



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

Judgment No. 2017-UNAT-757

Sarwar
(Respondent/Appellant on Cross-Appeal)
v.
Secretary-General of the United Nations
(Appellant/Respondent on Cross-Appeal)

JUDGMENT

Before: Judge John Murphy, Presiding
Judge Richard Lussick
Judge Martha Halfeld

Case No.: 2017-1034

Date: 14 July 2017

Registrar: Weicheng Lin

Counsel for Mr. Sarwar: George G. Irving

Counsel for Secretary-General: Stéphanie Cartier

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/178, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 28 September 2016, in the case of *Sarwar v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 28 November 2016, and Mr. Golam Sarwar filed his answer and cross-appeal on 16 December 2016. The Secretary-General filed his answer to the cross-appeal on 16 February 2017.

Facts and Procedure

Introduction

2. By letter dated 16 December 2011, Mr. Sarwar received an offer of a two-year fixed-term appointment as an Associate Social Affairs Officer at the P-2 level, step 6, in the Division for Social Policy and Development, Department of Economic and Social Affairs (DSPD, DESA) after successfully completing the National Competitive Recruitment Examination (NCRE) in 2009 and being placed on a roster. The offer stated:¹

After two years of probationary service on a Fixed-[T]erm Appointment, you will be granted a continuing appointment. *This means that you will have to demonstrate within that time that you possess the requisite qualifications to serve as a career staff member of the United Nations in order to receive a continuing appointment.*

3. The offer of appointment also stated:²

Junior Professional staff members are expected to gain experience in two different posts/functions, including serving with two separate direct supervisors, during their first five years of service at the professional level. Accordingly, *after serving for two to three years in your initial post*, you will participate in a managed reassignment process for transfer to a second post/function, in accordance with your qualifications and the needs of the Organization.

¹ Emphasis added.

² Emphasis added.

4. In terms of his letter of appointment, Mr. Sarwar's effective date of appointment was 19 March 2012. The letter of appointment also stated: "A fixed-term appointment, irrespective of length of service, does not carry any expectancy, legal or otherwise, of renewal or of conversion to any other type of appointment in the Secretariat."

5. Mr. Sarwar was separated from service on 7 December 2014 upon the expiration of his extended fixed-term appointment on the grounds of poor performance. Before the UNDT he contested the decisions of non-renewal of his contract, failure to grant continuing appointment and separation from service. He claimed the decisions were "procedurally flawed and improperly motivated". The UNDT narrowed the scope of his case to his challenge to the decision to separate him from service, since that was the only decision Mr. Sarwar had referred to management evaluation with the consequence that the jurisdiction of the UNDT was limited to consider that decision.

ST/AI/2010/5 - Performance Management and Development System

6. The process for managing performance in the Organization is set out in Administrative Instruction ST/AI/2010/5 (Performance Management and Development System) (the system). The question of proper compliance with the system has assumed central importance in this case, and it will therefore assist in understanding the issues to consider its relevant terms before further analysis of the facts.

7. The purpose of the system is to improve the delivery of programmes by optimizing performance at all levels and addressing underperformance in a fair and equitable manner. The system is supported by an electronic application (e-PAS or e-performance) that captures the main stages of the performance process (workplan, midpoint review and end-of-year performance appraisal). The performance cycle is normally 12 months. The cycle begins on 1 April of each year and ends on 31 March of the following year.

8. A first reporting officer (FRO) is designated for each staff member at the beginning of the performance cycle. The FRO is responsible for developing the workplan with the staff member; conducting the midpoint review and final evaluation; providing ongoing feedback on the overall work of the staff member throughout the

performance cycle; advising, supporting and coaching the staff member on professional development and in the development of a personal development plan; developing a performance improvement plan in consultation with the staff member in the case of performance shortcomings or underperformance, if applicable; and ensuring that all e-PAS and/or e-performance documents of staff supervised are completed in accordance with the prescribed procedures.³ A second reporting officer (SRO), who shall be the FRO's supervisor or equivalent, is responsible for ensuring that the FRO understands and applies the system properly and fairly.

9. At the beginning of the performance cycle, supervisors are required to meet with the staff under their direct supervision to ensure that the objectives of the work unit are understood and individual workplans are prepared. The work planning stage includes: establishing individual performance evaluation criteria by setting goals; defining competencies; and formulating a personal development plan. The format of the workplan may vary depending on the functions of the staff member, but must include results oriented elements such as goals and key results to be expected and actions to achieve them.

10. During the course of the performance cycle, the FRO and the staff member are required to hold conversations and dialogue, formally and informally, to address performance and any shortcomings as they become apparent at any time during the cycle. The FRO should conduct a midpoint review, usually six months after the creation of the workplan, after discussing with the staff member the progress to date of the goals set in the workplan. Within three months after the end of the performance appraisal cycle, the FRO and the staff member shall discuss the overall performance during the cycle. The FRO shall evaluate the extent to which the staff member has achieved the goals of the workplan and comment on the manner in which the staff member has demonstrated the core values and competencies. Evaluations are reviewed by the SRO, who may make comments, as appropriate.

11. When a performance shortcoming is identified during the performance cycle, the supervisors should proactively assist the staff member to remedy the shortcomings. Remedial measures may include counselling, transfer to more suitable functions,

³ Section 5.1 of ST/AI/2010/5.

additional training and/or the institution of a time-bound performance improvement plan, which should include clear targets for improvement.

12. Staff who have performed satisfactorily are rated overall as having either successfully met or exceeded performance expectations. Staff who have not performed adequately are rated either as “partially meets performance expectations” or “does not meet performance expectations”. A rating of “partially meets performance expectations” usually indicates that the staff member did not meet performance expectations but demonstrates potential to develop the required skills. A rating of “does not meet performance expectations” means that the staff member did not meet performance expectations and demonstrates an inability to develop the required skills.

13. Staff members who disagree with a “partially meets performance expectations” or “does not meet performance expectations” rating given at the end of the performance year may follow the rebuttal process provided in Sections 14 and 15 of ST/AI/2010/5. The rebuttal panel is required to prepare a report setting forth the reasons why the original rating should or should not be maintained.

The first performance cycle – 2012-2013

14. Mr. Sarwar commenced employment with the Organisation on 19 March 2012. His FRO and SRO testified before the UNDT that it was obvious from the beginning that he lacked communication abilities. The FRO testified that she initiated discussions with him regarding his work soon after his arrival. Mr. Sarwar sent a draft workplan to the FRO on 2 May 2012 and another version in July 2012. However, these drafts were not approved and his workplan for the 2012–2013 performance cycle was entered into Inspira⁴ only on 15 February 2013, that is 11 months after entering service and not in compliance with the guideline in Section 6.2 of ST/AI/2010/5, which requires workplans to be prepared “[a]t the beginning of the performance cycle”.

15. On 5 March 2013, Mr. Sarwar met with his FRO and SRO for a midpoint review. This too was not in accordance with the guideline in Section 7.2 of ST/AI/2010/5, which provides that the FRO should conduct a midpoint review “usually six months after the creation of the

⁴ A United Nations website used by staff members for various tasks including performance management.

workplan”. There is a factual dispute about whether a performance improvement plan was discussed at this meeting. A performance improvement plan is a remedial measure that may be used to proactively assist a staff member when a performance shortcoming is identified. Unsigned minutes from the meeting record that the parties would “meet again to work on his performance improvement plan”.

16. Mr. Sarwar sent his FRO, by e-mail dated 22 March 2013, a document setting out a plan identifying written and oral communication as skills that needed to be improved. The e-mail stated: “Thank you for your guidance on the matter. Attached please find the plan as we discussed.”

17. The one-page document set a six-month time frame for improvement. The actions to be taken were listed as attending available in-house and outside trainings and regularly updating his FRO on progress.

18. On 24 April 2013, Mr. Sarwar completed his self-evaluation for the 2012–2013 cycle in Inspira.

19. On 21 November 2013, the FRO completed her evaluation of Mr. Sarwar’s performance for the 2012–2013 cycle in Inspira. The evaluation of Mr. Sarwar by the FRO revealed that there were shortcomings in the majority of the key core values and competencies for the position of Associate Social Affairs Officer. With respect to the required core value of professionalism, the FRO rated Mr. Sarwar’s performance as “D - unsatisfactory” on the basis that some of his key inputs were of poor quality. The FRO rated Mr. Sarwar’s communication competency performance as “D - unsatisfactory,” stating that his communication skills in oral and written English were poor. With regard to the competency of planning and organizing, the FRO rated Mr. Sarwar’s performance as “D - unsatisfactory”, stating that he had taken too long to complete the required assignments to an acceptable level of quality. The FRO also rated Mr. Sarwar “D - unsatisfactory” in relation to the creative competency. The FRO gave him an overall rating of “D - unsatisfactory”.

20. The next day, the SRO completed his evaluation of Mr. Sarwar's performance for the 2012–2013 cycle in Inspira. Mr. Sarwar met with his FRO and SRO on that day and was informed that his performance for the 2012–2013 cycle had been rated "D - does not meet performance expectations", the lowest rating available.

21. The end of cycle discussions were not in keeping with the time periods set forth by Section 8.1 of ST/AI/2010/5 which provides that end-of-cycle performance discussions shall take place within three months after the end of the performance appraisal cycle. In the present case that would have been the end of June 2013, meaning that the discussions took place five months late.

22. On 6 December 2013, Mr. Sarwar acknowledged the evaluation for the 2012-2013 cycle in Inspira. That same day, he submitted a rebuttal statement with respect to his rating for the 2012–2013 cycle.

23. On 28 January 2014, the rebuttal report was finalized in regard to Mr. Sarwar's performance evaluation for the 2012–2013 performance cycle (the first rebuttal report). The rebuttal panel concluded in its report that the overall rating should be changed to "C - partially meets performance expectations".

24. As a key element in its methodology, the rebuttal panel reviewed in detail the four elements of the 2012-2013 workplan, and their evaluations at the mid-point review and at the end-of-cycle appraisal. It interviewed Mr. Sarwar, the FRO and SRO extensively on the related activities. The workplan consisted of four areas: i) work related to the World Youth Report 2013; ii) work related to an Secretary-General report on youth indicators; iii) support to the 51st session of the Commission for Social Development; and, iv) other assignments, including the publishing of the monthly newsletter Youth Flash.

25. The rebuttal panel found in relation to the first goal involving the World Youth Report, a flagship publication, that Mr. Sarwar had started work on the two expected deliverables, a concept note and a questionnaire, without delay. However, it stated: "The Panel has reviewed the evidence that the initial drafts were of poor quality (i.e. with limited conceptualization and written in poor English), and can therefore partially confirm the assessment of the FRO and SRO." However, the rebuttal panel acknowledged that the initial drafts had been corrected by Mr. Sarwar with the amendments suggested by his supervisors

being incorporated into the document promptly. It noted that there was not sufficient evidence to demonstrate that his input was so poor that the task needed to be taken over by others. The rebuttal panel noted further its concern that the tasks were not the kind of functions normally assigned to a new P-2 officer, and expressed the belief that the expectations set by the FRO and SRO “were simply too high and the support provided may have lacked clarity”.

26. The second goal of the workplan was to assist in the drafting of a Secretary-General’s report on a proposed set of indicators. The rebuttal panel accepted as credible a claim by Mr. Sarwar that he received no negative feedback about the quality of this task. However, evidence presented by the supervisors indicated that Mr. Sarwar had prepared a simple set of indicators, copied from the outcome of an expert group meeting, based on an existing set of indicators, and included only limited introductory text. The draft was evidently incomplete, but the rebuttal panel felt it could serve as a basis for more work. The SRO decided that other staff should complete the finalization of the report. Absent evidence of any feedback to Mr. Sarwar on the task, the rebuttal panel was reluctant to make a definitive assessment on the quality of this task.

27. The third goal of the workplan involved Mr. Sarwar assisting in the servicing of the 67th session of the General Assembly and the 51st Commission for Social Development. The FRO contended that Mr. Sarwar failed to pay attention to simple tasks such as sending correct versions of documents and failed to grasp the essence of the negotiations and was therefore unable to enter negotiated text in the computer during the negotiations. The rebuttal panel accepted that Mr. Sarwar had indeed made errors in sending documents and needed the assistance of his colleagues in servicing the negotiations. Yet it found that Mr. Sarwar had not been properly coached by his supervisors and that the tasks in question “could possibly be inconsistent with the responsibilities of a P-2 officer, with less than a year of experience, in other parts of the [United Nations] Secretariat”.

28. The fourth component of the workplan involved a set of *ad-hoc* tasks performed by Mr. Sarwar related to the drafting of Youth Flash and other drafting inputs. The general complaint in relation to them was that they were not done in a timely fashion. The rebuttal panel found that the assessment by the SRO of some of these tasks was “unnecessarily harsh and overly judgemental”. It also found that in some respects Mr. Sarwar was no less successful than some of his colleagues, that in some tasks his errors

were minor and his work quality acceptable. It concluded as follows in relation to some of these matters:

The e-mail messages ... all indicate haste and a very tight deadline; in brief messages, the FRO is requiring these tasks to be completed either the same day or the next. As was observed in the other tasks, it appears that there was little or no instruction on how to obtain an output that would satisfy the FRO's expectation. And as also observed before, the tasks assigned may simply be too difficult to achieve for a newcomer.

29. The rebuttal panel concluded that the rating for the core competency of professionalism should be changed from "D - unsatisfactory" to "C - requires development". It agreed that the inputs were of poor quality, but expressed the view that Mr. Sarwar's lack of experience had to be taken into account, that he had been willing to learn from his errors and that some of his assignments had been challenging.

30. As regards the competency of communication, the rebuttal panel concluded that the rating for the competency should be changed to "C - requires development". It reviewed some of Mr. Sarwar's assignments and agreed that his communication skills were unsatisfactory. It however opted to upgrade the rating from "D - unsatisfactory" to "C - requires development" because Mr. Sarwar undertook to take English composition and drafting classes offered through the Office of Human Resources Management.

31. With regard to the planning and organizing competency, the rebuttal panel again agreed with the FRO's assessment of his unsatisfactory performance, but upgraded the rating because it considered that Mr Sarwar had completed some tasks promptly, sometimes with short deadlines. It upgraded the rating of his creativity competency, because it appreciated some of his initiatives.

32. The rebuttal panel expressed concern that the timing of the 2012-2013 review failed to comply with the guidelines in Sections 6, 7 and 8 of ST/AI/2010/5 and rejected as "not credible" the explanation that Mr. Sarwar had delayed the process. It observed that the lack of compliance with the established timelines had "nearly incapacitated" the FRO's ability to properly use the cycle as a management tool for planning, feedback, and evaluation. As weekly meetings to address performance issues with Mr. Sarwar were set up only late into the cycle, there was limited evidence that the FRO sufficiently and promptly advised, supported and coached him in a timely manner. It stated:

The Panel is concerned about the specific circumstance of this rebuttal, where a new staff member, carefully recruited through a competitive process, has been given a negative rating during his first year of service to the United Nations. To this end, panel members inquired specifically on the level of feedback and support that the staff received from his colleagues, and his FRO in particular, during this crucial initial phase of the staff's United Nations career. There appeared little evidence that he received adequate support for these tasks. Also some of the tasks that he was assigned required a level of experience that could simply not be expected from him.

33. The rebuttal panel accordingly disagreed with the observation that Mr. Sarwar failed to meet the necessary standard, stating that it was too early to arrive at such a conclusion without sufficient or additional evidence. It concluded:

In the view of the Panel, and based on its observations above, the overall appraisal of 'requires development' appears an appropriate rating. The Panel expresses the hope that this rating has prompted the staff member to pay more attention to the expectations from him, and from his supervisors to guide him, and to prevent a recurrence of a negative evaluation during the second year of his career. The FRO and SRO deserve praise for effectively managing a programme with much work pressure and growing demands from the highest levels of the organization. Yet, in order to be a more inclusive work unit, its management is invited to consider setting timely, precise and realistic expectations on its staff, that are more in line with the existing practice of engaging junior staff at the P-2 level in other units of the Department and the Organization; and are commensurate with the seniority of the staff involved.

The second performance cycle: 2013-2014

34. Before the process for the first performance cycle was completed, the FRO requested Mr. Sarwar to prepare an e-PAS workplan for the 2013-2104 cycle on 25 October 2013. A reminder was sent to him on 4 November 2013 and he sent a draft of his workplan on the same day. The initial draft was not accepted by the FRO, as the goals and success criteria were not in accordance with the requirements of the position. Meetings on the workplan were held on 12 and 22 November 2013. At the meeting of 22 November 2013, the evaluation of the 2012-2013 cycle and a performance improvement plan were also discussed. There was some contention about the performance improvement plan that delayed the completion of the workplan. Mr. Sarwar eventually finalized his workplan for the 2013–2014 cycle, and posted it on Inspira on 16 December 2013 – eight months after the commencement of the cycle.

35. The FRO met Mr. Sarwar two weeks later, on 31 December 2013, to carry out the midpoint review for the 2013–2014 cycle and to finalize a performance improvement plan about which there was still some disagreement.

36. On 2 January 2014, Mr. Sarwar sent an e-mail to his FRO, copying his SRO, and outlining his objections to the performance improvement plan, including the fact that his FRO had not yet formally approved his workplan for the 2013-2014 performance cycle in Inspira, that he was yet to have a midpoint review for the performance cycle, and that he could not have a performance improvement plan until he had a midpoint review identifying his shortcomings.

37. The FRO approved the workplan for the 2013-2014 cycle in Inspira on 6 January 2014. In an e-mail to Mr. Sarwar on the same date, she noted that a review meeting had taken place on 31 December 2013 during which a final version of the e-PAS report had been discussed. The meeting was stated to be the culmination of many meetings for reviewing his work and developing the performance improvement plan for this cycle. When she received no response by 14 January 2014, the FRO wrote to Mr. Sarwar again complaining that the performance processes were being delayed which was “not conducive to the working environment and the workplan”.

38. In an e-mail dated 4 February 2014, the FRO requested Mr. Sarwar to inform her if he wanted to add any comments to the midpoint review for the 2013–2014 performance cycle so that it could be finalized. By e-mail response later the same day, Mr. Sarwar thanked her for her suggestions, feedback and support on performance issues in a meeting the previous day, but disputed a comment entered on Inspira that he had not agreed to the performance improvement plan, stating that he wanted to work on a performance improvement plan that was informed by “systematic discussions on my performances and based on my agreed [e-PAS] for the said period”.

39. On 12 February 2014, the FRO sent Mr. Sarwar an amended performance improvement plan, to be in effect from 12 February to 25 March 2014. On 18 March 2014, Mr. Sarwar’s appointment was extended for six months. The FRO met Mr. Sarwar for the end-of-cycle discussions on 25 April and 2 May 2014. The FRO completed her evaluation of Mr. Sarwar’s performance for the 2013-2014 cycle in Inspira on 5 May 2014, and assigned him an overall rating of “D - does not meet expectations”.

40. On 30 May 2014, the SRO approved the assessment of Mr. Sarwar's performance for the 2013-2014 cycle and on 13 June 2014, Mr. Sarwar acknowledged the rating.

41. On 25 June 2014, Mr. Sarwar submitted a rebuttal statement in respect to his evaluation for the 2013-2014 performance cycle. On 19 September 2014, Mr. Sarwar's fixed-term appointment was extended until 31 October 2014.⁵

42. The rebuttal panel delivered its report (second rebuttal report) on 14 October 2014. It commences with a discussion about procedural non-compliance. It states:

The Panel has observed that the timing of the ePAS 2013-2014 review has not fully complied with the established guidelines as described in sections 6, 7 and 8 of ST/AI/201/5. The initial workplan was signed off into Inspira nine months into the review period, i.e. on 16 December 2013. The mid-point review was completed on 4 April 2014, three days after the completion of the cycle. The staff's midterm self-evaluation was signed on 11 April 2014. The FR[O] evaluation was entered on 5 May 2014; the SRO approval on 30 May 2014, and staff member acknowledgement on 13 June 2014.

43. The rebuttal panel held that despite the contentions of Mr. Sarwar to the contrary, the end of cycle discussions on 25 April 2014 and 2 May 2014 were carried out in compliance with Section 8.3 of ST/AI/2010/5. Section 8.3 reads:

... The first reporting officer shall evaluate the extent to which the staff member has achieved the goals/key results/achievements as set out in his/her workplan. The first reporting officer shall also evaluate and comment on the manner in which the staff member has demonstrated the core values and competencies. The first reporting officer may comment on the staff member's self-appraisal in his/her evaluation of the staff member. First reporting officers are encouraged to discuss the career aspirations of staff during the end-of-the year discussion. An overall rating on the staff member's performance shall be given by the first reporting officer pursuant to section 9 below.

44. The rebuttal panel concluded in relation to the procedural questions as follows:

Overall, the late initiation of the workplan by the staff member and the late initiation follow-up actions by the FRO constrained the full implementation of ST/AI/2010/5.

⁵ Section 15.6 of ST/AI/2010/5 requires appointments to be renewed for the duration necessary for the completion of the rebuttal process when non-renewal of a fixed-term appointment on grounds of poor performance is being considered.

At the same time, these delays did not inhibit the possibility to evaluate the performance of the staff member.

45. The rebuttal panel reviewed in detail the five elements of the 2013-2014 e-PAS workplan. Only four of the goals are practically relevant.

46. The first performance goal was to conduct social analysis by drafting various substantive written inputs. The rebuttal panel reviewed a total of 15 delivered outputs, including some that required many months work and some that were short-term and limited in nature. In relation to some of the work, despite having concerns about tone and language, the rebuttal panel found that the work was of acceptable quality “for a new staff member with no substantive experience in the subject matter of his assignment”. At the same time, it found that Mr. Sarwar had not met the required standard when tasked to draft a paper in support of the drafting of a resolution on youth in the General Assembly Third Committee. It stated that Mr. Sarwar “did not deliver the required draft that was sufficiently researched in a timely manner” and that the quality of work was poor. The rebuttal panel rejected allegations that Mr. Sarwar was guilty of plagiarism in his work and again expressed the view that given his level the performance expectations may have been too high. It nonetheless accepted as credible the FRO’s complaint that most of the *ad-hoc* assignments were late and of poor quality.

47. The second performance goal concerned the organization of two events: the observance of International Youth Day on 12 August 2013 and the organization of the launch of the World Youth Report 2013 on 14 February 2014. The rebuttal panel recognized that Mr. Sarwar did not always receive the desirable level of support and supervision to carry out these tasks, but concluded that he “had difficulties” in making the arrangements for the two events, including “unnecessary delays, confusion with team members and external stakeholders, and late delivery of some of the required outputs”.

48. The third performance goal was to undertake outreach activity in assigned areas, comprising three components: a monthly e-mail newsletter, titled Youth Flash; maintenance of the main website of the team; and management of a set of published fact sheets. The rebuttal panel accepted the criticisms of the FRO that the newsletter was frequently published late and there was very little planning in compiling inputs for publication. The newsletters were poor in quality and Mr. Sarwar made little effective effort to make

sure the content of the newsletter was interesting and acceptable. He had also not acquainted himself with the applicable standards to be observed in United Nations publications. The rebuttal panel accordingly concluded that Mr. Sarwar “had consistent and serious problems with the timelines, the coordination of written contributions, and overall quality control of the e-newsletter under this associated performance goals”. It also found that Mr. Sarwar’s performance in relation to the maintenance of the website was below par, and his inability to achieve timely delivery on the fact-sheets revealed a lack of planning and organizing skills.

49. The last performance goal of relevance related principally to administrative tasks for the final delivery of the youth programme’s services. One *ad-hoc* assignment has particular importance. Mr. Sarwar was asked to prepare a background note and speaking points for the Deputy Secretary-General’s meeting with the Minister of Youth of Azerbaijan. During the course of two days in the lead up to the meeting, he submitted a number of drafts, each of them reviewed by the FRO, and all accepted by the rebuttal panel to have been of poor quality, containing many repetitions, language errors and elements that the FRO had asked to be removed from earlier drafts. The FRO had to redraft the document after the deadline had passed. The rebuttal panel found that this assignment presented “strong evidence of poor writing”. It also provided an example of the apparent difficulty of Mr. Sarwar “in internalizing guidance received from the FRO and making necessary improvements as suggested to him”.

50. The second rebuttal panel recommended that Mr. Sarwar’s overall rating be upgraded from “D - unsatisfactory” to “C - requires development”. In respect of the contested key competencies of professionalism, communication and teamwork, it upgraded the assessment of the FRO from “D - unsatisfactory” to “C - requires development”. It agreed though that the competency of planning and organizing should remain graded at “D - unsatisfactory”.

Termination of employment

51. On 30 October 2014, the Director, DSPD, DESA, addressed a letter to Mr. Sarwar conveying the decision not to grant him a continuing appointment and to separate him from service upon the expiration of his fixed-term appointment on 30 November 2014. The letter stated that the offer of appointment dated 16 December 2011 required him to prove within the probationary period that he had the qualifications to be a career staff member of the United Nations but that the results of the rebuttal panels for the past two e-Performance

cycles had determined that his service only partially met expectations. Mr. Sarwar was given thirty-days' notice and an extension of his appointment until 30 November 2014.

52. Mr. Sarwar requested management evaluation of the decision to separate him from service on 7 November 2014. He also submitted a letter to the Secretary-General requesting suspension of action of the decision. By letter dated 18 November 2014, the Under-Secretary-General for Management (USG/DM) informed Mr. Sarwar that the Secretary-General had decided to grant his request for suspension of action and extend his appointment until 7 December 2014. By letter dated 4 December 2014, the USG/DM informed Mr. Sarwar that the Secretary-General had decided to uphold the decision to separate him from service. On 7 December 2014, at the close of business, Mr. Sarwar was separated from service upon the expiration of his fixed-term appointment.

The UNDT proceedings

53. Mr. Sarwar filed his application with the UNDT on 12 February 2015 challenging the termination of his employment. A hearing on the merits was held on 19 and 20 July 2016 at which Mr. Sarwar; Ms. Nicola Shepherd, the FRO; Mr. Jean-Pierre Gonnot, the SRO; Mr. Joop Theunissen, the chairperson of both rebuttal panels; and Ms. Daniela Bas, the Director of DSPD, DESA all testified.

54. The UNDT issued its Judgment on 28 September 2016 in which it partially granted Mr. Sarwar's application.

55. In its Judgment, the UNDT limited the enquiry before it to an investigation of due process stating that it was not the role of the UNDT to re-assess the applicant's performance but rather to examine the process by which it was determined that the performance was unsatisfactory. It concluded that the management and assessment of Mr. Sarwar's performance was procedurally flawed in that he was not given a fair opportunity to demonstrate his suitability for the position for which he was recruited, through setting clear expectations through promptly agreed and approved workplans, providing documented feedback at the true midpoint of the performance cycles and remedial actions to formally identify, in a timely and specific manner, his areas of weakness which needed addressing with support and guidance. In this regard, it placed reliance upon the National Competitive Recruitment Examination (NCRE) programme, aimed at recruiting young staff from diverse countries and backgrounds and the principle of equitable

geographical distribution, which requires a higher standard of mentoring of probationary staff recruited through competitive examination.

56. The UNDT held that the separation decision was unlawful on the grounds that it had been based on a performance evaluation assessment that had been procedurally flawed. The repeated non-compliance with the various provisions of ST/AI/2010/5, it held, resulted in the management of Mr. Sarwar's performance being "so procedurally flawed and fraught with irregularities that it tainted and rendered the decision not to renew his fixed-term appointment unlawful".

57. The UNDT ordered rescission of the separation decision and in-lieu compensation in the amount of twelve months' net base salary and USD 5,000 as compensation for non-pecuniary damages. In declining to order specific performance (reinstatement), the UNDT noted that "the employment relationship may have irreconcilably broken down". By that one assumes that it considered there was a valid and fair reason for termination, but that the lack of a fair procedure nonetheless rendered the decision unlawful, justifying the rescission of the decision and an award of in-lieu compensation.

58. The UNDT also held that Mr. Sarwar's challenge to the decision not to grant him a continuing appointment was not receivable *ratione materiae* on the grounds that it had not been the subject of a request for management evaluation and further that there was not sufficient evidence to support Mr. Sarwar's claim that he had a legitimate expectation that his fixed-term contract would be renewed. While accepting that there may have been problems of communication arising from cultural diversity, the UNDT was not persuaded that the decision to terminate his appointment was tainted by improper motive, bias or discrimination.

Submissions

The Secretary-General's Appeal

59. The Secretary-General submits that the UNDT exceeded its competence and erred on a question of law by usurping the role of the rebuttal panels. It substituted its own conclusions concerning Mr. Sarwar's performance and failed to accord due deference to the reasonable exercise of discretionary authority weighing the factors observed regarding the evaluation performance process. Mr. Sarwar was on a "probationary" appointment within the meaning of

Staff Rule 13.3, and his overall performance was confirmed by the two rebuttal panels to have not fully met performance expectations. As such, the decision to separate him was lawful as it was fully supported by the facts and in accordance with Staff Rule 13.3 and ST/AI/2010/3.⁶

60. He further submits that the UNDT erred in law and in fact by concluding that Mr. Sarwar had not been given a genuine opportunity to improve his performance. The record shows that (i) Mr. Sarwar had been made aware within the first months of his probationary appointment that his performance did not meet the performance expectations, which he acknowledged, and with respect to which he agreed to a six-month improvement plan; and, (ii) Mr. Sarwar's fixed-term appointment was extended beyond the initial two-year probationary period so that a proper evaluation and rebuttal process could be completed.

61. Moreover, since Mr. Sarwar had not met performance expectations fully during two consecutive years, as confirmed by both rebuttal panels, and given the probationary nature of his service, the decision to terminate the appointment was lawful.

62. The UNDT erred when it awarded non-pecuniary damages for alleged irregularities. The UNDT's global award of non-pecuniary damages in the amount of USD 5,000 should be reduced so as to limit the award strictly to compensation for the delay in the performance evaluation process.

63. The Secretary-General requests that the Appeals Tribunal reverse the impugned Judgment (except for its finding that the contested decision had not been improperly motivated or tainted by bias or discrimination) and that the UNDT's award of non-pecuniary damages be reduced in order to provide compensation solely for the delay.

Mr. Sarwar's Answer

64. Mr. Sarwar submits that it is clearly within the remit of the UNDT to examine the basis for the separation decision and to rule on whether the decision was procedurally flawed or improperly motivated. Contrary to the Secretary-General's claims, Mr. Sarwar's performance was found to be in need of development. For junior professional officers recruited in terms of the NCRE and ST/SGB/2011/10 - the Young Professionals Programme (YPP), and serving on

⁶ Staff Rule 13.3(f) provides that at the end of his or her probationary service, a staff member who holds a probationary appointment shall either be granted a permanent appointment or be separated from service.

a probationary period, a grading of “requires development” is not indicative of a lack of competence. The Secretary-General’s appeal fails to address the underlying rationale of the UNDT’s Judgment that Mr. Sarwar never received the benefit of a proper two-year probationary period since his performance was not managed properly. The special provisions of the NCRE/YPP provide for the possibility of a five-year period in different positions in order to prove competency. There is nothing in the applicable rules requiring separation after only two years of service when room for improvement is identified. This would defeat the purpose of the NCRE/YPP programme. He submits therefore that he was denied a proper opportunity to prove his suitability in his first two years of service.

65. He submitted further that the UNDT correctly concluded that as a result of the failure to adhere to the timelines set out in ST/AI/2010/5, the setting of unrealistic expectations and inadequate support he did not receive a proper opportunity to improve. As the Secretary-General admits the delays and does not dispute the findings of the rebuttal panels, it is unclear in what respect he contests the UNDT’s conclusion. Moreover, the Secretary-General mistakes or omits relevant facts. There is no documentary evidence supporting his claim that Mr. Sarwar was advised “within the first months” of performance shortfalls; and, contrary to what the Secretary-General implies, the improvement plan was imposed as an after-thought to justify his non-renewal and came too late to have any impact on his second performance report. The UNDT correctly found that the contested decision should be rescinded and that he had suffered non-pecuniary harm.

66. Mr. Sarwar requests that the appeal be dismissed.

Mr. Sarwar’s Cross-Appeal

67. Mr. Sarwar requests that the Appeals Tribunal order his reinstatement with consideration for a continuing appointment and to increase the amount of in-lieu compensation to two years’ net base salary. He submits that because of the special circumstances surrounding his initial appointment under the NCRE/YPP programme, Mr. Sarwar had a legitimate expectation of not only renewal but also of eventually receiving a continuing appointment had the Administration properly adhered to the procedures in place for a NCRE/YPP recruit.

The Secretary-General's Answer to the Cross-Appeal

68. The Secretary-General requests that the cross-appeal be dismissed in its entirety. By presenting arguments in connection with the decision not to grant him a continuing appointment, Mr. Sarwar seeks to evade the statutory obligation of submitting a prior request for management evaluation. The UNDT correctly concluded that it had no jurisdiction to review the decision not to grant Mr. Sarwar a continuing appointment. His submission that the separation decision was “the same” as the decision denying him a continuing appointment is without merit.

69. Mr. Sarwar has not established any errors in fact or in law that would warrant an increase in the amount of compensation awarded by the UNDT. The Secretary-General reiterates the reasons advanced on appeal as to why the UNDT erred when ordering rescission and in-lieu compensation. In addition, it is not sufficient for Mr. Sarwar to simply disagree with the amount of in-lieu compensation awarded. Contrary to Mr. Sarwar's assertions, he completed an initial two-year appointment of a probationary nature which was not renewed on performance grounds; accordingly, there is no basis to consider that he would remain employed for another two years. Granting Mr. Sarwar's request would result in an in-lieu compensation that would be clearly excessive and disproportionate.

Considerations

70. Regulation 9.3(ii) and Rule 9.6(c)(ii) of ST/SGB/2014.1 (Staff Regulations and Rules) provide that the Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment if the services of the staff member prove unsatisfactory.

71. Both the UNDT and the Secretary-General have somewhat misstated the standard of review in poor performance cases. The Tribunals are not limited to examining the process by which it was determined that performance was unsatisfactory. Nor is it quite correct to contend that the UNDT may not reach its own conclusions concerning the performance of a staff member and to suggest that such would be “usurping the role” of the rebuttal panel.

72. 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.

73. 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 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.

74. In *Said*,⁷ this Tribunal clearly stated that the UNDT must accord deference to the Administration's appraisal of the performance of staff members, and cannot review *de novo* a staff member's appraisal, or place itself in the role of the decision-maker and determine whether it would have renewed the contract, based on the 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. The primary task is to decide whether the preferred and imposed performance standard was not met and to assess whether an adequate evaluation was followed to determine if the staff member failed to meet the required standard. There must be a rational objective connection between the information available and the finding of unsatisfactory work performance.

75. In terms of Section 9.7 of ST/AI/2010/5, staff members who receive a rating of "partially meets performance expectations" (i.e. "C - requires development") are considered not to have met performance expectations. The evidence in relation to Mr. Sarwar's performance indicates that it was for the most part poor and unsatisfactory. Although the

⁷ *Said v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-500, para 40.

FRO and SRO are not free from criticism, their evidence and the findings of the rebuttal panels reveal cogently that Mr. Sarwar had difficulty in fulfilling the goals of his workplan and was deficient in the core competencies of professionalism, communication and planning and organizing. In these, he either partially met or did not meet performance expectations. The ratings thus indicate the existence of performance shortcomings. Both the first and second rebuttal panels in scoring the overall rating as “C - requires development” accepted that the situation was not hopeless and that Mr. Sarwar demonstrated potential to develop the required skills. However, in rating his planning and organizing competency as “D - unsatisfactory”, the second rebuttal panel agreed with the supervisors that Mr. Sarwar demonstrated an inability to develop the skills required for this competency.

76. Mr. Sarwar contends that a different standard applies under ST/SGB/2011/10, the YPP, and that “requires development” does not mean a failure to meet performance expectations. That is not entirely correct. Section 1.1 of ST/SGB/2011/10 provides that the highest standards of efficiency, competence and integrity remain the “paramount consideration” in the employment of staff under the YPP, with due regard to the principle of equitable geographical distribution. Section 4.1 provides that successful candidates, upon placement, shall be supported by a series of structured programmes aimed at developing and fostering adaptable and diverse international civil servants ready to respond to the evolving mandates of the Organisation. Section 4.3 of ST/SGB/2011/10 obliges the relevant managers to “ensure that candidates have defined workplans, performance objectives and training and learning plans”. It records also that candidates “will be expected to serve on two different assignments and will be subject to a structured performance assessment and learning development programmes”. While it is perhaps correct that staff members recruited as part of the YPP might expect focused assistance and assessment, there is nothing in ST/SGB/2011/10 that introduces a lower standard or grade of evaluation different to that contemplated in ST/AI/2010/5.

77. There can be no question that the two rebuttal panels conducted a thorough review of Mr. Sarwar’s performance. Numerous documents he had prepared in the course of his duties were carefully scrutinized and evaluated. The two panel reports reflect a persistent concern with Mr. Sarwar’s weakness in drafting and written communication skills. Some of the documents passed muster, others did not and were found variously to be of poor quality, insufficiently researched, written with limited conceptualization, and/or in poor English.

Mr. Sarwar struggled also to meet deadlines. With regard to the e-newsletter, a key performance area, he was found to have had “consistent and serious problems” with timeliness and coordination. It was evident also that he lacked comprehension and insight into the question of publication standards and quality control.

78. Both rebuttal panels were inclined to give Mr. Sarwar the benefit of the doubt and expressed the concern that he had been assigned tasks beyond his level and grade and was not adequately supervised. However, Mr. Sarwar’s performance of the task of preparing briefing notes for the meeting with the Minister of Youth from Azerbaijan left the second rebuttal panel in doubt about his capacity to develop his potential. He submitted a number of drafts in this assignment, all of poor quality, and seemed incapable of grasping and incorporating the amendments proposed by his supervisor, who eventually had to draft the document herself. The second rebuttal panel saw this failure as incapacity to internalize guidance and an impediment to Mr. Sarwar developing the required skills. Added to that, the second panel’s rating of Mr. Sarwar’s planning and organizing competency as “D - unsatisfactory” was based on his demonstrated failings in relation to delivering an e-newsletter of appropriate quality on time and his poor organization of the International Youth Day event and the launch of the World Youth Report. Its rating is a reasonable finding on the basis of the comprehensive information before it that Mr. Sarwar lacked the capacity to perform at the expected level.

79. Sight should not be lost of the fact that Mr. Sarwar was on a two-year probation, which was extended for an additional nine months to afford him an opportunity to fully address performance issues. The purpose of a probationary period is not only to assess whether the employee has the technical skills or ability to do the job, but also serves the purpose of ascertaining whether the employee is suitable and has the ability to fit in. The second rebuttal panel accepted the evaluation of the FRO that Mr. Sarwar’s teamwork competency required development, and thus was lacking.

80. In effect, therefore, the evidence establishes that while Mr. Sarwar had some potential to develop, he was lacking particularly in communication, writing, language, planning and organizing skills. There was a reasonable basis and sufficient proof establishing that Mr. Sarwar’s performance fell short of the expected standard. Given that the performance areas were core competencies, without which it was not possible to fulfill the tasks of the position, the deficiency was sufficiently serious to render the continuation of the employment

relationship untenable. The UNDT acknowledged as much, implicitly, in finding that the employment relationship may have irreconcilably broken down. There was accordingly a valid and fair reason for the termination of Mr. Sarwar's appointment.

81. Both the UNDT and the rebuttal panels were concerned that Mr. Sarwar may have been assigned tasks which were not appropriate to his level of appointment and sought to give special consideration to his relative inexperience and the fact that some of the tasks were challenging for a junior staff member who may not have always had access to support. As stated, performance standards generally fall within the prerogative of the Secretary-General and, unless the standards are manifestly unfair or irrational, other bodies should not usurp the function of setting performance standards. There is nothing on record to suggest that the standards and performance expectations to which Mr. Sarwar was held were manifestly unfair. The tasks at which he failed were relatively routine and key to his position.

82. The UNDT did not give much attention to Mr. Sarwar's performance weaknesses. It instead focused its enquiry on procedural irregularities throughout the evaluation and assessment process and concluded that they were cumulatively of a magnitude to render the termination unlawful. The UNDT's concerns related chiefly to the failure to follow the timelines of ST/AI/2010/5 and the effect such failures had on the opportunity for improvement afforded to Mr. Sarwar.

83. The UNDT's criticism of the first performance cycle was that the workplan was entered into Inspira eleven months after the commencement of the performance cycle, a mere month before the completion of the cycle. It considered that the failure to finalize a workplan in a timely manner made it difficult for the staff member to have clarity about performance expectations and any rating would be of questionable validity. Moreover, the delay had an effect on the rest of the stages of performance management, with the midpoint review taking place on 5 March 2013 and the first improvement plan being finalized on 20 March 2013, a week before the end of the cycle. The UNDT believed that these delays had a prejudicial effect in that they denied Mr. Sarwar a reasonable opportunity to demonstrate his suitability and to improve on his weaknesses. This, according to the UNDT, rendered the process "materially flawed and prejudicial" and thus unlawful.

84. The criticism of the UNDT is not without validity. Proper evaluation will be best served by adherence to the stipulated timelines. But the question is whether the procedural non-compliance materially and adversely affected the rights of Mr. Sarwar so as to deny him a proper performance assessment. The first rebuttal panel observed that the lack of compliance “nearly incapacitated” the FRO’s ability to use the cycle as a management tool. However, it did not do so completely. The evidence shows there were draft workplans in existence from May 2012 and that these were adjusted during the year. Mr. Sarwar was accordingly working towards a set of goals that did not differ significantly from those in the final approved workplan. Moreover, although the midpoint review only took place in March 2013 towards the end of the cycle, the performance cycle was in effect extended by eight months until November 2013. The delay was irregular in that it would have been better to have given Mr. Sarwar an earlier opportunity to improve, but he was not denied that opportunity for the remainder of his contract or in the eight month period after his contract was extended to finalize the performance issues.

85. The UNDT was equally critical of the second performance cycle. The FRO discussed work issues with Mr. Sarwar in March 2013, but only requested a workplan in October 2013. There were then problems with the draft, resulting in the workplan only being finalized eight months after commencement on 16 December 2013, the midpoint review taking place on 31 December 2013 and the performance improvement plan being approved on 12 February 2014. The second rebuttal panel accepted that Mr. Sarwar had contributed to the delays. However, Mr. Sarwar’s contract was extended for an initial six months on 18 March 2014. The end of cycle discussions took place on 25 April 2014 and 2 May 2014. The SRO gave his approval of the evaluation on 30 May 2014. In effect, Mr. Sarwar therefore had a four-month period to work in accordance with the second cycle performance improvement plan.

86. The UNDT’s finding that the decision to terminate the appointment was unlawful on account of these lapses is, with respect, formalistic. While obviously a workplan should be finalized at the beginning of a cycle, the requirement is not mandatory. Section 6.2 of ST/AI/2010/5 requires supervisors to meet with staff at the beginning of a cycle to work on a workplan. There is nothing in ST/AI/2010/5 that holds any failure to generate a workplan at the commencement of a cycle to be a procedural flaw resulting axiomatically in any subsequent decision to terminate an appointment being unlawful. Likewise, there is no such consequence for not holding a midpoint review in a timely manner. Section 7 of

ST/AI/2010/5 provides that the FRO and the staff member “should” hold formal and informal discussions and dialogue during the course of the cycle and “should” conduct a midpoint review, “usually” six months after the creation of the workplan. The use of the non-peremptory words “should” and “usually” confirms that the provisions of ST/AI/2010/5, in this respect at least, are directory not mandatory. The provisions appropriately recognize the need for flexibility to take account of the multitude of circumstances in which the instruction will find application. Additionally, ST/AI/2010/5 does not provide for any minimum duration for a performance improvement plan.

87. The determination of whether Mr. Sarwar was denied due process or procedural fairness, in the final analysis, must rest upon the nature of any procedural irregularity and its impact. Non-compliance with directory provisions normally will not result in illegality. Although invalidity may seem the logical result of procedural unfairness, that will be an extreme or unwarranted result in cases of less serious error or where the defect is cured by subsequent procedural evaluations. In other words, lesser procedural irregularities in the performance assessment process may be cured in the rebuttal process. Moreover, too rigid an application of procedural formalism will overburden the Administration. Variability and flexibility acknowledge that the requirements of legality and the principles of fairness need not be applied uniformly in every case. The standards of fairness are not immutable. What fairness demands is dependent on the context of the decision.

88. Hence, the ultimate question of procedural fairness is whether the staff member was aware of the required standard and was given a fair opportunity to meet it. There can be no denying that Mr. Sarwar was acquainted with what was expected of him, was properly assessed in numerous assignments, was afforded an opportunity to improve and failed to do so in key performance areas, thus demonstrating his unsuitability for the position. The second rebuttal panel, moreover, was correct in its observation that the time delay in the second performance cycle “did not inhibit the possibility to evaluate the performance of the staff member” and that a proper evaluation in terms of Section 8.3 of ST/AI/2010/5 had been conducted by the FRO.

89. In the premises, there is no basis for holding the decision to separate Mr. Sarwar from service as unlawful. The appeal of the Secretary-General must be upheld. It follows that the cross-appeal seeking reinstatement and an increased award of in-lieu compensation must be dismissed.

90. The UNDT also awarded USD 5,000 moral damages for the harm Mr. Sarwar allegedly had suffered due to failures of due process. As there were no material procedural irregularities, there is no basis for any award of compensation.

Judgment

50. The appeal is upheld and Judgment No. UNDT/2016/178 is hereby vacated. The cross-appeal is dismissed.

Original and Authoritative Version: English

Dated this 14th day of July 2017 in Vienna, Austria.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Halfeld

Entered in the Register on this 5th day of September 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar