



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2024-UNAT-1428

Jerome Pascal
(Appellant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT

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| Before: | Judge Gao Xiaoli, Presiding Judge Nassib G. Ziadé Judge Katharine Mary Savage |
| Case No.: | 2023-1797 |
| Date of Decision: | 22 March 2024 |
| Date of Publication: | 2 May 2024 |
| Registrar: | Juliet E. Johnson |

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| Counsel for Appellant: | Self-represented |
| Counsel for Respondent: | Amanda Stoltz |

JUDGE GAO XIAOLI, PRESIDING.

1. Mr. Jerome Pascal, a former staff member of the Department of Management Strategy, Policy and Compliance (DMSPC), has filed an appeal of Judgment No. UNDT/2023/017¹ (impugned Judgment) with the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).
2. In the impugned Judgment, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) dismissed his application in which he contested the termination of his permanent appointment due to unsatisfactory performance (contested decision).
3. For the reasons set forth herein, the Appeals Tribunal dismisses Mr. Pascal's appeal and affirms the impugned Judgment.

Facts and Procedure

4. Mr. Pascal joined the Organization on 30 August 2000 as an Associate Finance Officer at the P-2 level and received a permanent appointment on 1 August 2002.
5. From 2004 to 2018, Mr. Pascal served in the Office of Programmed Planning, Budget and Accounts (OPPBA) of the former Department of Management. On 1 January 2019, he was reassigned to the position of Management and Program analyst at the P-3 level in the Organizational Performance Management Section (OPMS) of the Monitoring and Evaluation Service in the Business Transformation and Accountability Division (BTAD) of DMSPC.²
6. In the 2017-2018 and 2018-2019 performance cycles, Mr. Pascal received an overall rating of "partially meets performance expectations". He rebutted the 2018-2019 performance evaluation, but the Rebuttal Panel upheld the rating.³
7. In the 2019-2020 performance cycle, Mr. Pascal again received an overall rating of "partially meets performance expectations". His First Reporting Officer (FRO) rated Mr. Pascal "unsatisfactory" for the core value of professionalism, and "requires development" for the core competency of "teamwork". His work in many areas was of low quality. His Second Reporting Officer (SRO) commented that Mr. Pascal "fell short of expectations in many areas of his work", that his attitude was "quite disappointing" and that there was no justification for the large number

¹ *Pascal v. Secretary-General of the United Nations*, Judgment No. UNDT/2023/017 (21 March 2023).

² Impugned Judgment, paras. 5-6.

³ *Ibid.*, para. 7.

of unauthorized absences and extensions of leave periods without prior approval.⁴ Mr. Pascal did not rebut this rating.

8. From 22 October 2020 to 15 March 2021, Mr. Pascal was on a Performance Improvement Plan (PIP). There were seven target areas for improvement, which were further broken down into 23 specific actions. At the end of the PIP, Mr. Pascal had successfully satisfied only six of the 23 actions. Notably, Mr. Pascal did not achieve any of the specific tasks under the areas of: following instructions, showing pride of ownership in work, independently producing quality documents, or producing logical guidance documents.⁵

9. For the 2020-2021 performance cycle, Mr. Pascal received an overall rating of “does not meet performance expectations”. He was rated “unsatisfactory” for the core value of “professionalism”, and for the core competencies of “communication” and “teamwork”. It was also noted that his work with clients “require[d] development”. His FRO commented that Mr. Pascal was unable to demonstrate attention to detail and produce output of acceptable quality, and that he did not follow instructions or learn from mistakes. The SRO concurred with this assessment and summed up that Mr. Pascal’s contribution fell short of even the minimum expectations for a staff member at the P-3 level.⁶ Mr. Pascal did not rebut this rating.

