Thus, the UNDT's award of compensation is without basis and should be vacated.

74. In the premises, the appeal succeeds and Judgment No. UNDT/2021/032 must be vacated. The cross-appeal is dismissed.

²⁵ *Verma v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-829, para. 33, citing *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33.

Judgment

75. The appeal is granted and Judgment No. UNDT/2021/032 is hereby vacated. The cross-appeal is dismissed.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)

Judge Raikos, Presiding
Athens, Greece

(Signed)

Judge Murphy
Cape Town, South Africa

(Signed)

Judge Knierim
Hamburg, Germany

Entered in the Register on this 3rd day of May 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar