



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

WEERASOORIYA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Yamuna Balasuriya

Counsel for Respondent:
Andreas Ruckriegel, UNFPA

Introduction

1. The Applicant contests the decision of 15 July 2010 of the Executive Director, United Nations Population Fund (“UNFPA”), to terminate her permanent appointment following a finding that her performance was unsatisfactory. The Applicant seeks the rescission of the decision, her reinstatement with retroactive effect from 24 July 2010, the payment for loss of earnings as well as the payment of USD100,000 for moral damages on account of victimization, harassment and public humiliation.

Factual and procedural background

2. The Tribunal identified the following relevant facts in the present case.
3. The Applicant was appointed in 1991, as a locally recruited staff member at the National Officers (“NO”) category, level B, in UNFPA in Sri Lanka.
4. In 2003, a Review Panel comprising of representatives from the United Nations Development Programme, the World Food Programme and UNFPA conducted a global Country Office typology exercise in order to achieve a realignment between the Country Office functional requirements and the competency profiles of staff through a so called job matching exercise. During this exercise, the Applicant expressed her interest to be confirmed on the post of Assistant Representative of the UNFPA Country Office in Sri Lanka at the level NO-C.
5. On 26 September 2003, Ms. LB, UNFPA Country Representative signed a Note to File which contained, inter alia, the following recommendation:

Based on the interview and past performance and after careful consideration, the panel recommended:

- (i) SM [staff member (the Applicant)] requires improvements under several competency areas.
- (ii) Management and supervisory skills require attention.

(iii) SM should make an effort to improve team work and dynamics.

(iv) SM needs to provide better leadership and improve knowledge sharing.

(v) It was decided that UNFPA should set performance benchmarks to allow SM to develop skills. Her performance and suitability for AR [Assistant Representative] post should be examined after one year as per guidelines.

6. On 17 October 2003, Ms. LB provided the Applicant with a Mid-year Performance Appraisal Report (“PAR”) and feedback from the matching exercise, as follows:

As [the Applicant’s] supervisor, I informed her that I felt that she was capable of high quality work and respected her guidance in relation to the country situation and programme. I advised her that she did not however always apply herself and her performance had been quite uneven. I identified areas in her performance that needed attention:

...

The SM acknowledged my concerns mostly without comment. She noted that she had undergone considerable stress working under the former UNFPA Representative. ... Although, we had a discussion on this when I first took up my post, the SM explained that she had not fully recovered from the past situation and explained that her performance had suffered as a result of it. She noted that she would make every effort to address the concerns discussed.

I then informed her of the outcome of the matching exercise. The review panel had recommended that she be conditionally confirmed to the post of AR and assessed after a period of one year against meeting specific performance goals. Based on our discussion, I informed her of following specific goals:

...

7. On 30 October 2003, Ms. LB sent a letter to the Applicant titled “Results of Job Matching Exercise”. The letter informed the Applicant that:

The [Review] Panel based its review on the following criteria: staff member performs only some of the new functions of the post however she has potential, with some short-term training to reach the required level of the post.

The Panel reviewed the new post profiles, the present job description and the IPP as well as the latest performance record and PAR history.

...the Panel decided to conditionally confirm you in the post of Assistant Representative at the NOC level. Specific performance and development goals have been identified for 2004 and a follow-up review will be conducted in due time to assess if these goals have been met.

2004 PAD

8. On 1 September 2004, the Applicant finalized the Performance Planning for her 2004 Performance Appraisal and Development (“PAD”). The mid-year progress review was signed off by both the Applicant and her supervisor on 30 September 2004, without either one of them entering any comments. On 20 May 2005, the Applicant and her supervisor signed-off on her year-end 2004 appraisal. The Applicant was provided with the following overall ratings: “Partially Achieved Outputs” for the section “Work Plan Outputs; “Developing Proficiency” for the section Core Competencies”; “Developing Proficiency” for the section “Functional Competencies; and “Partially Achieved Output” for the section” Development Outputs”. The Management Review Group (“MRG”) signed-off on the PAD on 10 October 2006.

9. The Applicant filed a rebuttal of her 2004 PAD. On 8 September 2006, the Rebuttal Panel recommended that:

2. The MRG statement that “the staff member did not appear to take the feedback she has received over the years as seriously as warranted...” should be [struck] and reworded to state “the staff member did not appear to take the feedback she has received over the past 2 years as seriously as warranted...”

3. In view of adequate documentation of the staff member’s performance issues with the supervisor the Panel does not agree that the alleged poor performance rating was beyond the staff member's control.

2005 PAD

10. On 8 February 2006, the Applicant finalized the Performance Planning for her PAD for the 2005 performance period. The mid-year progress review was signed off by both the Applicant and her supervisor on 30 September 2005, without either one of them entering any comments. On 9 and 10 April 2006, the Applicant and her supervisor signed-off on her year-end appraisal. The Applicant was provided with the overall ratings of “Partially Achieved Outputs” for the section “Work Plan Outputs”; “Developing Proficiency” for the section “Core Competencies”; “Developing Proficiency” for the section “Functional Competencies”; and “Partially Achieved Output” for the section “Development Outputs”. The MRG signed off on the PAD on 22 June 2006.

2006 PAD

11. On 10 April 2006, the Applicant finalized the Performance Planning for her PAD for the 2006 performance period. The mid-year progress review was signed off by both the Applicant and her supervisor on 27 September 2006, with both of them entering comments. On 31 March and 2 April 2007, the Applicant and her supervisor signed-off on her year-end appraisal. The Applicant was provided with the overall ratings of “Partially Achieved Outputs” for the section “Work Plan Outputs”; “Developing Proficiency” for the section “Core Competencies”; “Developing Proficiency” for the section “Functional Competencies”; and “Fully Achieved Output” for the section “Development Outputs”. The MRG signed off on the PAD on 21 May 2007.

2007 PAD

12. On 29 June and 10 July 2007, the Applicant and her supervisor finalized the Performance Planning for her PAD for the 2007 performance period. The mid-year progress review was not-signed-off on by either the Applicant or her supervisor. Similarly, neither party signed off on her year-end appraisal which provided her with the overall ratings of “Partially Achieved Outputs” for the section “Work Plan

Outputs”; “Not Proficient” for the section “Core Competencies”; “Developing Proficiency” for the section “Functional Competencies”; and “Partially Achieved Output” for the section “Development Outputs”.

2008 PAD

13. On 11 April 2008 and 3 July 2008, the Applicant and her supervisor, respectively, finalized the Performance Planning for her PAD for the 2008 performance period. The mid-year progress review was signed off by both of them on 13 and 14 October 2008, with both their comments. On 6 and 9 April 2009, they signed off on the year-end appraisal. The Applicant was provided with the overall ratings of “Did Not Achieve Outputs” for the section “Work Plan Outputs”; “Not Proficient” for the section “Core Competencies”; “Developing Proficiency” for the section “Functional Competencies”; and “Did Not Achieve Outputs” for the section “Development Outputs”.

14. On 11 July 2009, the Applicant filed a rebuttal of her 2008 PAD. On 16 February 2010, the Rebuttal Panel issued its report which stated:

A. Decision

...the supervisor’s overall ratings for workplan outputs and on core and functional competencies have been substantiated mainly through feedback provided by the multiple reports and discussions between [the Direction for Human Resources] and Management of the Asia and Pacific Division. In light of this information the Rebuttal Panel decided that:

The Overall rating for workplan outputs is maintained as ”Did Not Achieve” the Overall Rating for core competencies is maintained as “Not Proficient” and the Overall rating for Functional competencies as “Developing Proficiency”.

...

D. Conclusion

1. ...the Rebuttal Panel is of the opinion that the Overall Ratings of the PAD are well substantiated.

...

4. The Overall Ratings made by the supervisor are maintained by the rebuttal panel.

Separation from service

15. On 16 March 2010, the Director of the Division for Human Resources (“DDHR”) prepared a document entitled “Determination of Unsatisfactory Performance” regarding the Applicant’s service with UNFPA. The memorandum included a review of the applicable policies; the Applicant’s performance appraisals for the years 1996 through 2008; the rebuttals against the 2004 and 2008 performance appraisals; the procedures followed in preparing the 2004 through 2008 performance appraisals and the following final determination:

I. Applicable policy provision:

1. The UNFPA Separation policy of 25 July 2006, para. 10.3.7, provides:

...the Director, DHR, may determine that the performance of any staff member is “unsatisfactory” if the staff member received combined performance ratings as follows:

- (a) Performance is appraised *in two consecutive intervals* as not achieved/non proficient regarding at least one combined performance rating;
- (b) Performance is appraised in *three consecutive intervals* as partially achieved/developing proficiency regarding at least one combined performance rating.

II. Does the staff member fall within the scope of para. 10.3.7 of the UNFPA Separation policy?

2. Since the promulgation of the UNFPA Separation policy of 25 July 2006, [the Applicant’s] performance has been appraised in PAD by her supervisors as follows:

For 2006: (i) partially achieved outputs; (ii) developing core competency proficiency; (iii) developing functional competency proficiency;

For 2007: (i) partially achieved outputs; (ii) not proficient in core competency; (iii) developing functional competency proficiency;

For 2008: (i) did not achieve outputs; (ii) not proficient in core competency; (iii) developing functional competency proficiency.

3. On the basis of the above, [the Applicant] falls within the scope of both sub-paragraphs (a) and (b) of para. 10.3.7 of the UNFPA Separation policy.

...

VI. PAD Procedure:

...I conclude that there are no material procedural defects in the PADs in question.

VII. Determination

On the basis of the above considerations, I conclude that since 2004, [the Applicant] has failed to meet the competency profile applicable to her post, and has not produced the work plan outputs annually required under her post and agreed upon with her supervisors, although she received reasonable opportunities and time for improvement.

As a result, I determine, in accordance with para. 10.3.7 of the UNFPA Separation policy, that her performance as an Assistant Representative of UNFPA is unsatisfactory.

16. By memorandum dated 1 April 2010, the DDHR, informed the Executive Director of his determination regarding the Applicant's unsatisfactory performance and recommended that, in accordance with para. 10.2 of the UNFPA Separation policy, the Applicant's service be terminated. The memorandum added that any consideration as to whether to terminate the Applicant's service should be taken "following due consideration by the Compliance Review Board ("CRB"). That same day, the DDHR, sent a memorandum to the Chairperson, CRB, requesting a review of the recommendation to terminate the permanent appointment of the Applicant.

17. On 4 June 2010, the Chairperson of the CRB informed the Executive Director that

The CRB members have concluded that due process [has] been followed and that the recommendation and submission of the [DDHR] has been taken in compliance with UNFPA preset policies and procedures. As such, the CRB members endorse the recommendation of the termination of [the Applicant's] services based on unsatisfactory performance.

18. On 11 June 2010, the Chief, Office of the Executive Director, informed the Applicant that, on 16 March 2010, the DDHR had determined that her

performance was unsatisfactory and had, on 1 April 2010, recommended the Applicant's termination from service. As required, this recommendation was referred to the CRB who, on 4 June 2010, endorsed the DDHR's recommendation. This memorandum attached the DDHR's 16 March 2010, 1 April 2010 and 4 June 2010 memoranda.

19. On 29 June 2010, the Applicant sent a letter to the Executive Director, UNFPA in response to a request that she provide any observations regarding the recommendation that her appointment be terminated.

20. On 15 July 2010, the Executive Director addressed a letter to the Applicant entitled "Termination of your permanent appointment" where he concluded that the Applicant's appointment was being terminated subject to the conditions stipulated in the letter.

21. On 23 July 2010, the Applicant was called into a meeting with the Chief, Security Advisor, United Nations Department for Safety and Security and a Representative of UNFPA for the purpose of providing her the 15 July 2010 termination letter. Prior to the meeting, the Applicant informed the participants that her lawyer had advised her to only participate in the meeting if it was being recorded. Due to the conditions set by the Applicant, the meeting ended with the Applicant "refus[ing] to accept the letter or have any further discussion ...". That same day, the DDHR sent an email to the Applicant whereby he stated that "UNFPA will count Friday, 23 July 2010, as the day on which [she received the Executive Director's letter dated 15 July 2010]". The email included a scanned copy of the letter.

22. On 20 September 2010, the Applicant addressed a letter to the Secretary-General of the United Nations requesting management evaluation of the decision to separate her from service. This letter was transmitted to the Executive Director, UNFPA three days later.

23. On 27 October 2010, the Executive Director informed the Applicant that he had concluded that the decision to terminate her contract did not violate the terms of her appointment.

24. On 24 January 2011, the Applicant filed a request for an extension of time to file an application before the Tribunal. By Order No. 23 (NY/2011), the Tribunal instructed the Applicant that any application was to be filed by 18 February 2011.

25. On 15 February 2011, the application was filed and, on 17 March 2011, the Respondent filed his reply.

26. On 25 October 2013, the Tribunal, by Order No. 271 (NY/2013), requested that the Applicant inform it of her professional status and file a power of attorney to authorize her legal representative to represent her before the Tribunal. The Order also requested that both parties file closing submissions by 25 November 2013.

27. On 25 November 2013, the Respondent filed his closing submissions and the Applicant, after obtaining leave from the Tribunal for an extension of time and without the Respondent objecting, submitted her closing submission on 17 February 2014.

Applicant's submissions

28. The Applicant's principal contentions may be summarized as follows:

a. In 2008, the Applicant began to be "unfairly singled out for unjustified adverse criticism from the UNFPA Country Representative" and finally an investigation was launched against her for alleged personal travel amounting to USD271 over a three-years period. Soon after these charges were dropped, the Country Representative initiated the process leading to the termination of her contract for unsatisfactory service, demonstrating that this was the ultimate objective all along;

b. The PAD reports deliberately ignored the repeated violations of the principles of natural justice and the conflict of interest of both the UNFPA Country Representative in Sri Lanka, and the DHR/UNFPA. In her appeal to the Executive Director, the Applicant clearly alleged bias and unfair treatment, but these contentions were not addressed. While the PAD system seeks to offer a fair process and opportunity for staff members to be assessed annually, in the Applicant's case, these procedures were breached, resulting in serious flaws. No consideration was given to the positive feedback provided by her colleagues in UNFPA. In 2007, there was no Country Representative to ensure that PAD discussions were held prior to finalizing the performance evaluation. In 2006, 2008 and 2009 the positive ratings from her colleagues were not reflected in her PADs and the conclusion that the Applicant's performance was "profoundly negative" was incorrect. The victimization and harassment of the Applicant did not stop at the termination of her service, but included treating her like a common criminal;

c. The Applicant seeks to be reinstated with payment of indemnities for her lost entitlements and compensation for moral injury to the amount of USD100,000.

29. The Respondent's principal contentions may be summarized as follows:

a. The decision was taken in compliance with the applicable regulations, rules and administrative issuances and the Applicant's appeal should be dismissed;

b. The Executive Director's decision was reasonable and the Applicant was provided with several opportunities to improve her performance and to rebut her evaluations;

c. The Executive Director did not demonstrate any bias in his dealing with the Applicant, all the while the Applicant made threats towards him and UNFPA as a whole.

Consideration

Receivability

30. The Applicant is contesting the 15 July 2010 administrative decision, notified to her on 23 July 2010, to terminate her permanent appointment for unsatisfactory service. The Applicant requested management evaluation on 20 September 2010, within 60 days from the date of notification of the decision. The Applicant received a response upholding the decision on 27 October 2010. Upon being granted an extension of time to file her application in response to her 24 January 2011 request for extension, the Applicant filed her appeal on 15 February 2011.

31. The present case meets all of the receivability requirements identified in art. 8 of the Dispute Tribunal's Statute.

Applicable law

32. Staff rule 101.3 (Performance of staff) of ST/SGB/2003/1 (Amendment to the 100 Series of the Staff Rules (ST/SGB/2002/1)), dated 1 January 2003, which was applicable at the relevant time, states:

(a) Staff members shall be evaluated for their efficiency, competence and integrity through performance appraisal mechanisms that shall assess the staff member's compliance with the standards set out in the Staff Regulations and Rules for purposes of accountability.

(b) The Secretary-General shall seek to ensure that appropriate learning and development programmes are available for the benefit of staff.

(c) Performance reports shall be prepared regularly for all staff members, including at the Assistant Secretary-General level and above, in accordance with procedures promulgated by the Secretary-General.

33. Former ST/AI/2002/3 (Performance Appraisal System) of the United Nations Secretariat, dated 20 March 2002 and which the Tribunal finds applicable at the time of the contested decision, states in relevant parts:

Section 2

Purpose

2.1 The purpose of the Performance Appraisal System (PAS) is to improve the delivery of programmes mandated by the General Assembly by optimizing performance at all levels. The PAS will achieve this by:

- a) Promoting the desired culture of high performance and continuous learning;
- b) Empowering managers and holding them responsible and accountable for managing and motivating their staff;
- c) Encouraging a high level of staff participation in the planning, delivery and evaluation of work;
- d) Recognizing successful performance and addressing underperformance in a fair and equitable manner.

...

Section 3

Appraisal period

3.1 Except as provided in sections 3.2 to 3.4, the performance cycle shall be annual. In all departments and offices, the cycle shall begin on 1 April of each year in order to promote consistency of approach and to facilitate reporting.

...

Section 7

Implementation and monitoring

...

7.4 Timely implementation of all aspects of the PAS and compliance with the spirit and the letter of the process, including completion of the PAS forms and development of remedial action under section 8.3 if necessary, rests with the supervisor acting as the first reporting officer under section 4.1. To ensure the timeliness of completion of the PAS under section 3.3, first reporting officers must complete the PAS for all staff under their supervision prior to assuming new duties in another department or office, or prior to separating from the Organization. Separation procedures and processing of final entitlements of officials acting as first reporting officers may be delayed until the appraisals for which they are responsible are completed.

...

Section 8

Mid-point performance review

...

8.3 As soon as a performance shortcoming is identified, the first reporting officer should discuss the situation with the staff member and take steps to rectify the situation, such as the development of a performance improvement plan, in consultation with the staff member.

Section 9

Appraising performance

9.1 At the end of the performance year, the first reporting officer and the staff member shall meet to discuss the overall performance during the reporting period. The first reporting officer appraises the extent to which the staff member has achieved the performance expectations as agreed in the work planning phase.

9.2 Prior to the appraisal meeting between the first reporting officer and the staff member, the staff member should review the manner in which he or she has carried out the work plan defined at the beginning of the performance year. The staff member may provide a self-appraisal as a basis for the discussion. The self-appraisal should provide a brief summary of the major accomplishments, and may include additional work activities, such as participation on a task force or focal point for a project. The staff member may also comment on the supervision received during the performance year.

...

9.4 Appraisals are reviewed by the second reporting officer, who may make comments, as appropriate. Finalized appraisals are signed by the first reporting officer, the second reporting officer and the staff member. The staff member's signature is an acknowledgement that the appraisal has been received, and is without prejudice to the right of the staff member to initiate a rebuttal process in accordance with section 14.

...

Section 10

Rating system

...

10.3 Staff who have not fully met performance expectations should be given one of the following two ratings:

- Partially meets performance expectations;

- Does not meet performance expectations.

10.4 These two ratings indicate the existence of shortcomings or development needs, which may call for a specific remedial plan. A rating of “partially meets performance expectations” may justify the withholding of a within-grade increment, particularly if the same rating is given for a second consecutive year, as further clarified in section 16.5.

10.5 A rating of “does not meet performance expectations” may lead to a number of administrative actions, such as transfer to a different post or function, the withholding of a within-grade increment as further clarified in section 16.6, the nonrenewal of a fixed-term contract or termination for unsatisfactory service.

Section 11

Management Review Committee

11.1 A Management Review Committee shall be established in each department or office by the head of the department or office who will serve as the Chairperson of the Committee. The members of the Committee, who shall be appointed by the head of the department or office, will normally be the senior managers of that department or office.

11.2 It is the responsibility of the head of the department or office to achieve the purpose of the PAS set out in section 2 by ensuring that the PAS is fully implemented, promoting communication between staff members and supervisors, including establishment of performance goals and expectations, ongoing feedback and teamwork. The Management Review Committee shall assist the head of department or office in ensuring the consistency of all phases of the process of PAS implementation at the departmental or office level, and in reaching the PAS goals in the annual performance management plan between the Secretary-General and individual heads of department and office as referred to in section 7.1.

...

11.5 The head of department or office should report to the Office of Human Resources Management on compliance, including rating distribution, no later than 30 June of each year. The Executive Office or Personnel Office for the department or office should ensure that completed, individual PAS records appear in the Integrated Management Information System and are included in the staff member’s official status file.

...

Section 15

Rebuttal process

15.1 Staff members who disagree with the performance rating given at the end of the performance year may, within 30 days of signing the completed performance appraisal form, submit to their Executive Office at Headquarters, or to the Chief of Administration elsewhere, a written rebuttal statement setting forth briefly the specific reasons why a higher rating should have been given. Staff members having received the rating of “consistently exceeds performance expectations” may not initiate a rebuttal. The rebuttal statement shall contain the names of the three individuals, one from each of the three groups identified in section 14.1, whom the staff member has selected to serve on the rebuttal panel. A copy of the rebuttal statement shall be placed in the staff member’s official status file.

15.2 After receiving a copy of the rebuttal statement, the head of department or office, or his or her representative, shall promptly prepare and submit to the rebuttal panel a brief written statement in reply to the rebuttal statement submitted by the staff member. A copy of the reply to the rebuttal statement shall be given to the staff member and placed in his or her official status file. Unless geographical location makes it impractical, the panel shall hear the staff member, the first and second reporting officers and, at the discretion of the panel, other staff members who may have information relevant to the review of the appraisal rating.

15.3 The rebuttal panels shall prepare with maximum dispatch a brief report setting forth the reasons why the original appraisal rating should or should not be maintained. The report of the rebuttal panel shall be placed in the staff member’s official status file as an attachment to the PAS. The performance rating resulting from the rebuttal process shall be binding on the head of the department or office and on the staff member concerned, subject to the ultimate authority of the Secretary-General as Chief Administrative Officer of the Organization, who may review the matter as needed on the basis of the record. Any change in the final rating, and the date of the decision, shall be marked by the executive or administrative office on the final appraisal section of the PAS form, with annotation that the rating was changed as a result of a PAS rebuttal.

15.4 The rating resulting from an appraisal that has not been rebutted, or from the rebuttal process, shall not be subject to further appeal. However, administrative decisions that stem from any final performance appraisal and that affect the conditions of service of a staff member may be appealed.

Section 16

Performance Appraisal System and salary increments

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16.4 One annual rating of “partially meets performance expectations” may justify the withholding of a salary increment, provided it is documented that, during the corresponding performance year, a performance improvement plan was put into place, in accordance with section 8.3, but that the staff member’s performance failed to rise to a level that would justify a rating of “fully successful performance”.

16.5 Two consecutive annual ratings of “partially meets performance expectations” shall normally lead to the withholding of a salary increment.

16.6 One rating of “does not meet performance expectations” shall normally lead to the withholding of a salary increment.

...

34. ST/AI/2010/5 (Performance Management and Development System) of the United Nations Secretariat, dated 30 April 2010, and which the Tribunal finds applicable in the present case, states, in relevant part:

Section 18

Entry in to force and transitory provisions

18.1 The present instruction shall enter into force on 1 April 2010.

18.2 ST/AI/2002/3 is hereby abolished. However, performance appraisals anterior to the performance cycle 2010-2011 shall be conducted and completed in accordance with the procedures described in ST/AI/2002/3.

35. UNFPA Personnel Policies and Procedures Manual: Human Resources Separation Policy, dated 25 July 2006, states in parts that the Tribunal finds relevant (footnotes omitted):

Section 3

Compatibility with United Nations Staff Regulations and Rules

Should the terms of this policy contravene any terms contained in the United Nations Staff Regulations, Staff Rules or the Regulations of the

United Nations Joint Staff Pension Fund, the terms of those Regulations and Rules shall prevail over the terms of this policy.

Section 4

Types of separation

4.1 Separation is the consequence of any one of the following circumstances:

- (a) Expiration of an appointment for a fixed term;
- (b) Resignation;
- (c) Retirement;
- (d) Abandonment of post;
- (e) Death;
- (f) Termination of appointment:
 - (i) Following abolition of post or reduction of staff;
 - (ii) For reasons of unsatisfactory performance;
 - (iii) For reasons of health;
 - (iv) Following disciplinary action; and
 - (v) Following agreed termination in the interest of the Organization.

4.2 Below, the circumstances that may result in separation are addressed separately.

...

Section 7

Retirement

7.1 Staff Rule 109.6 provides that the “retirement under article 28 of the United Nations Joint Staff Pension Fund Regulations shall not be regarded as a termination within the meaning of the Staff Regulations and Rules”.

7.2 Age of retirement: As provided in Staff Regulation 9.5, “staff members shall not be retained in actual service beyond the age of sixty years or, if appointed on or after January 1990, beyond the age of sixty-two years. “

7.3 For all participants who enter or re-enter the Pension Fund on or after 1 January 1990, the normal age of retirement is 62.

7.4 Effective date: The effective date of retirement is the last day of the month in which the staff member reaches 60 or 62 years of age, as applicable.

7.5 Under Staff Regulation 9.5, the executive Director may, in the interest of UNFPA and subject to his/her discretion, extend a staff member's service in exceptional cases beyond the age of 60 or 62 years, as the case may be.

7.6 Early retirement: Article 29 of the Regulations of the UN Joint Staff Pension Fund provides that an early retirement benefit shall be payable to a participant who is at least 55 but less than the normal retirement age and whose contributory service was five years or longer.

7.6 Notification: Staff members who are retiring should be notified of their impending separation from service *at least one month* in advance.

7.7 Re-employment following retirement: For the rules pertaining to re-employment of retirees, refer to the UNFPA policy on Employment of Retirees.

...

Section 10

10.1 General information and procedures:

10.1.1 Definition: Termination within the meaning of the Staff Regulations is defined as a "separation from service initiated by the "Executive Director of UNFPA" "other than retirement ... or summary dismissal for serious misconduct" (Staff Rule 109.1(b)). Termination, therefore, is an action to end the permanent appointment of a staff member prior to reaching the normal age of retirement or the fixed term appointment of a staff member prior to the date of expiration as stipulated either in the Letter of appointment or in a subsequent personnel action.

10.1.2 Approval by the Executive Director for terminations of appointment: The authority to terminate the appointment of any UNFPA staff member, irrespective of the type of appointment, is vested with the Executive Director. The Director, DHR, may recommend to the executive Director the termination of appointment of a UNFPA staff member. If the Executive Director or his/her designee approves the termination of the appointment, the Director, DHR, shall proceed. However, agreed terminations and terminations for reason of health shall not require the approval of the Executive Director.

10.1.3 With regard to staff members administered at field duty stations, the UNFPA manager concerned shall refer any matter involving the possible termination of the appointment of a UNFPA staff member to the Director , DHR, for his/her review and for

subsequent approval of the termination of appointment by the Executive Director under section 10.1.2 (above) if applicable.

....

10.3 Termination following unsatisfactory performance:

10.3.1 A staff member's performance (in terms of either quantity or quality, or both) may be low or deteriorate to an extent that his/her service proves unsatisfactory and, as a result, his/her continued service with UNFP A is placed in question.

Regulatory framework:

10.3.2 Fixed-term appointment: The fixed-term appointment of a staff member, whose service is unsatisfactory, may be terminated (Staff Regulation 9.1(b)). Such termination may be imposed at any time within the appointment period. Alternatively, the fixed-term appointment may be permitted to expire.

10.3.3 Permanent appointment: A permanent appointment may be terminated for unsatisfactory service (Staff Regulation 9.1(a)).

General procedures:

10.3.4 Termination or non-renewal of appointment for reason of unsatisfactory performance is a mechanism that requires guidance from DHR. In order to ensure compliance with the Staff Regulations and Rules, substantive managers should contact DHR early if faced with the deterioration of a staff member's performance.

10.3.5 The link between the performance appraisal system and the termination of appointment for unsatisfactory performance is addressed below. In addition, there are measures the supervisor can take in the interim and parallel to the performance appraisal mechanism. Those measures are addressed thereafter.

Sub-standard results in performance appraisals:

10.3.6 The principal human resources tool for reporting and documenting unsatisfactory performance is "Performance Appraisal and Development" (PAD), UNFPA's primary performance management system. Supervisors must use this system to record poor, sub-standard or deteriorating performance and to bring this fact to the attention of the staff member, in order to permit the staff member to improve his/her performance. The performance appraisal and development guide provides guidance to managers when implementing this tool. In addition, managers may contact the Chief, Learning and Career Management Branch, DHR, with questions pertaining to the performance appraisal mechanism.

10.3.7 Determination regarding unsatisfactory performance:

Performance appraisals are made by supervisors in regular intervals. Such performance appraisals include one combined performance rating *each* for (1) “work plan output”, (2) “core competency proficiency” and (3) “functional competency proficiency”. For purposes of this policy, the Director, DHR, may determine that the performance of any staff member is “unsatisfactory” if the staff member received combined performance ratings as follows:

- (a) Performance is appraised in *two consecutive intervals* as not achieved/non proficient regarding at least one combined performance rating;
- (b) Performance is appraised in *three consecutive intervals* as partially achieved/developing proficiency regarding at least one combined performance rating

10.3.8 Following receipt of poor performance ratings in any performance interval, a formal performance improvement plan is required under the PAD system (see the PAD Guide Book). Furthermore, it is the responsibility of supervisors to identify performance deficits in the mid-year review process.

10.3.9 Should the staff member concerned have initiated a rebuttal proceeding under the terms of the UNFPA Policy on Performance Appraisal Rebuttal, the Director, DHR, should not make any determination regarding “unsatisfactory” performance before the rebuttal proceeding is completed.

10.3.10. If a staff member fails or refuses to participate in the PAD, he/she may be admonished. However, failure or refusal to participate in the PAD does not provide an avenue to circumvent the processes contained in this policy as they relate to determinations of unsatisfactory performance. Therefore, in such cases the supervisor retains the right and the obligation to render a written evaluation/appraisal of the staff member. This is accomplished equally in the PAD.

Exceptionally severe cases of unsatisfactory performance:

10.3.11. In exceptional cases, it may occur that a staff member's performance of one or several official acts, tasks, projects or similar undertakings is categorically below the standard of performance expected from the staff member, making it plainly unreasonable to provide the staff member with the privilege of an opportunity for improvement. A departure of this kind from the standards of performance must be exceptionally egregious or severe. In such a case, a determination by the Executive Director that the staff member's service is “unsatisfactory” may be justified immediately.

10.3.12. The Executive Director will see to it that the facts underlying the official act(s), task(s), project(s) or similar undertaking(s) have been established before he/she takes a final decision regarding the termination of the appointment.

Additional actions available to the supervisor:

10.3.13. In addition to terms and mechanisms contained in the PAD, the supervisor, when confronted either with one act or with a phase of sub-standard or deteriorating professional performance, may consider the following steps in order to (i) put the relevant staff member on notice that a lack of meaningful improvement might result in the termination of his/her appointment and (ii) assist the staff member in improving his/her performance:

(a) The concerned staff member may be given one or several verbal reminders or warnings by the supervisor, identifying the professional area(s) in relation to which the performance has lapsed from the required standards;

(b) The supervisor may notify the staff member in writing of his/her shortcomings and request that he/she bring his/her performance up to the standard expected and required. There are no formal requirements for such notification. It may be made by any appropriate means or means customary at the duty station, including memorandum, e-mail or “note to the file” copied to the staff member;

(c) The staff member may be given a time frame reasonable and appropriate under the circumstances (for example three months) in the course of which the staff member’s performance must improve. It is helpful if the supervisor assesses and documents at the end of such time frame whether and in how far the performance improved. However, this does not replace the formal performance improvement plan required under the PAD system (see PAD Guide Book) following low performance ratings;

(d) If appropriate under the circumstances, the supervisor may extend a time frame set under paragraph (c) above;

(e) Supervisors should consider and document staff coaching and/or training, if sensible under the circumstances. Such options might include assigned reading, coaching by peers or senior staff, etc. The supervisor may also contact the Chief, Learning and Career Management Branch (LCMB), DHR, for guidance or require the staff member to do so. LCMB may provide assistance under its own methodology and processes.

10.3.14. The supervisor should keep records/evidence of poor performance and of his/her interventions and make them available to the Director, DHR, as and when required.

Additional action available to the MRG:

10.3.15. If a staff member's performance is assessed as not achieved/not proficient or partially achieved/developing proficiency, the Management Review Group (MRG) may decide to withhold a within-grade salary increment.

36. ST/SGB/2010/6 (Staff Regulations and provisional Staff Rules) dated 2 September 2010 states:

Regulation 9.3

(a) 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 or for any of the following reasons:

(i) If the necessities of service require abolition of the post or reduction of the staff;

(ii) If the services of the staff member prove unsatisfactory;

(iii) If the staff member is, for reasons of health, incapacitated for further service;

(iv) If the conduct of the staff member indicates that the staff member does not meet the highest standards of integrity required by Article 101, paragraph 3, of the Charter;

(v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter, have precluded his or her appointment;

(vi) In the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned;

(b) In addition, in the case of a staff member holding a continuing appointment, the Secretary-General may terminate the appointment without the consent of the staff member if, in the opinion of the Secretary-General, such action would be in the interest of the good administration of the Organization, to be interpreted principally as a

change or termination of a mandate, and in accordance with the standards of the Charter;

(c) If the Secretary-General terminates an appointment, the staff member shall be given such notice and such indemnity payment as may be applicable under the Staff Regulations and Staff Rules. Payments of termination indemnity shall be made by the Secretary-General in accordance with the rates and conditions specified in annex III to the present Regulations;

(d) The Secretary-General may, where the circumstances warrant and he or she considers it justified, pay to a staff member whose appointment has been terminated, provided that the termination is not contested, a termination indemnity payment not more than 50 per cent higher than that which would otherwise be payable under the Staff Regulations.

Rule 9.6

Termination

Definitions

(a) A termination within the meaning of the Staff Regulations and Staff Rules is a separation from service initiated by the Secretary-General.

(b) Separation as a result of resignation, abandonment of post, expiration of appointment, retirement or death shall not be regarded as a termination within the meaning of the Staff Rules.

Reasons for termination

(c) 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 the appointment or on any of the following grounds:

- (i) Abolition of posts or reduction of staff;
- (ii) Unsatisfactory service;
- (iii) If the staff member is, for reasons of health, incapacitated for further service;
- (iv) Disciplinary reasons in accordance with staff rule 10.2 (a) (viii) and (ix);
- (v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should,

under the standards established in the Charter of the United Nations, have precluded his or her appointment;

(vi) In the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned.

(d) In addition, in the case of a staff member holding a continuing appointment, the Secretary-General may terminate the appointment without the consent of the staff member if, in the opinion of the Secretary-General, such action would be in the interest of the good administration of the Organization, to be interpreted principally as a change or termination of a mandate, and in accordance with the standards of the Charter.

37. The Tribunal finds relevant the application of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) dated 11 February 2008, which states, in relevant parts:

3.2 Managers and supervisors have the duty to take all the appropriate measures to promote a harmonious environment, free of intimidation, hostility, offence and any form of prohibited conduct. They must act as role models by upholding the highest standards of conduct. Managers and supervisors have the obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner...

5.2 All reports and allegations of prohibited conduct shall be handled with sensitivity in order to protect the privacy of individuals concerned and ensure confidentiality to the maximum extent possible.

5.14 Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. If that is the case, the responsible office shall promptly appoint a panel of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster.

On the merits

38. The Tribunal finds that the performance appraisals considered relevant for the separation process were the ones from 2006, 2007 and 2008. Taking into

consideration the impact of the performance evaluations from 2004-2005 upon the Applicant's performance in 2006, the Tribunal will further analyze the Applicant's PAD reports since she was appointed as Assistant Representative.

39. A PAD report is comprised of three parts: (a) Performance Planning (prepared at the beginning of each new performance appraisal period) comprised of (i) the Individual Work Plan Outputs/Revisions; (ii) the Development Plan and Outputs/Revisions; and (iii) the Career Aspirations; (b) Mid-year Progress review (prepared half-way); and (c) Year-End Appraisal.

2004 PAD

40. The performance planning part of the 2004 PAD report was finalized by the Applicant on 1 September 2004 and in section (ii), she identified the individual work plan outputs and activities as follows: "1. Expand understanding of linkages in health, gender and poverty: follow on-line course, participate in seminars and discussions on these themes particularly in relation to MDGs - on line course on poverty and health identified and started. 2. Develop management and supervisory skills: Follow on line course on coaching. Follow management course - on line coaching course completed, management course started". The Applicant's supervisor noted "on line course on poverty and health identified and started; on line coaching course completed; management course started".

41. The 2004 PAD's mid-year progress review was finalized on 30 September 2004 and neither the Applicant nor her supervisor made any additional comments.

42. The PAD's Year-End Appraisal was finalized on 20 May 2005. The Applicant obtained the following overall ratings: "Partially Achieved Outputs" for the section Work Plan Outputs; "Developing Proficiency" for the section Core Competencies; "Developing Proficiency" for the section Functional Competencies; and "Partially Achieved Output" for the section Development Outputs. The DHR reflected the MRG's comments which stated, *inter alia*, "that there was a continuous pattern of disagreement between the staff and her supervisors (current and former) related to her

performance, the MRG concluded that the staff member did not appear to take the feedback she has received over the past two years as seriously as warranted and did not make a sufficient effort to recognize and address her shortfalls” and recommended a maximum six-month contract extension at which point they would be able to decide whether to extend the Applicant’s appointment or take further actions. The Applicant submitted a statement of rebuttal against this PAD report and, on 8 May 2006, the Rebuttal Panel’s report was sent to the Applicant. By letter dated 29 September 2006, the Applicant was provided with the Panel’s 8 September 2006 report which superseded the 8 May 2006 report.

43. The Rebuttal Panel maintained the performance ratings from the 2004 PAD report and recommended that the part from the MRG’s original recommendation regarding the maximum appointment extension be stricken and that only the requirement that the Applicant be provided with “a performance improvement plan to end December 2005, at which time the staff member should be reassessed by the MRG, be maintained. The MRG can then make the determination whether the staff member’s conditional confirmation as Assistant Representative be extended or other action be taken”.

44. The Tribunal makes the following observations regarding the Applicant’s 2004 PAD report following the PAD’s review and amendments thereto.

45. The Applicant was appointed as Assistant Representative on 17 October 2003. As results from the 26 September 2003 Note to file by the UNFPA Representative regarding the job matching exercise, the panel decided to assign the Applicant to the position of Assistant Representative and that her performance and suitability for this position should be examined after one year as per the guidelines.

46. In the following documents “Mid-year PAR and Feed-back from the Matching exercise” of 23 October 2003 and “Results of Job Matching Exercise” of 30 October 2003 signed by the same UNFPA Representative, was included the mention that the Applicant was “conditionally confirmed to the post Assistant

Representative”. The Tribunal observes that the word “conditionally” was not used expressly by the Panel, but it was added later by the UNFPA Representative. The Applicant continued to work after she was assigned as Assistant Representative, on a permanent contract as before and she did not receive and sign a new letter of appointment specifying the conditional and/or temporary nature of this position. This aspect is confirmed in the contested decision in the following terms: “I also have considered the fact that you hold not merely a fixed term but a permanent appointment”.

47. As results from the letter received by the Applicant on 29 September 2006, the Review Panel stated that it had reviewed the Applicant’s 2004 PAD report and the MRG’s comments contained therein. In section 2 of their report, the Panel identifies the “Process” they followed in the evaluation of the Applicant’s PAD, namely that they reviewed the Applicant’s “PARs from 2002 and 2003, notes to file, and 2003 mid-year PAR review”. Consequently, the Tribunal considers that this means that the Rebuttal Panel’s decision was also based on these documents, and not solely on the Applicant’s professional performance as Assistant Representative.

48. In accordance with art. 3.1 of the United Nations Secretariat ST/AI/2002/3 (Performance management and development system), which the Tribunal finds applicable in the present case, a staff member’s performance cycle shall be annual and runs from 1 April. Section 3.2 includes an exception with regard to staff members who take up new duties upon recruitment, transfer or assignment in the course of the performance year in the sense that, an individual work plan shall be established at that point and will run through the end of the performance year in April of the following year if such a period lasts six months or more.

49. The Applicant was assigned to the post of Assistant Representative on 17 October 2003, in the middle of the 2003 performance year. The UNFPA Representative established an individual work plan for the Applicant at that time, as recommended by the Panel and carried out a mid-point review. Considering that the Applicant started her new duties on 17 October 2003 and the end of the

performance year is 31 March 2004, a period of less than six months, a performance appraisal was not required in accordance with the above mentioned provision. The Review Panel in October 2003 specifically recommended a review of the Applicant's performance and suitability for the post after a year in October 2004, but such a review was not made by the supervisor.

50. In the present case, as results from the 2004 PAD report, no development needs were identified by her supervisor in the mid-year progress review finalized on 30 September 2004 and a performance improvement plan was considered unnecessary. The MRG, instead of limiting its references to the Applicant's professional performance in her new position of Assistant Representative for the year 2004, also referred to the "continuous pattern of disagreement between the staff member and her supervisors (current and former) related to her performance". The MRG then concluded that "she did not appear to take the feedback she has received over the years as seriously as warranted". The MRG, chaired by the UNFPA Representative initially recommended a period of six months by which the Applicant had to improve her performance and meet the expectations of the post of Assistant Representative, failing which, her future in UNFPA should be examined.

51. Such observations were based not only on the Applicant's performance but also on other extraneous elements such as the Applicant's previous disagreement with her supervisors regarding her performance. However, the Tribunal notes that in accordance with sec. 15.1 of ST/AI/2002/3 any staff member who disagrees with the performance rating given at the end of the performance evaluation cycle has the right to submit a rebuttal against the PAD and cannot be criticized and/or sanctioned for exercising his/her legal right to rebut the PAD every year.

52. As results from the evidence on the record, in June 2005, the Applicant was asked by her supervisor to take into consideration a separation package based on her uneven performance and lack of motivation to meet her performance benchmarks. The Applicant responded that she had decided to stay in UNFPA and rebut her 2004 PAD.

53. After the Applicant's first year performance as Assistant Representative, the MRG recommended that "the staff member be given a maximum period of six months to improve her performance and meet the expectations of the post of Assistant Representative, beyond which her future in UNFPA should be examined should she still fail to meet her development goals. Her supervisor should establish a performance improvement plan up to end December 2005".

54. The Applicant's 2004 PAD report assessed the Applicant's performance as an Assistant Representative for the period 17 October 2003-31 March 2005. Consequently, the documents from 2002-2003 analyzed by the Rebuttal Panel were not related to her performance in the new function during the relevant period and the Panel did not include any justification in its report as to why they were taking them into account during their review of the 2004 PAD report. The 2005 PAD report was finalized on June 2006. As part of its findings, the Rebuttal Panel stated that "the staff member's performance over the past [two] years [were] adequately documented and the supervisor's and the MRG's comments are in line with supporting documents". The Tribunal considers that it is clear from the content of the report issued in September 2006 that the MRG and the Rebuttal Panel based their decision on the Applicant's rebuttal of the 2004 PAD report and their recommendations both on the Applicant's 2004 and 2005 PAD reports, which is incorrect since the object of the rebuttal was only the 2004 PAD report.

55. The Rebuttal Panel recommended a different measure: "an improvement plan to end of December 2005 at which time the staff member should be reassessed by the MRG. The MRG can then make the determination whether the staff member's conditional confirmation as Assistant Representative be extended or other action be taken". Since the report in which this recommendation was made was issued only in September 2006, the proposed course of action was unrealistic and impossible to implement, because the 2005 PAD (which covers the period 1 April 2005 – 31 March 2006) was finalized on 10 April 2006. Consequently, the Applicant had no

real chance to follow an improvement plan and based on it to improve her performance.

2005 PAD

56. The second evaluation of the Applicant's performance was made by the same supervisor and the Applicant got the same ratings as in her 2004 PAD report: "Partially Achieved Outputs" for the section Work Plan Outputs; "Developing Proficiency" for the section Core Competencies; "Developing Proficiency" for the section Functional Competencies; and "Partially Achieved Output" for the section Development Outputs. The MRG signed off on the PAD on 22 June 2006.

57. The Tribunal makes the following observations regarding the Applicant's 2005 PAD report.

58. The Applicant's rebuttal against her 2004 PAD report was still pending at the time her 2005 PAD was completed in April 2006. Consequently, there was no legal possibility for her supervisor to corroborate the 2004 PAD ratings with the 2005 ratings. As results from the above considerations, it was only in September 2006 that the Rebuttal Panel confirmed the ratings for the 2004 PAD report.

59. In her comments included in the 2005 PAD report, the Applicant's supervisor stated that "it was agreed that [the Applicant] would be given an opportunity to develop her skills ... She has not be able to develop these critical competencies at the level required of an Assistant Representative and is mismatched for the post under the typology. [The Applicant] would be better placed in a post that relates to her interests, draws on her capabilities and inspires her to improve her performance".

60. On 22 June 2006, the MRG did not consider this measure proposed by her supervisor (placing the Applicant on another post which was not identified) as being necessary. Rather, the MRG encouraged the Applicant to take a proactive role in resolving some of the obstacles that inhibited her performance with her supervisor and reminded her that she was still conditionally confirmed on the post of Assistant

Representative subject to meeting specific developmental goals, even though there is no document to officially reflect a change in the Applicant's contractual status.

61. The Applicant filed a rebuttal against the 2005 PAD report which, as results from the MRG comments included in the 2006 PAD, was still pending in DHR on 21 May 2007. There is no evidence on the record if this rebuttal request was resolved before the Applicant's separation.

2006 PAD

62. The 2006 PAD report for the period 1 April 2006-31 March 2007 was finalized on 2 April 2007. The Applicant was provided with the overall ratings of "Partially Achieved Outputs" for the section Work Plan Outputs; "Developing Proficiency" for the section Core Competencies; "Developing Proficiency" for the section Functional Competencies; and "Fully Achieved Output" for the section Development Outputs. The MRG signed off on the PAD on 21 May 2007.

63. Regarding this PAD the Tribunal makes the following observations.

64. The 2005 PAD and the performance planning section from 2006 PAD were both signed off by the Applicant's supervisor on the same day, 10 April 2006. Seeing that the 2004 rebuttal report was issued in September 2006, it was clearly not possible to establish and include a developmental plan for the Applicant until December 2005 and to include it in the individual work plan for 2006 at the time. Nevertheless, her supervisor should have revised the PAD's work plan following the issuance of the Rebuttal Panel's report during the Applicant's mid-year progress review.

65. As part of the mid-year review finalized on 27 September 2006, the Applicant's supervisor mentioned the Applicant's progress in work plan output and competency and, with regard to the developmental plan, encouraged her to find on-line courses and/or options within the region.

66. The year-end appraisal ratings reflect a clear progress in the section developmental outputs, from partially achieved to fully achieved. Even if this rating is not countable for PAD purposes, the Applicant's real efforts to improve her work are not reflected in the supervisor's final comments which state that:

2006 has been a particularly disappointing year in terms of performance of the [the Applicant]. This is mainly because [the Applicant] made little effort to address her shortfalls and has reached a level of complacency in her work and performance that is disturbing. She has not made use of the opportunities provided to her over the years to develop her skills and competencies and instead has shown great resistance to change. She has decided to disregard the feedback and advice of her supervisor and considers it to be biased. Hence, she had freed herself from being accountable for her performance and tends to follow her own work agenda, instead of making an effort to respond to the priorities and needs of the country office. Moreover, there is an increasing lack of transparency in the manner in which she works. Her attitude has negatively impacted the efficiency and the effectiveness of the country office, including the environment for team work. In the view of the lack of progress demonstrated by the [Applicant] over the years, the prospects of her meeting the requirements of the [Assistant Representative] post are poor.

67. These matters were not previously addressed by the supervisor in the mid-year review for the 2006 PAD report and contradict other sections of the document. Further, the Applicant noted in her comments that her supervisor under-rated her performance, was not fair and did not take into consideration the context in which some of the tasks took place.

68. The MRG noted that:

...the [Applicant] had only partially achieved her outputs and was rated either as "not proficient" or "developing proficiency" in all competency areas ... [the Applicant] had made "little effort to address her shortfalls" and that she had shown "great resistance to change". It was also noted that [the Applicant] had not commented ..., but instead indicated that her supervisor lacked objectivity and sought to marginalize her work. MRG was informed that in the last 4 years, the [Applicant] demonstrated unsatisfactory performance In the

past few years, she had processed rebuttals and the outcome of the 2005 rebuttal was still pending in DHR.

69. The Applicant's supervisor, as in 2004, once again made comments that were unrelated to the Applicant's 2006 performance, but rather to lack of progress "over the years", and the MRG was informed about the unsatisfactory performance during the last four years.

2007 PAD

70. The 2007 PAD report covers the period 1 April 2007 to 31 March 2008.

71. In the document entitled "Determination on Unsatisfactory Performance" dated 16 March 2010, the DDHR noted that "[the] 2007 PAD was completed, but carries no finalization date. Upon inquiry, the Learning and Career Management Branch informed [him] that this is due to the fact that the [Applicant] failed to click on 'finalize' in the PAD platform. As a result the supervisor could not click on 'finalize' either, given that the PAD programme source code prevented the supervisor from doing so prior the finalization by the staff member. [He] was further advised that this anomaly in the PAD programme source code has since then been rectified to permit a supervisor to click on 'finalize' even if the staff member forgot or refused to do so. Given, however, that the staff member and the supervisor completed the substantive PAD evaluation process in its entirety, [he] found that the absence of the click on finalize by the staff member (and as a consequence by her supervisor) is merely a slip caused by a computer programme phenomenon with no substantive consequences to the validity of the content of the PAD".

72. The Tribunal makes the following observations.

73. The section "Performance planning" was finalized by the Applicant on 29 June 2007 and by her supervisor, Ms. LB on 10 July 2007. In the section "Mid-year review" the date of finalization by the supervisor and the Applicant is not indicated, but the supervisor stated in her review that "the [Applicant] has not completed her mid-year self-appraisal despite [the supervisor's] request to her to

attempt to finalize it by 7 September, due to [the supervisor's] reassignment and end of duty in Colombo effective 14 September". It is unclear if this section was completed by Ms. LB between 8 and 13 September 2007, before her departure in accordance with sec. 7.4 of ST/AI/2002/3 or from New York as affirmed by the Applicant. The last section "Year-end appraisal" was finalized by the new supervisor, Mr. LK. Since the Applicant functioned as an Officer in Charge, Representative, UNFPA from January 2008 to the end of April 2008, it results that her supervisor left in December 2007 and it is unclear when the Applicant's supervisor finalized the PAD report.

74. In accordance with sec. 9.4 of ST/AI/2002/3, the finalized appraisals are signed by the reporting officer(s) and the staff member. The staff member's signature is an acknowledgement that the appraisal has been received and is without prejudice to the right of the staff member to initiate a rebuttal process in accordance with sec. 14 of the administrative instruction. It results that the supervisor's signature is mandatory once the appraisal is completed and an appraisal must always be signed by the supervisor before it is signed by the staff member. The lack of the supervisor's signature on an appraisal cannot be justified by the absence of the staff member's signature, as in the present case.

75. The Applicant's ratings in the 2007 PAD report were: Work plan outputs - Partially achieved; Core Competencies - Not proficient; Functional Competencies - Developing Proficiency and Developmental Outputs - Partially achieved. It is also unclear if the Applicant's right to initiate a rebuttal of the 2007 PAD report was affected. At the end of the PAD cycle, the supervisor made no comments or recommendations to the staff member, no developmental plan was identified together with the staff member and no administrative measure was identified in the light of art.10.3.5 and 10.3.13 of the UNFPA Personnel Policies and Procedure Manual.

2008 PAD

76. This PAD report covers the period of 1 April 2008 to 31 March 2009. The Applicant acted as Officer- in-Charge from January to end of April 2008.

77. The Tribunal makes the following observations.

78. The section “Performance planning” was finalized by the Applicant on 11 April 2008 and by the supervisor on 3 July 2008. The new UNFPA Representative arrived at the beginning of May 2008.

79. In the section “Mid-year review” finalized on 14 October 2008, the new supervisor mentioned the following: (1) the work plan output: “this year is unusual due to late signing of the CPAP and late arrival of the Rep [Country Representative], hence too early to express firm opinion on progress of [the Applicant]” ; (2) the developmental plan: “this year is unusual due to late signing of the CPAP and late arrival of the Rep, hence so far output could not be achieved”, and (3) the competency progress: “due to late arrival of the Rep. it is too early to express firm opinion on this”. It results that no developmental plan was established for the Applicant by the new supervisor for the remaining period of the appraisal cycle (namely from 15 October 2008 to 31 March 2009).

80. The last part, “Year-End Appraisal”, was finalized by the supervisor on 9 April 2009 and the ratings were the following with regard to (1) work plan output: did not achieve output; (2) core competencies and functional competencies: developing proficiency; (3) development plan output: did not achieve outputs. No comments or recommendations were made by her supervisor, no developmental plan was identified together with the Applicant and no administrative measures were identified in the light of art.10.3.5 and 10.3.13 of the UNFPA Personnel Policies and Procedure Manual.

81. The Applicant submitted a rebuttal to her 2008 PAD report on 11 July 2009 and her main contentions were that the PAD contained factual errors and the supervisor was biased against the Applicant.

82. The case was presented to the Rebuttal Panel on 26 August 2009 and the report was issued on 16 February 2010. In the Report, the Panel mentioned in the section entitled “Main findings” that prior to assuming her new assignment, a meeting was organized in April 2008 by DHR and management to prepare the new Representative (the Applicant’s supervisor for the 2008 PAD report) prior to her arrival in Sri Lanka by describing the nature of the problems in the Country Office. The new assigned UNFPA Representative, Ms. LC was informed about “the Assistant Representative’s performance and its serious and negative impact on the morale of the staff in the office and the status of the program operational in general. At the core of the performance problem is not the question of technical or functional skills, but rather deficiencies in the core competencies required to perform the job of Assistant Representative”.

83. In the absence of the former supervisor, Mr. LK, who was responsible for the supervision of the Applicant prior to the arrival of the new Representative in May 2008, the Panel interviewed the former supervisor, Ms. LB, who repeated her previous conclusions in the 2004 PAD report in relation to the Applicant’s performance and reminded her “provisional status” as Assistant Representative.

84. It was also mentioned that both UNFPA representatives, Ms. LB and Ms. LC talked about the “lack of transparency and poor communications with the [Representative]” and the Applicant’s “intimidation of other staff and her abuse of authority”. Reference was made to her being a major disruption to the work of the office, affecting the morale of the staff and creating a poor working environment and to the allegations of abuse of the assets and resources of the Country Office which were being investigated.

85. The Rebuttal Panel concluded that the Applicant's poor performance was a "function of mismatch between the SM [staff member] and the post. This mismatch was documented early by the DHR and validated by the observations and assessments of two Representatives and the mission of December 2008 of the DHR advisor. This assignment as OIC [Officer-in-Charge] accentuated the vulnerability of both SM and the staff of the office".

86. The Rebuttal Panel decided on 16 February 2010 that the overall rate for work plan outputs was to be maintained as "did not achieve", the overall rating for core competencies was to be maintained as "not proficient", the overall rating for functional competencies as "developing proficiency" and the overall rating for development outputs as " did not achieve".

87. The Applicant's new supervisor, Ms. LC, was informed before her arrival in Sri Lanka that the Applicant had a poor performance and that serious problems were created by her in the Country Office. Despite this specific information, Ms. LC was not able to identify in her mid-year appraisal any problems regarding the Applicant's performance and she did not make a developmental plan for the Applicant in order to remedy deficiencies. Only at the end of the year appraisal, she addressed these problems in the PAD report and there was no real premise for the Applicant to improve her performance.

88. After the former UNFPA Representative left the Sri Lanka Country Office in December 2007, the Applicant was Officer-in-Charge in the Country Office between January and April 2008. The Tribunal finds that the delay of the Organization in appointing the new Representative and the lack of support from DHR during this period, despite the alleged Applicant's deficiencies, cannot be used against her. Her performance during January to 31 March 2008 cannot be part of her 2008 PAD report and of the Rebuttal report, since the reference period for her assessment as Assistant Representative is from 1 April 2008 to 31 March 2009. The section "Planning" from the 2009 PAD report was completed on 4 May 2009 and there was no developmental

areas identified by the supervisor together with the staff member, despite the negative outputs in April 2009.

89. The Applicant's former supervisor who completed her PAD report for the period 2004-2005, and who had strong views about the Applicant's performance, used the same negative terms of reference for the Applicant's performance.

90. No recommendations were made by the Rebuttal Panel following their findings that there was a mismatch between the Applicant and her current post of Assistant Representative. The Applicant's general technical and functional skills were not in dispute and a change of post was needed but she continued to remain in the same post the following year.

91. During 2008, the Applicant was investigated by the UNFPA Division for Oversight Services ("DOS") and a report was issued on 13 February 2009 in which DOS concluded that the Applicant had committed misconduct. On 28 September 2009, the DDHR charged the Applicant with misconduct. Following a detailed review of the Applicant's response, the Director decided that the charge should not be sustained and that the case should be closed. The Applicant was not suspended or transferred to a different post during the investigation.

92. As stated by the Respondent in his closing submissions, an early retirement in connection with a separation package was proposed in 2008, but the Applicant refused the offer.

2009 PAD

93. The Applicant's 2009 PAD report covers the period 1 April 2009 to 31 March 2010 and was finalized on 4 May 2010.

94. The ratings were as follows: (1) work-plan outputs: partially achieved; (2) development outputs: partially achieved; (3) core competencies: developing proficiency; and (4) functional competencies: developing proficiency.

Separation decision

95. The Applicant's permanent contract was terminated for unsatisfactory service. The decision was taken on 15 July 2010 and was notified to the Applicant by email on 23 July 2010 after she refused to accept service of the letter of termination handed out to her, on the grounds that there was no audio-recording of her meeting with the Country Representative.

96. The Tribunal will analyze the legality of this decision in accordance with the UNFPA Separation Policy and the United Nations Staff Regulation and Rules, taking into consideration that art. 3 of the UNFPA's Policies and Procedures Manual, Human Resources Separation Policy, states: "[s]hould the terms of this policy contravene any terms contained in the United Nations Staff Regulations, Staff Rules or the Regulations of the United Nations Joint Staff Pension Fund, the terms of those Regulations and Rules shall prevail over the terms of this policy". The Tribunal underlines that UNAT held in *Valimarki-Erk* 2012-UNAT-276 that "Staff Regulations [and Rules] embody the conditions of service and the basic rights and duties and obligations of United Nations staff members. They are supplemented by the administrative issuances in application of and consistent with, the said Regulations and Rules".

97. On 1 April 2010, the DDHR, determined that the Applicant's performance was unsatisfactory and recommended that her appointment be terminated for unsatisfactory service. On the same day, the DDHR addressed a request to the CRB Chairperson, for them to review his recommendation. On 4 June 2010, the CRB endorsed the recommendation of the Applicant's termination for unsatisfactory performance. On 21 June 2010, the Applicant received documents relating to her termination and, on 29 June 2010, she sent her observations to the Executive Director. On 15 July 2010, the contested decision was issued.

98. UNFPA's Personnel Policies and Procedure Manual (arts. 10.3.3 to 10.3.6) states that a permanent appointment may be terminated for unsatisfactory service and

such a termination is a mechanism that requires guidance from DHR. In order to ensure compliance with the staff Regulations and Rules, substantive managers should contact DHR early if faced with the deterioration of a staff member's performance.

99. The Tribunal considers that a staff member's PAD report is the principal tool for reporting and documenting unsatisfactory performance and managers "must use this system to record poor, sub-standard or deteriorating performance and to bring this fact to the attention of the staff member, in order to permit the staff member to improve his/her performance".

100. The determination regarding unsatisfactory performance is a process based on the performance appraisals which are made by supervisors in regular intervals and include one combined performance rating each for (1) "work plan output"; (2) "core competency proficiency"; and (3) "functional competency proficiency". The PAD document provides for a fourth combined performance rating for "developmental output". For purposes of determining unsatisfactory performance, the performance rating for developmental output is not relevant and not taken into account.

101. Article 10.3.7 further states that the DDHR "may determine that the performance of any staff member is 'unsatisfactory' if the staff member [has] received combined performance ratings as follows: (a) performance is appraised in two consecutive intervals as not achieved/non proficient regarding at least one combined performance rating; (b) performance is appraised in three consecutive intervals as partially achieved/developing proficiency regarding at least one combined performance rating".

102. Article 10.3.8 also states that "following the receipt of poor performance ratings in any performance interval, a formal performance improvement plan is required under the PAD system (see PAD Guide Book). Furthermore, it is the responsibility of the supervisors to identify the deficits in the mid-year review process".

103. The DDHR evaluated the Applicant's unsatisfactory performances over three consecutive intervals from 2006 to 2008.

104. In 2006, the Applicant's ratings were as follows: (1) work-plan output: partially achieved; (2) core competency proficiency: developing proficiency; (3) functional competency: developing proficiency.

105. In 2007, the ratings were as follows: (1) work-plan output: partially achieved; (2) core competency proficiency: not proficient; (3) functional competency: developing proficiency.

106. In 2008, the ratings were the following: (1) work-plan output: did not achieve outputs; (2) core competencies: developing proficiency; (3) functional competency: developing proficiency.

107. The Tribunal considers that in the present case the contested administrative decision to separate the Applicant for unsatisfactory service is unlawful for the following reasons.

108. Firstly, the requirement of three consecutive intervals of poor performance was not respected. Article 10.3.7 of the UNFPA Human Resources Manual concerning the determination of unsatisfactory performance states:

Performance appraisals are made by supervisors in regular intervals. Such performance appraisals include one combined performance rating *each* for (1) "work plan output", (2) "core competency proficiency" and (3) "functional competency proficiency".

For purposes of this policy, the Director, DHR, may determine that the performance of any staff member is "unsatisfactory" if the staff member received combined performance ratings as follows:

- (a) Performance is appraised in *two consecutive intervals* as not achieved/non proficient regarding at least one combined performance rating;
- (b) Performance is appraised in *three consecutive intervals* as partially achieved/developing proficiency regarding at least one combined performance rating

109. The Tribunal considers that this legal provision impose expressly the mandatory condition for a staff member's performance to be considered unsatisfactory over a two (item a) or three (item b) consecutive intervals of poor performance, depending on the combined rating.

110. In *Das* 2014-UNAT-421, the United Nations Appeal Tribunal found that “two consecutive reporting cycles should involve the most recent [performance evaluation reports], to protect staff against arbitrary selection of reporting cycles by their reporting officers”.

111. The administrative procedure to terminate the Applicant's employment for unsatisfactory performance was initiated by the DDHR on 16 March 2010 based on his review of the Applicant's 2006, 2007 and 2008 PAD reports. This decision was reviewed and considered appropriate by the CRB on 4 June 2010. The Applicant's 2009 PAD report was finalized on 4 May 2010, before the measure of separation was confirmed by the CRB.

112. The Tribunal considers that, starting 4 May 2010, the most recent performance evaluation report, relevant for a separation procedure for unsatisfactory service, was the 2009 PAD report, so the three consecutive intervals of poor performance should have been for the years 2007, 2008, and 2009.

113. In 2007, the ratings were as follows: (1) work-plan output: partially achieved; (2) core competency proficiency: not proficient; (3) functional competency: developing proficiency.

114. In 2008, the ratings were: (1) work-plan output: did not achieve outputs; (2) core competencies: developing proficiency; (3) functional competency: developing proficiency.

115. In 2009, the ratings were: (1) work-plan outputs: partially achieved; (2) core competencies: developing proficiency; (3) functional competencies: developing proficiency.

116. The Tribunal finds that since the administrative decision to terminate the Applicant's permanent contract for unsatisfactory service was not taken by the Executive Director before the 4 May 2010 finalization of her 2009 PAD report, but only on 15 July 2010, a new procedure should have been initiated by the DDHR, based on the new period of reference which was to be considered in accordance with the UNFPA Human Resources Manual for the 2008 and 2009 cycles (art.10.3.7 (a) or for the 2007, 2008 and 2009 cycles (art. 10.3.7(b)).

117. In the contested decision, the Executive Director, in reference to the Applicant having stated that her 2009 PAD report demonstrated that her performance was improving, indicated that “[w]hile neither the determination by the Director, DHR, of unsatisfactory performance on [the Applicant’s] part, his subsequent recommendation of termination of appointment, the review by the UNFPA CRB nor this administrative decision is based on your 2009 performance appraisal, I am compelled to conclude that it corroborates your poor performance”. Further, as part of his 17 March 2011 reply, the Respondent stated that the administrative decision “was neither explicitly nor by reference based on the Applicant’s performance appraisal for 2009”.

118. The Tribunal concludes that the separation decision was not based, as legally required, on the last three consecutive intervals and is unlawful.

119. Secondly, the Applicant’s complaint of discrimination and abuse of power, and her rebuttal of the 2009 PAD report were not resolved before the separation decision was issued.

120. The Applicant stated in her 29 June 2010 response to the 1 June 2010 letter from the Office of the Executive Director that: “[s]ince 2008, the Representative of UNFPA in Sri Lanka has deliberately pursued a course of action that is both unfair and discriminatory towards [the Applicant] ... [t]here is a clear pattern of discrimination against [her] The Representative/UNFPA charged [her] with unauthorized vehicle deviations ... [for an alleged prejudice] of 171 USD”.

The investigation started on 4 September 2008 and ended in February 2010, when the charges were dropped by the DDHR.

121. In the PAD report for 2009, which was finalized on 4 May 2010, the Representative wrote the following comment under Values/Guiding Principles within Core Competencies: “in connection with the elsewhere mentioned fraud investigation the [Applicant] demonstrated clear unethical behavior by lying and twisting the facts, particularly targeted against her supervisor who had brought the issue to the attention of [the United Nations Headquarters]. Her unethical behavior included gaining unauthorized access to and use of confidential information related to other staff members, including the Representative”.

122. The Applicant affirmed that her supervisor abused her power because, despite the fact that the DDHR decided to close the disciplinary case in February 2010, the Representative mentioned it in the 2009 PAD report. The supervisor used in her comments confidential information submitted by the Applicant as part of her defense during the disciplinary process (which she should not have had access to) and she was manifestly biased by taking out her anger in the PAD report, which constitutes retaliation and abuse of authority.

123. The Tribunal finds that the Applicant’s response of 29 June 2010 to the notice of termination, dated 11 June 2010, not only contained the Applicant’s observations regarding the proposed measure to terminate her contract for unsatisfactory performance, but also consisted of a complaint of abuse of power and harassment against her supervisor for the period 2008 - 2009 and a rebuttal of the 2009 PAD report.

124. The Executive Director totally ignored the Applicant’s allegations and instead of following the procedures to resolve the complaint of abuse of power and harassment and transmit the rebuttal to the Rebuttal Panel, she continued the termination procedure and used the Applicant’s statements filed in response to her notice of termination and some of the elements from her 2009 PAD report, which

officially was not part of the termination procedure against her. The Tribunal finds that until a rebuttal process is finalized, ratings are not definitive and an administrative measure based on it cannot be taken against the staff member.

125. The Tribunal recalls that, as held in *Das* 2014-UNAT-421, “an effective rebuttal mechanism is an integral part of the performance evaluation process”.

126. Thirdly, the Tribunal also finds that there were incompatibilities between the UNFPA Policies and Procedure Manual (2006) and the United Nations Secretariat policy ST/AI/2002/3 implementing Staff Regulations and Rules regarding appraisal of staff.

127. On 20 March 2002, the Under-Secretary-General for Management in the United Nations Secretariat, for the purpose of establishing a Performance Appraisal System in accordance with former staff rule 101.3(a), promulgated ST/AI/2002/3 (Performance Appraisal System), which states that staff members shall be evaluated for their efficiency, competence and integrity through performance appraisal mechanism that shall assess the staff member’s compliance with the standards set out in the Staff Regulations and Rules for purposes of accountability.

128. The Tribunal underlines the following provisions from this document.

129. Section 10.3 states that staff who have not fully met the performance expectations should be given one of the following two ratings: partially meet performance expectations or does not meet performance expectations.

130. In accordance with sec. 10.4, these two ratings indicate the existence of shortcomings or development needs which may call for a specific remedial plan. A rating of “partially meets performance expectations” may justify the withholding of a within-grade increment, particularly if the same rating is given for a second consecutive year, as further clarified in sec. 16.5. Section 10.5 states that a rating that does not meet performance expectations “may lead to a number of administrative actions such as transfer to a different post or function, the withholding of a within-

grade increment as further clarified in sec. 16.6, the non-renewal of a fixed term contract or termination for unsatisfactory service”.

131. Section 16.4 states that “one annual rating of partially meets performance expectations may justify the withholding of a salary increment, provided that it is documented that during the corresponding performance year, a performance improvement plan was put into place in accordance with section 8.3, but that the staff member’s performance failed to rise to a level that would justify a rating of “fully successful performance”. Sections 16.5 and 16.6 further state that two consecutive annual ratings of “partially meets performance expectations” shall normally lead to the withholding of a salary increment and one rating of “does not meet performance expectations” shall normally lead to the withholding of a salary increment.

132. Article 10.3.13 of the UNFPA’s Policies and Procedure Manual, Human Resources Separation Policy adopted on 25 July 2006 (applicable in the present case), provide the supervisor with additional actions for the purpose of putting a staff member on notice that a lack of meaningful improvement in their performance might result in the termination of their appointment and assist the staff member in improving her performance such as: (a) one or several reminders or warnings by the supervisor identifying the professional area(s) in relation to which then performance has lapsed from the required standards; (b) a notification in writing (e.g., note to file, memorandum) of his/her shortcomings and request that the staff member bring his/her performance up to the standard expected and required within a specific time frame (for example three months); (c) considering and documenting staff coaching and/or training and/or contacting the Chief, Learning and Career Management branch, DHR for guidance or requiring the staff member to do so and a specific action specific to the MRG in case a staff member’s performance is assessed as not having achieved/not proficient or partially achieved/developing proficiency: to withhold within salary increment.

133. Further, in accordance with art. 10.3.14, the supervisor should keep records or evidence of poor performance and of her interventions and make them available to

the DDHR, as and when required. Article. 10.3.15 provides the MRG with an additional action, namely if a staff member's performance is assessed as a not achieved/not proficient or partially achieved/developing proficiency, the MRG may decide to withhold a within-grade salary increment in accordance with Annex I, para.4 to the Staff Regulations and staff rule 103.8(a).

134. Article. 3 of the UNFPA Policies and Procedures Manual of 25 July 2006 states that "should the terms of this policy contravene any terms contained in the United Nations Staff Regulations, Staff Rules or the Regulations of the United Nations Joint Staff pension Fund, the terms of those Regulations and Rules shall prevail over the terms of this policy". The Tribunal considers that, in accordance with art. 3 of the UNFPA Policies and Procedures Manual, all the above mentioned provisions from ST/AI/2002/3 are general and they are directly applicable to UNFPA staff members in case the UNFPA provisions contradict them.

135. Consequently, when the performance of a UNFPA staff member is unsatisfactory for a period of two or three consecutive appraisal cycles, any administrative action or measure taken by the supervisor or the MRG in accordance with arts. 10.3.7, 10.3.13 and 10.3.15 of the UNFPA Separation Policy must also be in compliance with and be among the following progressive measures mentioned in secs. 10.4 and 10.5 of ST/AI/2002/3 applicable at the time:

- a. If the staff member receives a rating partially meet performance expectations:
 - i. Withholding of a within-grade increment;
- b. If the staff member receives a rating does not meet performance expectations:
 - i. Withholding of within-grade increment;
 - ii. Transfer to a different post or function;
 - iii. Non-renewal of a fixed term contract or termination for unsatisfactory service.

136. The Tribunal considers that arts. 10.3.13 to 10.3.15 of the UNFPA Policies and Procedures, Manual contravene the ones in ST/AI/2002/3 for the following reasons:

- a. There are no mention regarding the legal measure to transfer the staff member to a different post or function; and
- b. The provisions regarding the measure to withhold a within-grade increment which should normally be decided by the MRG do not include the mention that such a measure can be applied only in the two following circumstances:
 - i. If a rating of partially meets performance expectations is given for a second consecutive year; or
 - ii. If the staff member receives a rating of does not meet performance expectations and the first measure indicated in sec. 10.5, a transfer to a different post or function, was applied before and there was no improvement or, there is objectively no real possibility to apply such a measure in the absence of such an available post or function, or the staff member refuses a transfer.

137. All these measures can only be applied conditionally if an improvement developmental plan has been put into place (see PAD Guide). They are progressive and the supervisor can take them in the interim and parallel to the performance appraisal system. Consequently, the Tribunal considers that the supervisors are requested to have an active role in identifying as soon as possible the deterioration of a staff member's performance, in informing the staff member and in taking all the necessary measures to permit the staff member to improve his/her performance because the scope of these measures is to prevent a further deterioration of the staff member's performance and the application of the severe measure of separation for unsatisfactory service.

138. In *Jennings* UNDT/2010/2013, the Tribunal held that as soon as a staff member's performance shortcomings are identified, appropriate steps to rectify the situation should have been taken, in consultation with the staff member. Accordingly, performance improvement measures may be instituted based on the ongoing performance evaluation and prior to the finalization of the staff member's performance appraisal report.

139. In *Rees* UNDT/2011/156, the Dispute Tribunal held that the heads of the departments and offices have primary responsibility for the timely execution, overall compliance with, and fair implementation of performance evaluation reports. Without a document that properly and fairly reflects the staff member's shortcomings in accordance with the administrative instruction, the Administration has no reliable grounds for taking decisions based on poor performance.

140. The Tribunal considers that in reality at no time did the Applicant benefit from a real improvement plan from her supervisors and there were no real premises for her to develop a constructive and positive relation with her last supervisor who already had a subjective opinion about the Applicant's performance and behavior after she was briefed negatively by Human Resources prior to her arrival in Sri Lanka.

141. No specific steps were taken by any of the Applicant's supervisors to address the sub-standard or deterioration of her professional performance in accordance with the legal provisions. The work plan at the beginning of each of her PAD reports did not reflect her shortcomings and needs. After the first year, in accordance with the 2004 PAD report, a developmental plan was supposed to have been established for the six remaining months of 2005. Such a plan was never established since it was impossible to retroactively implement such a measure after the finalization of the 2004 PAD report in September 2006. The 2008 PAD report was finalized on 16 February 2010 when the Rebuttal Panel issued its report, so the 2009 PAD report also did not reflect any of the Applicant's improvement needs.

142. Regarding the interim measures which should have been taken by the supervisor and/or by the MRG prior a separation decision was taken into consideration, the Tribunal notes that only a rating “does not meet performance expectations” for a second consecutive year can legally justify an administrative action such as a transfer to a different post or function. The rebuttal report regarding the 2004 PAD report was finalized after the 2005 PAD report was completed and it results that the Applicant’s supervisor’s proposed measure in 2005 to transfer the Applicant was not in accordance with the legal provisions, because in April 2006, the 2004 PAD report was not yet confirmed by the Rebuttal Panel and a correlation between the 2004 and 2005 PAD reports was not possible.

143. Also, there was no interim decision before July 2010 taken by the MRG, in accordance with art. 10.3.15 of the UNFPA Personnel Policies and Procedures Manual and sec. 16.5 of the United Nations Secretariat administrative instruction ST/AI/2002/3. It results that these legal provisions were ignored without any reasonable explanation.

144. In the present case, from the results of the February 2010 rebuttal report, the most appropriate measure to be applied even if it is not clearly recommended, was a transfer to another post or function, in light of the conclusion that the Applicant’s functional and technical skills were not disputed. Such a measure was not taken into consideration by the DDHR or by the Executive Director.

145. The Applicant remained in the same job where it was clear that she would have no chance to improve her performance in the absence of a concrete improvement developmental plan with clear time frames, more frequent reviews and closer assessment of progress made in areas identified as needing improvement, completion of the mid-year review and ongoing performance discussions with her supervisor. The comments included two months later by the UNFPPA Representative in the 2009 PAD report, related to a disciplinary investigation which was closed, appears to reflect an adverse attitude and not an objective and impartial evaluation, aspects invoked by the Applicant in her letter of complaint dated 29 June 2010.

146. The Tribunal has no competence to make findings and to decide on such a complaint for abuse of authority and harassment against the Applicant's supervisor, but concludes that the complaint was not properly investigated in accordance with the relevant UNFPA Policy on Harassment, Sexual Harassment and Abuse of Authority and secs. 3.2 and 5.14 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment and abuse of authority) .

147. The Tribunal concludes that from the beginning of the Applicant's appointment as Assistant Representative, her supervisors constantly contributed to the deterioration of her performance by treating her as having been appointed conditionally, not establishing improvement development plans, proposing a separation package in 2005 or early retirement in 2008 before the end of the appraisal cycles, influencing negative observations made by the MRG (chaired by her supervisor), initiating a disciplinary investigation in 2008, and not respecting their mandatory obligations as supervisors to support the Applicant to improve her performances. It is also notable that, despite the shortcomings in the Applicant's performance during the previous periods, UNFPA, as a result of the delayed appointment of a Country Office Representative, decided that the Applicant was to act as Officer-in-Charge for four months, a decision which actually contradicts the negative performance ratings previously established. The Tribunal also observes that the documents filed by the Applicant support the statement that her work was highly appreciated by UNFPA partners and that these positive elements were ignored by the maker of the contested decision.

148. The Tribunal notes that the decision was taken by the Executive Director based on the Applicant's performance during the cycles 2006 to 2008, based on art. 10.3.7 of the relevant UNFPA policy. Even if in the termination decision, the Executive Director made comments that were related to the Applicant's unsatisfactory performance during the previous years, including 2009, she did not exercised the prerogative from art. 10.3.11 to terminate the Applicant's appointment because she had a severe case of unsatisfactory performance. Such a measure can be

decided immediately by the Executive Director and it has to be related to one or several official acts, tasks, projects or similar undertakings where the staff member had a performance below the expected standard. In such a case, before taking a final decision regarding the termination of the appointment, the Executive Director, in accordance with art. 10.3.12 of the policy has to verify if the facts underlying the official acts, tasks, projects or similar undertakings have been established. In the present case there was no such analysis and it cannot be said that the separation decision was legally taken in accordance with art. 10.3.11.

149. The Tribunal considers that the reason included in the decision regarding an alleged threat from the Applicant against UNFPA, if her contract was to be terminated, which was considered a “departure from her obligations as an international civil servant” is not legally related to the Applicant’s performance. This was part of the Applicant’s defense regarding the proposal to terminate her contract for specific reasons – unsatisfactory performance, it was taken out of context and used as an accusation against her without providing her with the chance to further comment on this reason for termination. The Executive Director’s findings that the Applicant did not respect her obligations as civil servant cannot be a valid reason for a termination for unsatisfactory service. Such a determination can only represent a justification for a disciplinary sanction.

150. Consequently, the Tribunal will rescind the contested decision of 15 July 2010 to terminate the Applicant’s permanent appointment for unsatisfactory service.

Relief: reinstatement and compensation

151. The Statute of the Dispute Tribunal states, in relevant part:

Article 10

...

5. As part of its judgment, the Dispute Tribunal may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

152. The Tribunal considers that art. 10 of the Statute includes two types of legal remedies. Article 10(a) refers to the rescission of the contested decision or specific performance and to a compensation that the Respondent may elect to pay as an alternative to the rescission. The compensation which is to be determined by the Tribunal when a decision is rescinded reflects the Respondent's right to choose between the rescission or specific performance ordered and the compensation. Consequently, the compensation mentioned in this paragraph represents an alternative remedy and the Tribunal must always establish the amount of it, even if the staff member does not expressly request it because the legal provision uses the expression "[t]he tribunal shall determine an amount of compensation". Article 10 (b) refers to a compensation. The Tribunal considers that the compensation established in accordance with art. 10.5(a), which is mandatory and directly related to the rescission of the decision, is distinct and separate from the compensation which may be ordered based on art. 10.5(b).

153. The Tribunal has the option to order one or both remedies, so the compensation mentioned in art. 10.5(b) can represent either an additional legal remedy to the rescission of the contested decision or can be an independent and singular legal remedy when the Tribunal decides not to rescind the decision. The only common element of the two compensations is that each of them separately "shall normally not exceed the equivalent of two years net base salary of the applicant",

respective four years if the Tribunal decides to order both of them. In exceptional cases, the Tribunal can establish a higher compensation and must provide the reasons for it.

154. When the Tribunal considers an appeal against an administrative decision, the Tribunal can decide to :

- a. Confirm the decision;
- b. Rescind the decision if the decision is unlawful and set an amount of alternative compensation; or
- c. Set an amount of compensation in accordance with art. 10(b).

155. The Tribunal notes that the Respondent can, on his own volition, rescind the contested decision at any time prior to the issuance of the judgment. After the judgment is issued, the rescission of the contested decision represents a legal remedy decided by the Tribunal.

156. The Organization's failure to comply with all the requirements of a legal termination of appointment causes a prejudice to a staff member since his/her contract was unlawfully terminated and his/her right to work was affected. Consequently, the Organization is responsible with repairing the material and/or the moral damages caused to the staff member. In response to an applicant's request for rescission of the decision and his reinstatement into service with compensation for the lost salaries (restitution *in integrum*), the principal legal remedy is the rescission of the contested decision and reinstatement together with compensation for the damages produced by the rescinded decision for the period between the termination until the actual reinstatement.

157. A severe administrative measure, like a separation from service for unsatisfactory service, is a work-related event which generates a certain emotional distress. This legal remedy generally covers both the moral distress produced to

the Applicant by the illegal decision and the material damages produced by the rescinded decision.

158. If the Respondent proves during the proceedings that the reinstatement is no longer possible or that the staff member did not ask for a reinstatement, then the Tribunal will only grant compensation for the damages produced by the rescinded decision

159. The Tribunal underlines that the rescission of the contested decision does not automatically imply the reinstatement of the parties into the same contractual relation that existed prior to the termination. According with the principle of availability, the Tribunal can only order a remedy of reinstatement if the staff member requested it. Further, the Tribunal notes that reinstatement cannot be ordered in all cases where it is requested by the staff member, for example if during the proceeding in front of the Tribunal the staff member reached the retirement age, is since deceased or her/his contract expired during the judicial proceedings.

160. In *Tolstopiatov* UNDT/2011/012 and *Garcia* UNDT/2011/068, the Tribunal held that the purpose of compensation is to place the staff member in the same position s/he would have been had the Organization complied with its contractual obligations.

161. In *Mmatta* 2010-UNAT-092, the Appeal Tribunal stated:

Compensation could include compensation for loss of earnings up to the date of reinstatement, as was ordered in the case on appeal, and if not reinstated, then an amount determined by the [Dispute Tribunal] to compensate for loss of earnings in lieu of reinstatement up to the date of judgment

162. In the present case, the Applicant expressly requested her reinstatement as part of her appeal and the contested decision concerns a separation from service for unsatisfactory performance. The Applicant previously had a permanent appointment as Assistant Representative in Sri Lanka.

163. The Applicant was 56 year-old at the time of the contested decision and she started being employed by UNFPA in 1991. The mandatory retirement age for staff members recruited after 1 January 1990 is 62. The Tribunal notes that in her management evaluation request filed on 20 September 2010 and transmitted to the Executive Director on 23 September 2010, the Applicant stated that she is prepared to enter into early retirement after April 2011.

164. An early retirement is an option which is open to staff members who are 55 years old or older when they wish to separate from service and claim an early retirement benefit from the United Nations Joint Staff Pension Fund and, technically, it is a resignation which must be submitted in writing. A resignation does not involve an employer's approval because it is the staff member's free will to end his/her contract of employment.

165. Taking into consideration the Applicant's free will to be put on early retirement after April 2011, the Tribunal considers that the Applicant is to be reinstated from 24 July 2010 until 31 April 2011 and she is entitled to receive compensation from the Respondent for this period, including net base salary and entitlements, minus the termination indemnity. After 1 May 2011, the Applicant is to be considered retired after 20 years of service and DHR is to prepare within 30 days the necessary documentation, including a letter of appreciation to be sent for the signature of the Executive Director. The Applicant is entitled to receive retroactive pension from 1 May 2011.

166. A staff member whose appointment is to be terminated shall be given a written notice of such a termination. In lieu of the notice period, upon authorization, a staff member may receive a compensation equivalent to salary, applicable post adjustment and allowances corresponding to the relevant notice period at the rate in effect on the last day of service.

167. The Tribunal considers that the implementation of any administrative decision, including a termination decision, is part of the administrative procedure and

a staff member has the right to be treated with respect and dignity until the end of the contract, respective until the expiration of the written notice of such termination or upon notification, if the staff member is to be compensated in lieu of the notice period.

168. In the present case, on Friday, 23 July 2010, at 4 p.m., the Applicant was called to a meeting with her supervisor and, upon being informed that the meeting concerned her employment, she requested a recording of the meeting. The UNFPA Representative was not instructed by DDHR as to whether this was acceptable to UNFPA, and they could not come to an agreement on how to proceed with the meeting. Later in the evening, after the end of the working day, the DDHR sent the Applicant an email to her UNFPA account with the termination letter and informed her that since the termination of her appointment became effective on 23 July 2010, the Country Office had been instructed to initiate through UNDP the standard separation procedures and in the course of these procedures she would be requested to return to UNFPA all the assets belonging to UNFPA. She was also informed that she was requested not to return to the office on 26 July 2010 and, if she needed to retrieve any personal effects, she had to make prior arrangements.

169. The security guards were informed through a note containing the Applicant's photograph and name in the way specific only to criminal proceedings that she was not allowed to enter UNFPA's premises "unless by appointment with UNFPA Representative". This note was seen by other UN staff members in the morning of 26 July 2010.

170. It results that the Applicant was not only unlawfully separated but she was also exposed to an unnecessary public humiliation and there was no reasonable reason for such a disrespectful manner of treating a former staff member. The Tribunal notes that on 27 October 2010, in his management evaluation response letter, the Executive Director stated in relation to this incident that: "any embarrassment caused to [her] is regretted".

171. Based on the particular circumstances in the present case, the Tribunal considers that the judgment itself and the letter of appreciation to be signed by the Executive Director are a sufficient remedy for the moral prejudice caused to the Applicant by the unlawful decision to separate her for unsatisfactory performance and the unusual way of “publicly” announcing it and rejects the claim for moral damages. There is no evidence that shows that the Applicant suffered a moral prejudice as a result of the contested decision which cannot be covered by the legal remedy of rescission and reinstatement until her early retirement.

172. The Tribunal, in accordance with art. 10.5 of the Tribunal’s Statute, establishes the alternative compensation to the rescission of the decision at USD5,000 plus material compensation for the loss of earnings for the period 24 July 2010-31 April 2011 (net base salary and entitlements), minus the termination indemnity (compensation in lieu of notice). The Applicant is to be considered retired after 1 May 2011 and the Respondent is to make the necessary arrangements for the retroactive payment of the pension to the Applicant and for a letter of appreciation to be sent for the Executive Director’s signature.

173. The Tribunal will reject the Applicant’s request for judicial costs of USD1,500 since no evidence was filed in support of this claim.

Conclusion

In the light of the foregoing the Tribunal DECIDES:

174. The application is granted in part.

175. The contested decision from 15 July 2010 is rescinded, the Applicant is reinstated from 15 July 2010 to 31 April 2011 and she is to receive a compensation for her loss of earnings (net-base salary and entitlements) for this period minus the termination indemnity she received. The Respondent is to pay an alternative compensation to the rescission of the decision USD5,000 plus the loss of earnings

(net base salary and entitlements) for the period 24 July 2010 to 31 April 2011, minus the termination indemnity she received.

176. These amounts are to be paid within 60 days from the date the Judgment becomes executable, during which period interest at 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.

177. The Applicant is to be considered retired as of 1 May 2011 (early retirement after 20 years of service) and the Respondent is to make all necessary arrangements within 30 days for her to receive her pension awards retroactively as of 1 May 2011, including a letter of appreciation to be sent for the Executive Director's signature.

178. The claims for moral damages and judicial costs are rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 6th day of August 2014

Entered in the Register on this 6th day of August 2014

(Signed)

Hafida Lahiouel, Registrar, New York