10. On 29 July 2021, his SRO, who was also the Director of BTAD, sent a request for termination of Mr. Pascal’s appointment to the Central Review Bodies (CRBs). The SRO advised that remedial measures, including the PIP, had been employed over two consecutive years but yielded little success. The SRO further noted that not one, but four different supervisors had assessed Mr. Pascal’s performance as being unsatisfactory.⁷

11. The Secretariat of the CRB appointed the members of the Central Review Committee (CRC) on 24 August 2021. The CRC was provided with the documentation submitted by DMSPC on Mr. Pascal, including the four most recent performance appraisals and the results of the PIP.

12. Mr. Pascal was provided an opportunity to comment on his proposed termination, and he had an interview with the CRC on 20 September 2021. The CRC also interviewed his current FRO, a former FRO and two additional supervisors.

⁴ United Nations Performance Document, Performance Cycle 2019-2020.

⁵ Performance Improvement Plan, 22/10/2020 to 15/03/2021.

⁶ United Nations Performance Document, Performance Cycle 2020-2021.

⁷ Request for Termination of Appointment (28 July 2021).

13. With regard to Mr. Pascal's arguments on the fairness of the process, the CRC noted that due process was followed in accordance with Administrative Instruction ST/AI/2010/5 (Performance Management and Development System). In response to Mr. Pascal's claim that his performance was affected by his transfer to a new division, the CRC noted that he had performance problems both before and after the transfer. Finally, the CRC rejected Mr. Pascal's claim that a PIP could not be suitably undertaken when a staff member was using an Alternate Working Arrangement (AWA).⁸

14. The CRC unanimously concluded that there was sufficient ground for the termination of Mr. Pascal's permanent appointment due to unsatisfactory performance.⁹

15. On 8 October 2021, the Under-Secretary-General, DMSPC (USG/DMSPC) informed Mr. Pascal of the Organization's decision to terminate his permanent appointment with immediate effect, with termination indemnity and compensation in lieu of notice.

16. Mr. Pascal sought management evaluation of the contested decision, which was upheld.

17. On 8 November 2021, Mr. Pascal filed an application for suspension of action with the Dispute Tribunal, which was rejected by Order No. 107 (NY/2021).¹⁰

18. On 23 February 2022, Mr. Pascal filed an application with the Dispute Tribunal in which he challenged the termination of his permanent appointment.

Impugned Judgment

19. In the impugned Judgment, the Dispute Tribunal examined two issues: (1) whether Mr. Pascal's performance was evaluated in a fair and objective manner, and (2) whether the Administration followed the proper procedure in making the contested decision.¹¹

20. The Dispute Tribunal noted that the contested decision was based on Mr. Pascal's performance over two cycles, 2019-2020 and 2020-2021, for which he received ratings of "partially meets performance expectations" and "does not meet performance expectations", respectively.

⁸ 7 October 2021 Letter from the Chairperson, CRC to the Assistant Secretary-General for Human Resources.

⁹ *Ibid.*

¹⁰ *Pascal v. Secretary-General of the United Nations*, Order No. 107 (NY/2021), dated 11 November 2021.

¹¹ Impugned Judgment, para. 24.

The UNDT noted that with regard to the 2019-2020 performance cycle, the evidence showed that Mr. Pascal and his FRO met to discuss his performance shortcomings and the unauthorized leaves, and that Mr. Pascal's performance did not improve.

21. The UNDT noted that for the 2020-2021 performance cycle, Mr. Pascal's performance continued to deteriorate, as his work required multiple corrections and he continued to be absent without approval. The UNDT observed that the record showed that during the PIP, his FRO met with Mr. Pascal regularly to review progress, but at the end of the PIP period, it was determined that he only met six of the 23 target actions. At the end of the cycle, Mr. Pascal was assessed as "unsatisfactory" in several competencies and a core value, and he had achieved only one of his four goals.

22. The UNDT determined that it was clear that the FRO and SRO as well as additional supervisors had provided Mr. Pascal with performance guidance and feedback, and implemented the PIP, in line with the requirements of ST/AI/2010/5. Accordingly, the Dispute Tribunal was satisfied that Mr. Pascal's performance was evaluated in a fair and objective manner.¹²

23. With regard to whether the proper procedure was followed, the UNDT noted that the SRO had correctly submitted the proposal for termination of Mr. Pascal's appointment in line with Administrative Instruction ST/AI/222 (Procedure to be followed in cases of termination of permanent appointment for unsatisfactory service). The evidence showed that the CRC had been provided the relevant documentation and that Mr. Pascal was afforded the opportunity to comment and to be interviewed. The UNDT recorded that the CRC had duly deliberated and provided the unanimous recommendation that his appointment be terminated, which was accepted by the USG/DMSPC pursuant to her delegated authority. The UNDT thus found that the Administration properly followed the relevant procedures for termination of Mr. Pascal's appointment.¹³

24. The UNDT rejected Mr. Pascal's argument that the terms of appointment of the members of the CRC had expired. The UNDT noted that the CRC members' terms of service were from 1 January 2021 to 31 December 2022, and the CRC reviewed the proposal for termination within this period, during September and October 2021.

¹² *Ibid.*, para. 37.

¹³ *Ibid.*, para. 48.

25. In view of the foregoing, the Dispute Tribunal determined that the contested decision was lawful and dismissed Mr. Pascal's application.

26. Mr. Pascal filed an appeal of the impugned Judgment on 26 April 2023, to which the Secretary-General submitted an answer on 5 July 2023.

Submissions

Mr. Pascal's Appeal

27. Mr. Pascal submits that the Dispute Tribunal erred on a question of law when it failed to distinguish between the "illegality of the unreasonable, bad faith, capricious and unfair" decision, and the legality of the procedure that was used to adopt the decision.

28. Relying on the Appeals Tribunal's judgment in *Timothy*,¹⁴ Mr. Pascal argues that as a staff member on a permanent appointment, he was entitled to the highest level of legal protection from termination. He submits that an administrative decision can only be lawful if it is "reasonable", and that the UNDT erred in failing to consider the reasonableness of the Administration's decision. Mr. Pascal argues that the contested decision was "outrageous in its defiance of the moral standards expected of a humanitarian international Organization".

29. Mr. Pascal submits that the UNDT erred in rejecting his contention that the Administration acted unreasonably in terminating his appointment during the Covid-19 pandemic, just a few months prior to his retirement and after he had served the Organization for twenty-one years.

30. Mr. Pascal submits that besides determining whether the contested decision is in line with the correct procedures in the regulatory framework, the Administration should consider the rationale, proportionality and overall impact on staff.

31. Mr. Pascal submits that the UNDT erred in its interpretation of Staff Regulation 9.3(a)(ii) and Staff Rules 9.6(c)(ii) and 13.1(b)(i), which provide that the Administration "may" terminate a staff member on a permanent appointment for unsatisfactory service, but not that the Administration "must" terminate the staff member.

¹⁴ *Timothy v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-847.

32. Mr. Pascal argues that termination was not the only option available to the USG/DMSPC, and that he had a choice of what action to take when the USG/DMSPC received the recommendation from the CRC. Mr. Pascal submits that the facts of this case show an inhumane application of the Staff Regulations and Rules. Mr. Pascal contends that justice would have been served by a more humane option rather than termination.

33. Mr. Pascal submits that the UNDT erred in finding that his application for suspension of action was not receivable because he filed his request after the contested decision had already been implemented. Mr. Pascal argues that authorities such as *Calvani*¹⁵ reject the notion that implementation of the decision always prohibits the granting of an application for suspension of action.

34. Mr. Pascal claims that the UNDT Judge who ruled on the suspension of action application should have recused herself from consideration of his application on the merits of his case.

35. Mr. Pascal submits that the UNDT erred on several questions of fact that resulted in findings that were against the weight of the evidence. First, Mr. Pascal points out that his negative performance evaluations were related to his transfer from being an Accountant to the post of Management and Program Analyst, a function that did not match his area of training and expertise.

36. Second, Mr. Pascal claims that the Secretary-General misrepresented that he was warned about his performance issues during the 2019-2020 performance cycle. Mr. Pascal claims that when he met with his FRO after his home leave in January 2020 to discuss his unauthorized absences, the new Director of BATD threatened him, and noted that he had already been unsuccessful in a prior attempt to rebut his performance appraisal, so all that was needed to terminate him was a second unfavorable performance evaluation.

37. Third, Mr. Pascal alleges that given the significant change in functions that he underwent, he needed more robust, targeted and sustained training in order to meet performance expectations.

38. Fourth, Mr. Pascal argues that the Secretary-General erroneously claims that because he started at the Organization as an Associate Information System Officer at the P-2 level that he should have had the training and experience to execute his functions in BTAD.

¹⁵ *Calvani v. Secretary-General of the United Nations*, Judgment No. UNDT/2009/092.

39. Mr. Pascal submits that notwithstanding his alleged non-performance, this should not have been the only consideration in terminating his appointment. He notes that he was recruited as a young professional and then terminated during the Covid-19 pandemic and was forced to return to his country of citizenship without having the opportunity to explore residency in the United States, his last duty station. The reason for his termination was demeaning and essentially ended all hope for his reemployment.

40. Mr. Pascal submits that discretionary authority is not an absolute power to be exercised in bad faith. He argues that the employment rights of an employee like himself, who had served the Organization for many years and was preparing for an honorable retirement, should be jealously protected.

41. Mr. Pascal requests that the UNAT order the rescission of the contested decision or reconsideration by the UNDT.

42. Mr. Pascal requests reasonable compensation in the amount of 12 months' net base salary in addition to compensation in the amount equal to the contributions that would have been paid to the United Nations Joint Staff Pension Fund for the period from the termination of Mr. Pascal's permanent appointment.

43. Mr. Pascal requests compensation for moral damage owing to the overwhelming emotional and psychological stress caused to him, including damage to his professional career reputation and personal dignity.

The Secretary-General's Answer

44. The Secretary-General submits that the Dispute Tribunal correctly held that the contested decision had been lawfully taken. The Secretary-General submits that the UNDT properly applied the relevant legal framework, namely, Staff Regulation 9.3(a)(ii), Staff Rules 9.6(c)(ii) and 13(b)(i), as well as ST/AI/2010/5, Secretary-General's bulletin ST/SGB/2011/7 (Central review bodies), and ST/AI/222.

45. The Secretary-General submits that the evidence before the UNDT unequivocally demonstrated that all relevant procedures for the termination of Mr. Pascal's appointment had been followed and that the contested decision was fair. Mr. Pascal was unable to meet

performance expectations despite having been advised on multiple occasions of his shortcomings and given numerous opportunities to improve, including through a PIP.

46. The Secretary-General refutes Mr. Pascal's argument that the Dispute Tribunal erred by failing to recognize that the Administration should have considered his length of service and proximity to retirement when making the contested decision. The Secretary-General counters that the UNDT properly concluded that these were not relevant factors in evaluating the legality of the contested decision.

47. The Secretary-General submits that there is nothing in the legal framework that requires the Administration to consider length of service or proximity to retirement before terminating an appointment.

48. The Secretary-General submits that the Dispute Tribunal did not interpret the Staff Regulations and Rules as mandating termination. The UNDT was fully cognizant that this was a discretionary decision. The fact that Mr. Pascal thinks there was a "more humane option" available does not render the contested decision unlawful.

49. The Secretary-General avers that Mr. Pascal failed to demonstrate how any of the purported errors of fact resulted in a manifestly unreasonable decision. These arguments are also repetitive of his arguments before the UNDT and should be rejected by the Appeals Tribunal on this basis alone.

50. The Secretary-General submits that the Dispute Tribunal did not fail to consider Mr. Pascal's argument that the evaluations of his performance were purportedly "unfair and subjective". Mr. Pascal's performance shortcomings and the remedial actions taken were well documented and there was no evidence suggesting that the contested decision was influenced by improper motivation.

51. The Secretary-General submits that the Dispute Tribunal also had evidence before it that Mr. Pascal was on notice of the issues surrounding his unilateral prolonging of his leave without prior approval. These issues were also documented in his performance appraisals, which he did not rebut.

52. The Secretary-General submits that the Dispute Tribunal also considered the efforts made by the Administration to improve Mr. Pascal's performance. The evidence before the

UNDT demonstrated that Mr. Pascal had been afforded many opportunities to improve over several performance cycles.

53. The Secretary-General submits that neither the Dispute Tribunal nor the Secretary-General have referred to Mr. Pascal's previous position as being an "Associate Information System Officer".

54. The Secretary-General argues that Mr. Pascal's challenge to the Dispute Tribunal's order on his application for suspension of action is not receivable. Article 2(2) of the Dispute Tribunal Statute (UNDT Statute) provides that decisions of the Dispute Tribunal on such applications are not subject to appeal.

55. The Secretary-General further contends that the Dispute Tribunal correctly determined that the implementation of the contested decision could not be suspended because it had already been implemented when Mr. Pascal filed his application for suspension of action.

56. The Secretary-General submits that Mr. Pascal is not entitled to any remedies in view of the lawfulness of the contested decision.

57. The Secretary-General requests that the Appeals Tribunal affirm the impugned Judgment and dismiss the appeal in its entirety.

Considerations

58. Based on the submission of Mr. Pascal and the answer of the Secretary-General, the issues raised in this case are: 1) Did the UNDT err in concluding that the Administration's decision to terminate Mr. Pascal's appointment was lawful? 2) Did the UNDT err in finding that his application for suspension of action was not receivable, and is this argument receivable on appeal to the UNAT? and 3) Is Mr. Pascal entitled to any compensation?

Did the UNDT err in concluding that the Administration's decision to terminate Mr. Pascal's appointment was lawful?

59. We find that the UNDT has correctly identified and applied the legal framework governing the termination of appointments for unsatisfactory performance. Staff Regulation 9.3(a)(ii) and

Staff Rules 9.6(c)(ii) and 13.1(b)(i)¹⁶ provide that the Administration may terminate a permanent appointment for unsatisfactory service. The legal framework for identifying and addressing performance shortcomings and unsatisfactory performance is set forth in Section 10 of ST/AI/2010/5. When performance has not improved sufficiently, pursuant to Section 4.10 of ST/SGB/2011/7, requests for termination of permanent appointment under Staff Regulation 9.3(a)(ii) and Staff Rule 13.1(b)(i) are reviewed by a CRC, following the procedure established in ST/AI/222, before the Secretary-General makes a decision on whether to terminate a permanent appointment.

60. In *Said*,¹⁷ we held that the UNDT must accord deference to the Administration's appraisal of the performance of staff members and cannot conduct a *de novo* appraisal of the staff member, or place itself in the role of the decision-maker and determine whether it would have renewed a staff member's contract, based on its own performance appraisal. Performance standards generally fall within the prerogative of the Secretary-General and, unless the standards are manifestly unfair or irrational, the UNDT should not substitute its judgment for that of the Secretary-General.

61. In *Sarwar*, we have established the standard of review in poor performance cases:¹⁸

... Generally, termination of an appointment on the grounds of poor or unsatisfactory work performance must be justified by the evidence. It is incumbent on the Secretary-General to provide sufficient proof of incompetence, usually on the basis of a procedurally fair assessment or appraisal establishing the staff member's shortcomings and the reasons for them. There must be a valid and fair reason for termination based on poor performance. By "valid" one means that the reason for termination must rest on a reasonable basis and sufficient proof, as a matter of objective fact, that the staff member's performance falls short. Fairness in relation to the substantive reason goes to the weight or sufficiency of the reason - the issue being whether the deficiency was sufficiently serious to render the continuation of the employment relationship untenable.

... Whenever the Secretary-General is called upon to decide if a valid and fair reason exists to terminate an appointment for poor performance, he should consider whether the staff member in fact failed to meet the performance standard and if so whether: i) the staff member was aware, or could reasonably be expected to have been

¹⁶ Secretary-General's bulletin ST/SGB/2018/1/Rev. 2 (Staff Regulations and Rules of the United Nations).

¹⁷ *Said v. Secretary General of the United Nations*, Judgment No. 2015-UNAT-500, para. 40.

¹⁸ *Sarwar v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-757, paras. 72-73.

aware, of the required standard; ii) the staff member was given a fair opportunity to meet the required standard; and iii) termination of appointment is an appropriate action for not meeting the standard in the circumstances. The processes and standards contained in ST/AI/2010/5 are geared to the specific attainment of these general objectives.

62. In this case, we find that: firstly, Mr. Pascal was aware of the required performance standard. According to the record, Mr. Pascal joined the Organization in 2000 as an Associate Finance Officer at the P-2 level and was granted a permanent appointment as of 2002. The duration of his service is over twenty years. In addition, he has been assessed in numerous performance cycles. He had rebutted his 2018-2019 performance evaluation, but the Rebuttal Panel maintained the rating. He was also placed on a PIP from 22 October 2020 to 15 March 2021. Considering Mr. Pascal's long service in the Organization as well as his numerous performance assessments and the PIP offered to improve his work performance, it is clear that Mr. Pascal was very acquainted with the required performance standard for his work.

63. Secondly, Mr. Pascal has been given a fair opportunity to meet the required performance standard. Mr. Pascal's overall performance rating was "partially meets performance expectations" for the 2017-2018, 2018-2019 and 2019-2020 performance cycles, and "does not meet performance expectations" for the 2020-2021 performance cycle. According to Section 9.7 of ST/AI/2010/5, Mr. Pascal was assessed as not fully meeting performance expectations for three consecutive performance cycles. The Administration assisted him in trying to remedy the shortcomings according to Section 10 of ST/AI/2010/5. During the 2019-2020 performance cycle, Mr. Pascal was advised on multiple occasions to improve his work and was put on notice of his need to request approval prior to taking leave or unilaterally prolonging his leave. His FRO also met with him to discuss unauthorized absences and performance shortcomings. Mr. Pascal was then placed on a PIP lasting five months from 22 October 2020 to 15 March 2021. During the PIP period, his FRO held regular meetings with him to review his progress against the PIP. From the record, we can see that Mr. Pascal was provided with performance guidance and feedback from his FRO, SRO and his additional supervisors. Therefore, it can be deduced from the Administration's efforts that Mr. Pascal was given a fair opportunity to meet the required performance standard.

64. Thirdly, the termination of appointment is an appropriate action for the Secretary-General to take in response to Mr. Pascal's unsatisfactory performance.

65. Mr. Pascal argues that as a staff member on a permanent appointment he was entitled to the highest level of legal protection from termination and termination of his permanent appointment was unreasonable. Mr. Pascal relies on *Timothy*¹⁹ to argue that he was deserving of the highest level of legal protection. However, *Timothy* did not concern the termination of a staff member on a permanent appointment. It is about efforts that should be made by the Organization following an abolition of post of a staff member on an indefinite appointment. Notably, even in instances of an abolition of post, the UNAT has held that the staff member must still be *competent* in order to be placed in a suitable alternative post.²⁰ Mr. Pascal failed to demonstrate such competency according to his performance evaluations. Meanwhile, the Organization's legal framework, especially Staff Regulation 9.3(a)(ii), clearly provides that the Secretary-General may terminate the appointment of a staff member who holds a continuing or permanent appointment on the ground of unsatisfactory service. Therefore, we cannot support that the UNDT erred in failing to consider the reasonableness of the Administration's decision on this basis alone.

66. Mr. Pascal contends that the length of his service, the proximity to retirement and the Covid-19 pandemic all constitute sufficient reasons for the Administration to explore a more reasonable and humane option rather than terminating his appointment. However, all of these elements are not relevant to the administrative decision concerning Mr. Pascal's unsatisfactory performance.

67. Mr. Pascal further contends that his transfer to the post of Management and Program Analyst affected his performance since the new function was unrelated to his specialized area of training and experience. As a result, Mr. Pascal deems his performance evaluations to have been unfair and subjective and the termination of his appointment unjust. If Mr. Pascal believed that his performance rating did not take into account his change of function, he could have rebutted the performance appraisals. Moreover, Mr. Pascal was reassigned to the position which he described as unrelated to his specialized area of training and experience on 1 January 2019. Notably, he had already received an overall rating of "partially meets performance expectations" for the 2017-2018 performance cycle, before the change to his functions. After the Administration placed him on a PIP, Mr. Pascal got an even worse overall rating in the 2020-2021 performance cycle. These facts

¹⁹ *Timothy* Judgment, *op. cit.*, para. 31.

²⁰ *Ibid.*, para. 38.

demonstrate that Mr. Pascal's performance shortcomings and his lack of improvement were long-standing issues and were unrelated to the change of his post.

68. Mr. Pascal submits that the UNDT erred in its interpretation of Staff Regulation 9.3(a)(ii) and Staff Rules 9.6(c)(ii) and 13.1(b)(i), which provide that the Administration "may" terminate a staff member on a permanent appointment for unsatisfactory service, but not that the Administration "must" terminate the staff member. He further argues that termination was not the only option available to the USG/DMSPC, and that justice would have been served by a more humane option rather than termination. The Organization's legal framework entrusts the Administration undoubted authority in such matters. Furthermore, the United Nations established the two-tier internal justice mechanism to protect the legal rights of staff members to guard against the capricious exercise of administrative discretion by judicial review. We established the criteria for judicial review in our jurisprudence. As we reiterated in *Ncube*:²¹

[W]hen judging the validity of the Secretary-General's exercise of discretion in administrative matters, 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 made 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.

In the present case, the UNDT carefully examined "whether the Applicant's performance was evaluated in a fair and objective manner" and "whether the Administration followed a proper procedure in making the contested decision".²² So, we do not consider that the UNDT erred in its interpretation and application of Staff Regulation 9.3(a)(ii) and Staff Rules 9.6(c)(ii) and 13.1(b)(i) in this case.

69. In *Guenfoudi*, an analogous case of termination of appointment for poor performance, we affirmed:²³

In this case, the UNDT was not at liberty to re-assess the Appellant's performance on its own, but rather should have examined the process by which the Administration

²¹ *Ncube v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-721, para. 14.

²² Impugned judgment, para. 24.

²³ *Mustapha Guenfoudi v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1364, paras. 81 and 83.

determined that his performance was unsatisfactory, including whether unfairness or irrationality was present. The Administration has the discretion to establish the criteria that a staff member should meet and to terminate the service of a staff member upon unsatisfactory performance of those prescribed criteria.

...

In addition, Mr. Guenfoudi did not take any action to ameliorate his performance or show any active intention to cooperate with the Administration. In this circumstance, he did not fulfill his duty. The contested decision for termination made by the USG/MSPC is based on two consecutive years of substandard ratings and the failure to remedy the shortcomings by the Appellant. Mr. Guenfoudi's repetitive allegations that his substandard ratings were a product of retaliation, and that the rebuttal process was biased are groundless. During the performance evaluation process no unfairness and irrationality was found. The ratings made through such process are final and effective, unless challenged pursuant to specific procedures that were well-known to him, but that he did not pursue with regard to his last rating in the 2020-2021 cycle. It is lawful for the Administration to terminate the Appellant's continuing appointment in accordance with the rules concerned. We uphold the UNDT's decision in this regard.

70. Similar to Mr. Guenfoudi, as discussed above, Mr. Pascal was aware of the required performance standard and was advised of his performance shortcomings on multiple occasions. After three consecutive years of performance ratings of "partially meets performance expectations", he was afforded an opportunity to improve but still failed to do so in key performance areas. In view of the seriousness of his deficiencies and the Organization's accountability to uphold the highest standards of efficiency and competence for its staff, it was not unreasonable for the Administration to terminate Mr. Pascal's appointment. The Administration has the discretion to establish the standard which staff members should meet and to terminate staff appointments upon unsatisfactory performance. Mr. Pascal's arguments on service duration, proximity to retirement, appointment type and the Covid-19 pandemic are irrelevant to the legality of the contested decision. Therefore, we find that the Administration's decision was an appropriate action. Accordingly, the UNDT did not err in concluding that the contested decision was lawful.

Did the UNDT err in finding that Mr. Pascal's application for suspension of action was not receivable? And is this argument receivable on appeal to the UNAT?

71. With respect to applications on suspension of action, Article 2(2) of the UNDT Statute provides:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the

management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

72. Article 10(2) of the UNDT Statute further states:

At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

73. Regarding the foregoing UNDT statutory provisions, we stated in *Wamalala*:²⁴

The Appeals Tribunal has held that the UNDT enjoys wide powers of discretion in all matters relating to case management and that it must not interfere lightly in the exercise of the jurisdictional powers conferred on the tribunal of first instance to enable cases to be judged fairly and expeditiously and for the dispensation of justice. For this reason, and in accordance with Articles 2(2) and 10(2) of the UNDT Statute, appeals against decisions taken in the course of proceedings and relating to procedure, such as matters of proof, the production of evidence, or interim measures, are not receivable, even where the judge of first instance has committed an error of law or fact relating to the application of the conditions to which the grant of a suspension of action is subject or a procedural error.

74. In *Nwuke* we also said: “The jurisprudence of the Appeals Tribunal establishes that appeals from the Dispute Tribunal on suspension of action decisions will be receivable only if that Tribunal, in adjudicating on such applications, exceeded its competence or jurisdiction.”²⁵

75. In this case, Mr. Pascal submits that the UNDT erred in finding that his application for suspension of action was not receivable. However, he did not establish that the UNDT exceeded its jurisdiction or competence.

76. Mr. Pascal relies on *Calvani* to argue that his termination has “continuing” effect, and therefore, the UNDT could have granted his application for suspension of action.²⁶ This case

²⁴ *Wamalala v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-300, para. 17.

²⁵ *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-330, para. 19.

²⁶ *Calvani* Judgment, *op. cit.*, para. 21.

is inapposite, because the staff member in *Calvani* was on administrative leave without pay for an indefinite period, and the UNDT could have suspended it temporarily. By contrast, in this case the termination notice received by Mr. Pascal was a single administrative act with immediate effect. As his termination had already been implemented when Mr. Pascal came before the UNDT, there was no action for the UNDT to suspend.

77. Accordingly, because the UNDT did not exceed its jurisdiction or competence, Mr. Pascal's appeal against the UNDT Order No. 107 is not receivable *ratione materiae*.

78. Mr. Pascal claims that the UNDT Judge who ruled on the suspension of action application should have recused herself from consideration of his application on the merits of his case. This argument has no legal basis. The Appeals Tribunal has previously held that recusal is not warranted merely because the UNDT Judge "may have decided some preliminary issues against the litigant".²⁷

Is Mr. Pascal entitled to any compensation?

79. Based on the foregoing analysis, all of Mr. Pascal's submissions in his appeal are without merit.

80. As we have 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".²⁸ Therefore, Mr. Pascal's request for compensation is denied.

²⁷ *Asr Ahmed Toson v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1159, para. 35.

²⁸ *Kawamleh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-818, para. 16 (internal citations omitted).

Judgment

81. Mr. Pascal's appeal is dismissed, and Judgment No. UNDT/2023/017 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 22nd day of March 2024 in New York, United States.

(Signed)

Judge Gao, Presiding

(Signed)

Judge Ziadé

(Signed)

Judge Savage

Judgment published and entered into the Register on this 2nd day of May 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar