



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

JENNINGS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is a former staff member in the Procurement Division of the Department of Management in New York. She entered the service of the Organisation on 13 March 2008 on an eleven-month fixed-term contract. She contests the decision to separate her from service following the non-renewal of her fixed-term appointment. The Applicant asserts, *inter alia*, that she was harassed and discriminated against and that her performance evaluation process was not in accordance with the established procedures. She requests reinstatement with retroactive effect and compensation for the damage to her career and reputation or, in the alternative, fifteen years' net base pay and pension benefits.

2. On 16 July 2009 the Tribunal rendered a judgment on a suspension of action request by the Applicant (*Jennings* UNDT/2009/002), rejecting the request, and on 23 November 2009 it rendered a judgment on the Respondent's request for an extension of time to file a reply (*Jennings* UNDT/2009/080), granting a one-month extension. Five case management orders were issued in this case in response to various motions and requests: Orders No. 49 (NY/2010) (15 March 2010), No. 173 (NY/2010) (19 July 2010), No. 179 (NY/2010) (26 July 2010), No. 205 (NY/2010) (16 August 2010), and No. 264 (NY/2010) (4 October 2010). Two case management hearings were held on 10 March and 4 August 2010, respectively.

3. The application, the Respondent's reply, and subsequent submissions constitute the pleadings and the record in this case. By Order No. 205, in light of the strong objections expressed by the Applicant to a hearing on the merits and cross-examination of witnesses, and with the consent of the parties, the Tribunal ordered that the matter be decided by the Tribunal on the papers before it and without any further hearings.

Preliminary matters

Withdrawn request for recusal

4. On 12 December 2009, after the rendering of *Jennings* UNDT/2009/080, by which the Tribunal granted the Respondent an extension of time to file a reply to the application, the Applicant filed a motion requesting my recusal from this case. The Applicant's request was transmitted to the President of the Dispute Tribunal for consideration pursuant to art. 28.2 of the Rules of Procedure. However, on 16 December 2009, before the matter was considered by the President of the Dispute Tribunal, the Applicant withdrew her request. On 11 February 2010, the Nairobi Registry of the Dispute Tribunal communicated to the New York Registry that Judge President Boolell considered that, in light of the withdrawal of the Applicant's request, there was no matter pending under art. 28 of the Rules of Procedure and there was no impediment to the further review and determination of the case by the Dispute Tribunal. In light of the withdrawal and this communication I resumed the proceedings.

Hearings

5. On 24 June 2010 the Registry informed the parties, by email, of the Tribunal's view that a hearing on the merits would assist the Tribunal with the determination of this case. The hearing was set for 29 July 2010 and both parties were requested to confirm their availability. On 25 June 2010, in response to a communication received from the Applicant, the Registry sent an email explaining the purpose of the hearing on the merits, which stated, *inter alia*:

The purpose of the hearing scheduled for 29 July 2010 is to hear the parties' oral arguments and to receive oral evidence from witnesses, if any. The hearing is intended to give you, and the [R]espondent, an equal opportunity to present oral arguments on the issues of fact and law and to elaborate on your written submissions in order to assist the Judge with the adjudication of the matter.

6. On 26 June 2010 the Applicant replied to the proposed hearing as follows: “I do not require nor do I desire ... a hearing on the merits and therefore ‘object’”. The Applicant reiterated her objection in a further submission dated 7 July 2010, in which she stated that “[t]he Applicant maintains that the above referenced hearing were it to take place serves only to benefit the Respondent and is therefore biased (the [R]espondent is being given ‘another bite at the apple’ so to speak)”. The Applicant also reiterated that her “written material and supporting documentatio[n] are more than sufficient to stand on their own”. In view of the strong objections expressed by the Applicant to a hearing on the merits, the Tribunal ordered by Orders No. 173 and No. 179 that the hearing scheduled for 29 July 2010 (and subsequently rescheduled for 4 August 2010) be a case management hearing the purpose of which would be to address outstanding matters and not to receive oral evidence. The Tribunal also ordered the Respondent to file and serve written statements by witnesses that he had previously proposed to call. These signed statements from the Applicant’s former supervisors were filed on 29 July and 4 August 2010. The Applicant subsequently filed several submissions in response, commenting on these statements and further addressing the issues in this case.

7. Although the statements filed by the Respondent pursuant to the Orders No. 173 and No. 179 were signed and made “to the best of [each of the proposed witnesses’] knowledge and belief” and identified each of them by name and title, the purpose of these statements was to provide the Applicant with the opportunity to review the proposed evidence of the five witnesses that the Respondent intended to call in order for the Applicant to determine her position regarding a hearing on the merits. As a result of the Applicant’s position (explained below), these witnesses did not appear before the Tribunal and were not subjected to cross-examination. The statements filed before the Tribunal were neither witnessed nor attested to. Having considered the circumstances under which these statements were presented to the Tribunal, the Tribunal decided not to admit them as evidence and therefore they have not been used to make any determinations either for or against the Applicant. The Tribunal notes, however, that *had* these statements been admitted as evidence—

which, in the view of the Tribunal, would have required further affirmation and attestation—they would have supported the Respondent’s case as they appeared to be consistent with each other and appeared to be corroborative of the contemporaneous records before the Tribunal. This, however, was not required as the documentary evidence before the Tribunal is sufficient to conclusively determine this matter, as explained below.

8. At the case management hearing of 4 August 2010, bearing in mind the challenges presented by the absence of sworn testimony and because the Applicant was self-represented, I explained at length the significance of oral testimony and the right to cross-examination, and, specifically, that cross-examination is the most effective way to challenge witness testimony. The Applicant stated that she understood this, but declined to cross-examine any witnesses at any hearing, to provide any witness statements, or to call any witnesses, stating that her witnesses were afraid of exposing themselves and jeopardizing their careers. Throughout the proceedings before the Tribunal, the Applicant maintained that she did not wish to cross-examine the Respondent’s witnesses, asserting that they lacked any credibility. The Applicant further stated that if the Respondent’s witnesses were to be called to testify, the hearing would be a farce. The Applicant stated that she expected the Tribunal to render its judgment based on the parties’ written submissions.

9. Following the case management hearing of 4 August 2010, the Applicant sent emails to the Registry on 4 and 6 August 2010 stating that “[t]he witness statements from the [R]espondent at this point in the [A]pplicant’s case are really quite abounding and ... she has no plans of reading more falsities”. In this correspondence, the Applicant requested a “closing judgement in this case”.

Facts

10. The Applicant has more than thirty years of experience in procurement operations. On 13 March 2008, she accepted an offer of appointment with the United Nations Procurement Division for eleven months as a P-2 level Associate Officer.

11. The Applicant began working on 20 May 2008 and her contract was set to expire on 19 April 2009. Her contract was subsequently extended until 17 July 2009 to allow the Applicant to complete her electronic performance evaluation system (“e-PAS”) report. During her employment with the Procurement Division, the Applicant worked in three different sections and under three different team leaders. The transfers from one direct supervisor to another were done at the Applicant’s request. Her team leaders and the relevant dates of their supervision over the Applicant are listed below:

- a. First team leader (Procurement Officer, Corporate and IT Procurement Section)—from 20 May to 7 September 2008;
- b. Second team leader (Chief, Procurement Management Section)—from 8 September to 9 November 2008; and
- c. Third team leader (Team Leader, Field Supply Team, Peacekeeping Procurement Section)—from 10 November 2008 to 17 July 2009.

12. The Applicant and her first team leader signed off on her work plan on 28 May 2008. The Applicant’s performance in the following months, however, was viewed by her supervisors as sub-par. The Applicant had a series of formal meetings with her managers in September and October 2008 on how to improve her performance and relationship with her colleagues and supervisors. In September 2008, at the Applicant’s request, she was moved to another unit in her section, where she commenced her work under the supervision of her second team leader.

13. On 5 November 2008 the Applicant’s second team leader (i.e., her direct supervisor at the time) signed off on her mid-point performance review, which contained comments critical of the Applicant’s performance and concluded that she was not performing at the expected level. The Applicant signed off on the mid-point review three months later, on 10 February 2009. The mid-point review stated:

[The Applicant] joined the UN on 20 May 2008 and started working in the Management Services Team. On 8 September 2008, she was transferred to the Infrastructure Support Team.

[The Applicant] has not adequately demonstrated the analytical skills required at her level. It has become apparent as her supervisor that she has difficulties grasping the concepts of the UN procurement procedures and the contents of the work assigned to her. She has also shown weakness in multi-tasking and takes too long to complete assigned tasks. Among other examples, this became particularly evident since she did not even initiate working on [a Request for Proposal] for On-call Construction for five weeks. This led to weekly meetings being held since the beginning of October in order to monitor her performance and ensure timely delivery of assigned tasks. Since these meetings started, the work output of [the Applicant] has somewhat improved, however is still below expectation.

When receiving training or having things explained to her, [the Applicant] does not pay proper attention. [The Applicant] has a negative and confrontational attitude. This attitude has not been conducive to her work output nor to her working relationships.

It should be noted, however, that [the Applicant] has maintained courteous working relationships with requisitioners and offices away from headquarters.

In short, [the Applicant] has not been performing at the level expected of a P2 Procurement Officer. The transfer to a new section may offer [the Applicant] an opportunity to finally demonstrate her procurement skills.

14. On 10 November 2008, again at the Applicant's request, she was transferred to another section (Peacekeeping Procurement Section) in the Procurement Division.

15. The Applicant signed off on her self-appraisal section of the end-of-cycle appraisal in the e-PAS report on 31 March 2009, but the system was re-set in May 2009 to accommodate the Applicant's request to include additional supervisors so that they could enter their comments directly into the system.

16. On 8 May 2009 the Applicant's second team leader sent an email to the e-PAS Support Team of the Office of Human Resources Management ("OHRM"), requesting it to "add an additional supervisor to [the Applicant's] e-PAS" because the Applicant "since her midpoint review started working in a new team". On

12 May 2009 the Applicant was informed that, pursuant to her requests to change her supervisors in her e-PAS report, her e-PAS for 2008–2009 was “rolled back to the start end-of-cycle stage”. Therefore, the “ownership” over the end-of-cycle stage appraisal (i.e., technical ability to finalise the end-of-cycle stage) was again with the Applicant, who needed to sign-off on the section requiring self-appraisal before the e-PAS system could transfer the “ownership” over the e-PAS report to the Applicant’s supervisors. The records indicate that the Applicant did not sign off on her e-PAS self-appraisal until mid-July 2009.

17. On 28 May 2009 the Applicant was informed by a letter signed by the Administrative Officer, Department of Management, that her contract would not be extended beyond 30 June 2009. The letter stated:

I regret to inform you that your present fixed-term contract, which expires on 30 June 2009, will not be extended beyond 30 June 2009. This letter is therefore intended to comply with the requirement of providing you with the 30-day notice in respect of our inability to renew your appointment.

On behalf of the Department of Management, I would like to thank you for your work and wish you the best in your future endeavours.

18. On 17 June 2009, approximately three weeks after she was informed of the non-renewal of her contract, the Applicant lodged a complaint with the Ethics Office, alleging, *inter alia*, that the non-renewal of her contract was motivated by retaliation for having reported misconduct.

19. By letter to the Secretary-General, dated 23 June 2009, the Applicant requested review of the decision not to renew her contract, stating, *inter alia*:

I am writing to you pursuant to the provisions set forth in Staff Rule 111.2(a) in order to request a review of the administrative decision contained in the communication dated 28 May 2009 ... advising me of my separation from service as of 30 June 2009.

I wish to contest this decision since the non-renewal of my fixed term appointment is improperly motivated and appears to be in retaliation for having complained about various acts of harassment

by my immediate supervisors. These issues were raised with the chief of the Procurement Division by my counsel in order to seek a resolution, but soon after I was advised I would be separated from service. I believe this [is] an act of retaliation and have brought the case to the attention of the UN Ethics Office, where it is currently under review.

20. On the same day, the Applicant filed a request with the Joint Appeals Board (“JAB”) for a suspension of action on the decision not to renew her fixed-term contract. The JAB issued its report on 26 June 2009, recommending, *inter alia*, that the implementation of the decision not to renew her contract be suspended “until such time as her appeal has been considered on the merits or until 31 August 2009, whatever is earlier”.

21. On 29 June 2009 the Ethics Office issued a report on the Applicant’s case, declining to find a *prima facie* case of retaliation. The Ethics Office stated in its report, *inter alia*:

1. On 17 June 2009, [the Applicant] ... lodged a complaint of retaliation with the Ethics Office pursuant to Secretary-General’s Bulletin ST/SGB/2005/21, “Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations”.

2. In support of her request for protection, [the Applicant] stated that she had reported possible corruption in the Procurement Division (PD) to a member of the Panel of Counsel as well as harassment by her supervisor to senior managers in the PD, including the Director. [The Applicant] alleged that the unfair evaluation she received in the mid term review of her performance as well as the subsequent decision not to renew her contract were retaliatory actions taken as a result of her having reported misconduct.

...

13. Based on the above and after a careful review of all the information received, the Ethics Office is unable to find convincing evidence to support a finding that [the Applicant’s] reporting of alleged harassment by [her first team leader] was a contributing factor to either the allegedly unfair performance evaluation by [her second team leader] or the decision not to renew her contract.

...

15. The detailed review of all the documents and information provided to the Ethics Office points to the conclusion that while the complainant has engaged in a protected activity within the scope of the Bulletin [ST/SGB/2005/21], the information provided and obtained does not indicate that the alleged retaliation occurred because of the protected activity.

16. The Ethics office does not therefore find a prima facie case of retaliation.

22. By letter dated 30 June 2009 the Deputy Secretary-General informed the Applicant of the Secretary-General's decision to grant her request for suspension of action on the decision not to renew her fixed-term appointment until 17 July 2009 "in order that a final [performance evaluation] for 2008–2009 may be finalized and issued to [her]".

23. On 10 July 2009 the Applicant's third team leader filed a note-to-file stating:

On 1 April 2009 ... the previous and current direct supervisors [i.e., the second and third team leaders] of [the Applicant] completed the comments on the end-of-cycle report of [the Applicant's] e-PAS for the period 20 May 2008 through 30 March 2009. On the same date, [the second and third team leaders] approached [the Applicant] and requested to discuss her e-PAS with her. It was suggested—as it is difficult to change supervisors in the system—that [the second team leader] would remain First Reporting Officer and that the End-Of-Cycle comments would be made by the current supervisor [i.e., the third team leader]. [The Applicant] declined to participate in such discussions and insisted that the supervisors be changed in her e-PAS before any discussions be held.

[The second and third team leaders] advised [the Applicant] that they would explore whether this could [be] arranged and that they would be to accommodate her request.

On 1 April 2009, [the second team leader] sent an e-mail to ITSD to request such change. Subsequently, ITSD advised that a detailed request would have to be submitted to HR Help Desk. On 8 May 2009, a request was sent to HR Help desk to replace [the second team leader] with [the third team leader] as First Reporting Officer and add [the Chief of the Applicant's Section] as Second Reporting Officer. This request was copied to [the Applicant] and it was

explicitly indicated in such email that the e-PAS would have to be rolled back to Start-End-of-Cycle and that [the Applicant] would be the activity owner from that point on.

On 12 May 2009, e-PAS support team sent an email to [the Applicant] advising that the intended changes can now be done. [The Applicant] should open the e-PAS, edit it and proofread carefully before submitting it forward to her Reporting Officers. In addition, on 20 May 2009 [the Applicant] was advised by email by [the second team leader] that the e-PAS had been rolled back and that supervisors can now be changed. Since 12 May 2009, the e-PAS has been with [the Applicant] for action and was released to the [third team leader] on 7 July 2009.

24. On 13 July 2009 the Applicant filed an application with the Dispute Tribunal seeking further suspension of the implementation of the administrative decision of 28 May 2009 not to renew her fixed-term appointment. The Applicant submitted that the decision not to renew her appointment was improperly motivated and retaliatory and that she would suffer irreparable harm as a result of the non-renewal of her contract. The Applicant submitted that her e-PAS report for the period of May 2008 to June 2009 had not been completed and her right of rebuttal had not been exercised. The Applicant stated: “As of today I have not received my completed e-PAS and the present suspension [i.e., until 17 July 2009] would not allow me sufficient time to exercise my right to rebut the report if necessary”.

25. On 15 July 2009 the Applicant’s end-of-cycle appraisal and the e-PAS report were finalised and signed by the Applicant. As a result of the Applicant’s request to include all of her first and second reporting officers, the finalised e-PAS report contained signatures and comments of three first reporting officers (the Applicant’s first, second, and third team leaders), one second reporting officer (the Chief of the Applicant’s Section), and two additional supervisors (the Applicant’s second team leader and the Chief of the Headquarters Procurement Section). The Applicant was rated as partially meeting performance expectations. The comments section in the e-PAS report stated (emphasis in original):

Additional supervisor(s)

Supervisor 1 [second team leader] comments

I have no additional comments, other than those stated in the mid term review

Supervisor 2 [Chief of the Headquarters Procurement Section] comments

I have no additional comments to make, other than to agree with [the Applicant's second team leader]'s comments made during the Mid Point Review

First Reporting Officer

**Comments on the Work Plan Accomplishment –
Goals/Performance Expectations**

Comments by ... team leader from 8 September 2008 to 10 November 2008 [second team leader]:

See comments made in Mid-point Review. As [the Applicant] moved to another team not long after this review, [the team leader] does not have any further comments.

Comments by ... team leader from 10 November 2008 to 30 June 2009 [third team leader]:

In mid November 2008 [the Applicant] was transferred to the Field Supply Team. From that time until the 30 June 2009, [the Applicant] has demonstrated strong interest in the procurement activities and goals of the team. [The Applicant] accomplished providing timely responses to the team's clients and has accomplished several procurement assignments in a satisfactory manner. [The Applicant] has a good working relationship with the team members and consults for advice whenever required. During the above mentioned period she concluded several case presentations representing different missions for the procurement of a diverse range of goods and services such as provision of fuel, security services, Letters of Assist, etc. In addition she processed Invitation to Bid for the purchase of security goods and participated in a pre-bidders' conference for the provision of Ration Packs w[h]ere she demonstrated solid integrity.

The below ratings represent a consolidated evaluation by both sections for the entire reporting period.

First Reporting Officer

...

Comments on Values and Competencies

[The Applicant] is fully competent in some areas and developing in others.

...

Overall Comments

[The Applicant] had problems with her performance in the first section of the reporting period, as described in the mid-point review. Since she moved to Field Supply Team her performance has improved.

Second Reporting Officer's comments

I agree with the comments above and with the overall rating.

Staff member's comments

To All Concerned.

Please be advised that I plan to "rebut" appraisal.

26. The Applicant's overall rating was "[p]artially meets performance expectations". She was rated as "Fully Competent" with respect to integrity, respect for diversity and gender, teamwork, accountability, client orientation, and commitment to continuous learning. She was rated as "Developing" with regard to professionalism, communication, planning and organization, creativity, and technological awareness.

27. On 16 July 2009 the Tribunal rendered *Jennings* UNDT/2009/002, rejecting the application for a suspension of the contested administrative decision. The Tribunal found that the Applicant failed to satisfy the criteria established in art. 2.2 of its Statute.

28. On 17 July 2009 the Applicant filed a complaint of harassment and abuse of authority with OHRM against the Chief of the Procurement Division and two of her former team leaders. On 21 July 2009 the Applicant received an email from OHRM, stating that her complaint was being forwarded to the Under-Secretary-General for Management for action pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The Respondent

submitted to the Tribunal that OHRM had thereafter concluded its review and found that there were insufficient grounds to warrant a formal fact-finding investigation.

29. On 30 July 2009 the Applicant received a response to her request for administrative review. The letter stated that the decision not to renew the Applicant's appointment beyond its expiration date of 30 June 2009 was taken in accordance with the relevant rules and procedures. The Management Evaluation Unit found that the decision not to renew the Applicant's contract beyond its expiration was not an act of retaliation, which was confirmed by the Ethics Office's review.

Scope of the case

30. The scope of the Tribunal's review in this case is limited to the issue addressed in the Applicant's request for administrative review, namely the non-renewal of her contract.

31. In her submissions the Applicant raised two additional matters, namely the grade level given to her when she joined the Organisation and the conduct of her former Counsel in relation to proceedings that preceded her application to the Dispute Tribunal.

32. With respect to the complaint of harassment and abuse against the Applicant's supervisors that she filed on 17 July 2009, although the Applicant's submissions in this respect are relevant to the present case, the Tribunal finds that the Administration's actions in response to this complaint are outside the scope of this case and the Applicant's claims with respect to the handling of the complaint filed on 17 July 2009 are not receivable as they have not been submitted for administrative review. Requests for administrative review and management evaluation are mandatory first steps in the appeal process (*Syed* 2010-UNAT-061). The Applicant's complaints against her former Counsel from the Panel of Counsel are also not properly before the Tribunal. The Applicant's former Counsel's alleged professional

misconduct is not an administrative decision within the meaning of art. 2.1 of this Statute and, in any event, is not a matter for this Tribunal.

33. The issue of the Applicant's grade level on her recruitment is also not properly before the Tribunal as this claim was not the subject of the Applicant's request for administrative review. The Tribunal finds it appropriate to observe that, even if this claim were receivable, the Applicant would not have succeeded on it because she was offered a contract at the P-2 level and accepted this offer. Even if some promise was given to the Applicant prior to her signing the contract, as she alleges, it would have no effect as it pre-dated the written contract signed by the Applicant and the terms stated therein. A promise could not override the clear words of the letter of appointment signed subsequently (*Hepworth* UNDT/2010/193).

Applicant's submissions

34. Below is a summary of the Applicant's principal contentions concerning only the relevant matters within the scope of the case:

a. The decision not to renew the Applicant's contract with the Procurement Division was procedurally defective and motivated by improper considerations. The Applicant was subjected to harassment and discriminatory treatment and her separation was an act of retaliation for having filed complaints against her supervisors.

b. The Tribunal is not being asked to reevaluate the Applicant's performance or to substitute its views for those of the supervisors, but rather to see whether the process followed to arrive at the final assessment met the requirements of due process and fundamental fairness.

c. The Applicant's first and second team leaders were biased in their treatment of the Applicant and the harassment only intensified when she was transferred from one unit to another. While the Applicant worked under her second team leader, the Chief of the Procurement Division began to request

weekly “work output performance” meetings with the Applicant to discuss her assignments. The Applicant’s second team leader also began to request “weekly output” meetings to discuss her work, during which her former (first) team leader was present. These meetings were separate and apart from those requested by the Chief of the Procurement Division. Thus, on a weekly basis the Applicant had two separate meetings with different supervisors about her work. No other staff member in the Procurement Division was subjected to such level of supervision. The weekly “work output performance” meetings were based on the premise that there had been a “work output” issue while working with the previous team leader. However, in reality there were no “work output performance” issues as all work assigned while working with her prior supervisor had been completed without reassignment and on many occasions the Applicant had to ask for additional work to be assigned. These meetings were nothing more than subtle forms of harassment and abuse and were used as a vehicle to harass and demean the Applicant.

d. During her time in the Procurement Division, there were emails sent multiple times a day that monitored her time and denigrated her on the bases of her performance and nationality. The Applicant also had her work sabotaged by her supervisors to demonstrate her incompetence (her supervisor modified her work documents and forwarded the revised documents to other managers). During this period the Applicant became extremely frustrated, defensive and began to suffer serious health concerns. It appeared to the Applicant that “all parties had banned [sic] together against [her] for what [she] could only surmise was for [the Applicant’s] demise and the instrument of choice to effectuate that end would be [her] ‘work output’”.

e. As a result of the Applicant’s many protests, after approximately two months of working under her second team leader, the Applicant was informed that, in the furtherance of a fresh start, an out-of-section transfer would be granted. On 10 November 2008, the Applicant began her new work

assignment in the Peacekeeping Section of the Procurement Division. During her assignment, the Applicant was provided with performance feedback that was complimentary, however goal achievement objectives were never discussed and an individual work plan was never established. The Applicant's new supervisor in the Peacekeeping Section (i.e., her third team leader) was another member of the group of the Chief of the Procurement Division and this transfer was nothing more than a ruse, a disingenuous maneuver effectuated to give the appearance of assistance rendered. Although the performance assessment received from the third team leader was by far the fairest the Applicant received, however, it was still unduly influenced by the Chief of the Procurement Division and therefore inaccurate.

f. The Applicant's performance evaluation was not done objectively and was not in accordance with the established procedures. The Applicant had no discussions with her team leaders about her work goals, planning objectives, or work plan. On 5 November 2008 a mid-point performance review, unfavourable to the Applicant, was executed by her second team leader, who had only worked with the Applicant for two months. This review was performed without consultation with the prior first reporting officer (i.e., first team leader) and was employed without having any discussions concerning the Applicant's work goals. The mid-point review was the first time the Applicant was provided with any performance feedback. A work plan had never been established and the objectives of the work unit were never understood. The Applicant signed the assessment after many months of deliberation and is still in "complete disagreement" with it.

g. The Applicant's e-PAS was not finalised until after a decision had been taken to separate her. The Applicant was not responsible for her e-PAS not being complete until mid-July 2010. She disagrees with the assessment of her performance in the final e-PAS report and maintains that a new review with a change in performance period and reporting officers should be allowed

or, alternately, her assessment for cycle 2008–2009 should be discarded in its entirety.

Respondent's submissions

35. The Respondent's principal contentions may be summarised as follows:

a. The Applicant had no expectancy of renewal of her fixed-term contract. No representations had been made to the Applicant that her contract would be renewed. The Applicant's contract was not renewed for two reasons: first, the Applicant's performance did not meet the performance expectations for a P-2 Associate Officer in the Procurement Division; and, second, management was required to cut staffing as a result of an anticipated reduction in General Temporary Assistance funding.

b. The Applicant failed to attain the performance standards expected of her and failed to respond to efforts by her supervisors to assist her in improving the standard of her work and the level of output. Despite the fact that the Applicant joined the Organisation on a contract of less than one year and therefore there was no obligation on the Respondent to follow the procedures set out in ST/AI/2002/3 (Performance appraisal system), the Respondent nevertheless ensured that the Applicant had a work plan, that a mid-point review was conducted and, ultimately, that a final e-PAS was delivered. The Applicant's first team leader explained the work plan of the Division and the purpose of the work plan to the Applicant. Contrary to the Applicant's own assertions that she had no performance feedback, she acknowledged that she had regular work output performance meetings with her supervisors. Although her supervisors provided a timely evaluation of her performance, the Applicant, without any valid justification, declined to participate in end-of-cycle discussions and failed to timeously finalise the e-PAS report, delaying its completion.

c. The contested decision was not an act of retaliation and did not result from harassment or discriminatory treatment. There is no evidence that the Applicant's allegations of harassment were a contributing factor to the decision not to renew her contract. Contrary to the Applicant's submissions, the Procurement Division functions in accordance with the highest standards of professionalism and integrity. The Applicant's suggestion that performance meetings were vehicles to harass and demean are not substantiated. At all times these meetings were conducted with the utmost professional courtesy and respect. The Applicant's assertions concerning the conduct of her former supervisors are unsubstantiated.

Consideration

General procedures for performance evaluation

36. A fixed-term appointment does not carry any automatic expectancy of renewal. However, all decisions, including a decision not to renew an appointment, must be based on proper grounds and be in conformity with due process. An expectancy of renewal may be created by countervailing circumstances, such as a violation of due process, arbitrariness or other extraneous motivation on the part of the Administration (*Ahmed* UNDT/2010/161). Whenever the Administration decides not to renew an appointment on the grounds of poor performance, the Tribunal has to verify if the Administration has complied with the relevant procedures (*Eldam* UNDT/2010/133). The Tribunal must also examine whether there was a sufficient basis to conclude that, because of the identified performance shortcomings, it was appropriate not to renew the Applicant's contract. If this decision was reasonably made on the material available and was not affected by any improper consideration or the omission of a significantly relevant consideration or by the making of any significant error of fact or law, then it cannot be held to be made in breach of the contractual obligations of the Organisation (*Riquelme* UNDT/2010/107).

37. Although the Applicant's appointment was for a period of less than one year and therefore the Administration was not required to evaluate her performance under the procedures laid out in ST/AI/2002/3 (see sec. 1), the parties accept that the Applicant's supervisors chose to evaluate her performance under the provisions of that administrative instruction. Once the procedures under ST/AI/2002/3 are triggered, they must be followed through. To summarise some of the salient features of the e-PAS process as promulgated in ST/AI/2002/3, performance expectations are agreed in the work planning phase (sec. 6) and at the end of the performance period the first reporting officer and staff member meet to discuss the overall performance (sec. 9.1). After this has been done, the first and second reporting officers and the staff member sign the e-PAS via which the staff member's performance is evaluated and rated (sec. 10), without prejudice to the staff member's right to initiate a rebuttal process (sec. 9.4). The evaluation is placed on the staff member's official status file (sec. 11.5). Where a staff member disagrees with the performance rating given at the end of a performance period, he or she may submit a written rebuttal statement in accordance with and pursuant to sec. 15. This statement is placed on the staff member's file, as is management's written reply to it. Thereafter, a rebuttal panel considers the matter and provides a written report, with reasons, on whether the original appraisal rating should be maintained or not. The rebuttal panel makes a binding determination of the appropriate performance rating and makes a notation on the final appraisal section of the e-PAS form, marking any change in the rating as a result of the rebuttal. The rebuttal panel's report is also placed on the staff member's file and the rating resulting from the rebuttal process cannot be appealed (sec. 15.4).

38. As soon as performance shortcomings are identified, appropriate steps to rectify the situation should be taken, in consultation with the staff member (ST/AI/2002/3, sec. 8.3). Accordingly, performance improvement measures may be instituted based on the ongoing performance evaluation, including mid-point review, and prior to the finalisation of the e-PAS report. As fixed-term contracts generally do not carry an expectation of renewal, a rating below "fully successful", received *after* the implementation of performance improvement measures, provided that the

performance evaluation procedures leading to this decision were followed, could be a sufficient basis not to renew a staff member's contract.

Applicant's performance rating

39. There is no basis for the Tribunal to question the assessment of the Applicant's performance as "partially meet[ing] performance expectations". All of the Applicant's supervisors agreed that her performance was not up-to-par. The Applicant's supervisors' comments in her final e-PAS report appear moderate and balanced compared to the Applicant's contentions of alleged personal animus toward her. This assessment was confirmed by the Rebuttal Panel and the Tribunal must accept this rating as final (see ST/AI/2002/3, sec. 15.4, which states that "[t]he rating resulting from an appraisal that has not been rebutted, or from the rebuttal process, shall not be subject to further appeal").

Performance evaluation and the decision not to renew the Applicant's contract

40. It is desirable and, indeed, required, under sec. 8.3 of ST/AI/2002/3 that as soon as performance shortcomings are identified they be brought to the attention of the staff member and improvement measures be instituted. If the performance of a short-term staff member does not improve, it is a sufficient ground not to renew a contract. The Administration is not required to institute another round of improvement measures and renew a short-term contract further just because the staff member has failed during the duration of the contract to respond positively to the performance improvement measures.

41. An individual work plan was established for the Applicant and signed off by her on 28 May 2008, approximately a week after she joined the Procurement Division. Within the first months of the Applicant's employment, performance shortcomings were identified. The Applicant's supervisors brought them to the Applicant's attention and discussed them with her in a series of meetings beginning September 2008. On the record before it, including contemporaneous notes and

emails, the Tribunal finds that the purpose of these meetings was to provide the Applicant with feedback concerning her performance and ways to improve it and to give her guidance as to her work objectives.

42. There is an extensive documented record before the Tribunal showing the Administration's efforts to accommodate the Applicant in improving her performance. The Tribunal finds that the Applicant's supervisors instituted, in consultation with the Applicant, appropriate, reasonable, and timeous measures to improve her performance, which included two transfers— at the Applicant's request and in consultation with her—to different units and different supervisors. The fact that the Applicant worked under three supervisors in the course of approximately one year provides proof of management's serious concerns with her performance and of the efforts put in place to address the situation.

43. There is no doubt that at the time of and in the months prior to the decision not to renew the Applicant's appointment she was aware of her supervisors' and management's negative views concerning her performance. The dissatisfaction with the Applicant's performance was well documented since September 2008. The Respondent's submissions in this respect are consistent with the record before the Tribunal. Having found that the efforts to improve the Applicant's performance did not bear fruit, the Administration did not have to institute a second round of improvement measures and renew the Applicant's short-term contract further in order to do so.

44. Although the Applicant's e-PAS was not finalised until after a decision had been taken to separate her, it is an established fact that the Applicant was given the final e-PAS report for her final comments and signature approximately two weeks before she was notified, in writing, of the decision not to renew her contract. The Tribunal finds that the report was not finalised due to the Applicant's failure to follow the procedures established for the end-of-cycle appraisal in the e-PAS report. The Applicant had the "ownership" of the e-PAS report in the period of 12 May to 7 July 2009—this is confirmed in the parties' submissions and in the record before the

Tribunal, including emails between March and July 2009 which dealt with the completion of the Applicant's e-PAS. In her submissions, the Applicant did not seek to dispute that the e-PAS report was with her between 12 May and 7 July 2009 and that it required further action by her to be finalised, submitting instead that no one properly explained to her the procedures for finalising it. The Tribunal is not satisfied with this explanation. The Applicant was informed of the action she needed to take and obviously had accessed the e-PAS throughout her employment, as she initiated her work plan in May 2008 and reviewed and signed off on her mid-point review in February 2009. Further, she was also aware of the significance of the e-PAS procedure because she insisted in April 2009 that certain changes be made to the list of supervisors as it appeared in her e-PAS report.

45. Section 3.3 of ST/AI/2002/3 provides that if the staff member remains in the same functions but serves under successive supervisors during the year for periods of less than six months, the Applicant's supervisor at the end of the performance cycle shall complete the appraisal in consultation with the prior supervisors. Thus, it was not a violation of the performance evaluation procedures for the Applicant's third team leader to consult with the Applicant's first and second team leaders when finalising the e-PAS report and it was entirely appropriate to include the comments of the Applicant's prior supervisors in the final e-PAS report.

46. In her submissions, the Applicant raised numerous claims against various individuals, alleging that the decision not to renew her contract was due to a conspiracy against her and due to retaliation for her complaints filed with OHRM and the Ethics Office. The Tribunal is also not persuaded by this submission. The Applicant's complaints to OHRM and the Ethics Office were filed *after* she had been informed that her contract would not be renewed, and therefore could not have affected the contested decision. Furthermore, as explained above, the Tribunal is persuaded that the decision not to renew the Applicant's contract was not a result of retaliation but was based on the management's evaluation of the Applicant's performance. The Tribunal also finds that this evaluation was conducted properly.

47. The Tribunal therefore finds that the contested decision was lawful.

Delays in the rebuttal proceedings

48. On 23 July 2009 the Applicant initiated an e-PAS rebuttal process pursuant to ST/AI/2002/3. On 6 April 2010, in response to the Applicant's enquiry, the Registry sent an email to the Applicant stating that "[p]roceedings before the Dispute Tribunal are separate and independent from the proceedings before the e-PAS rebuttal panel" and that the Applicant's pending application before the Dispute Tribunal "did not preclude [her] from proceeding with [her] e-PAS rebuttal".

49. On 24 and 25 June 2010 the Tribunal requested the Applicant to provide information concerning the status of her e-PAS rebuttal proceedings and whether it was expected that they would be completed before 29 July 2010. The Applicant submitted that, aside from brief email exchanges with the Chairman of the Rebuttal Panel in October 2009 and April 2010 concerning the possible dates for the e-PAS rebuttal hearing, no further developments had taken place.

50. The Rebuttal Panel's task is to evaluate, relying on the knowledge and experience of its members, whether or not the substantive achievements of the staff member have been accurately reflected in his or her performance rating as against the agreed individual and team goals over the reporting period, and whether the evaluation procedures were followed. The Tribunal's findings, on the other hand, will generally be limited to whether or not the performance evaluation was carried out in an improper, irregular or otherwise flawed manner and whether the resulting decision was tainted by undue considerations or was manifestly unreasonable. The roles of the Tribunal and the Rebuttal Panel are therefore distinct and while rebuttal procedures are ongoing the Tribunal cannot accept the contested performance evaluation as final as it would be prejudicial to the staff member and not in the interests of justice.

51. In Order No. 173 of 19 July 2010 the Tribunal directed the Respondent to file a submission explaining the reasons for the delay and stating when the report of the

Rebuttal Panel was expected to be completed. Further, in Order No. 179, dated 26 July 2010, the parties were directed to “exercise their best efforts to schedule and conduct the Rebuttal’s Panel hearings as soon as possible”.

52. On 29 July 2010 the Respondent filed a submission explaining the reasons for the delay in finalising the rebuttal proceedings. The Respondent submitted that the Rebuttal Panel was constituted in August 2009 and met in October 2009. At that meeting, the Panel decided to “speak to the Applicant before meeting with the representatives from management”. No meeting took place, however, as the Chairman of the Panel was away on business in the second half of October and the first half of November 2009. In “early 2010”, the Chairman of the Panel contacted the Applicant but was unable to arrange for a time convenient to him to meet with her. He finally contacted the Applicant on 23 July 2010—i.e., several days after the Tribunal issued Order No. 173 requiring submissions on the status of the rebuttal proceedings—proposing to meet with the Applicant on 27 or 28 July 2010. The Applicant was not available on those dates and no meeting took place as the Chairman, in turn, was not available to meet in August 2010. Then, at the insistence of the Applicant, a new Rebuttal Panel was constituted, with a new Chairman.

53. By submission dated 21 September 2010 the Respondent provided the Tribunal with a copy of the Report of the new Rebuttal Panel, stamped 21 September 2010. The Panel found that the e-PAS “had been administered in conformity with the UN’s regulations, rules and administrative issuances” and that the issue of alleged harassment and other complaints contained in the rebuttal statement were not considered relevant to the Applicant’s performance evaluation. The Rebuttal Panel further stated:

7) Other than a few emails relating to two cases complimenting her on her work, [the Applicant] has not provided any evidence to rebut her [first reporting officer’s] assessment of poor performance. The [first reporting officer’s] assessment is backed up by a comprehensive record of exchanges between various managers and supervisors and [the Applicant]. The areas of underperformance were clearly explained to [the Applicant] early on in the reporting period,

and regularly reinforced thereafter. In particular, the comments contained in her mid-point review, a series of weekly meetings to monitor her performance, and comments at the meeting at which she was informed of her contract extension, should have left her in no doubt that her performance was unsatisfactory and which areas needed to be improved.

8) Given the above, the Panel is of the view that there is insufficient evidence to sustain [the Applicant's] rebuttal, and the rating of the staff member as "partially meeting performance expectations" for the year 2008–2009 has been justified by her First Reporting Officer and should stand.

54. The Tribunal finds that the rebuttal procedures are well within the scope of this case as they constitute part of the performance evaluation process. Despite a clear obligation imposed on the Rebuttal Panel by sec. 15.3 of ST/AI/2002/3 to "prepare with maximum dispatch a brief report setting forth the reasons why the original appraisal rating should or should not be maintained", the rebuttal process took an inordinate amount of time—more than one year. The rebuttal proceedings were properly undertaken and completed only after the Tribunal issued its orders seeking information concerning the status of the Applicant's rebuttal process. There was a clear failure on the part of the Rebuttal Panel, including its first Chairman (who was later replaced), to take substantive steps to complete the rebuttal process. The extensive delay in the issuance of the Rebuttal Panel's report is simply unacceptable and unconscionable. The right to timeous rebuttal proceedings and to a final report is an integral part of the Applicant's contract and must be respected.

55. The delay in the rebuttal process, for which the Applicant was not responsible, was unreasonable. The Applicant submitted that this delay caused her emotional distress and anxiety. This was clearly evident and the Tribunal is persuaded by the Applicant's submission. The emotional distress caused to the Applicant by this delay warrants compensation in the amount of USD6,000.

Conclusion

56. The Tribunal finds that the decision not to renew the Applicant's contract was based on lawful grounds and was not vitiated by any improper considerations, such as retaliation for the Applicant's complaints, or by failure to take any proper considerations into account. The Tribunal finds that the contested decision was not vitiated by any procedural errors.

57. The Tribunal finds that there was an unreasonable delay in the rebuttal process. Although this delay had no bearing on the lawfulness of the contested decision, it caused emotional distress to the Applicant. The Respondent shall pay the Applicant USD6,000 as compensation for this emotional distress. This sum is to be paid within 60 days after the present Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

58. The Applicant's other pleas are rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 9th day of December 2010

Entered in the Register on this 9th day of December 2010

(Signed)

Santiago Villalpando, Registrar, UNDT, New York