UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2014/015
Judgment No.: UNDT/2014/137
Date: 20 November 2014
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

MASYLKANOVA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 11 July 2012 with the New York Registry of the Tribunal, the Applicant, who served until 5 March 2012 under a temporary appointment with the United Nations Assistance Mission in Afghanistan ("UNAMA"), contests the "[n]on-extension of [her] contract as a result of [the] Administration's failure to respond to [her] complaint of harassment".

Facts

2. The Applicant joined the Organization on 7 March 2011, under a six-month temporary appointment limited to the service with UNAMA as a Political Affairs Officer (P-3). In this capacity, she was assigned to the Regional Office of Bamyan (Central Highlands Region) in April 2011. Her temporary appointment was extended once until 5 March 2012.

3. The record shows tense exchanges between the Applicant and her immediate supervisor—the Political Affairs Officer, Central Highlands Region, UNAMA—as from the end of April 2011, relating, *inter alia*, to reporting lines and the scope of the Applicant's purview.

4. According to the Applicant, in May 2011, she approached, first, the Head of Office, Central Highlands Regional Office, UNAMA, and, later, the Director, Political Affairs Division ("D/PAD"), to discuss her difficult relationship with her supervisor; both advised her to bear with the situation, noting that she was employed on a temporary contract.

5. By memorandum dated 30 May 2011, the Chief, Civilian Personnel Officer ("CCPO"), UNAMA, transmitted to the D/PAD the form to be filled by the Applicant and her supervisor to express their intention concerning the possible extension of the Applicant's temporary contract up to 5 March 2012. The memorandum specified that "[i]f there are any performance-related issues which need to be taken into account, please [contact] the Human Resources Section immediately before completing this form". The form, recommending an

extension of the Applicant's temporary appointment up to 5 March 2012, was signed by the Applicant's supervisor on 7 June 2011 and by the Applicant on 9 June 2011.

6. On 21 June 2011, the Applicant sent an email to her supervisor, titled "working together", expressing her concerns about "increasing tensions in [their] communication/cooperation" and identifying numerous instances of disagreement between the two of them.

7. At the beginning of July 2011, the Applicant received a letter of appointment—signed by the CCPO, UNAMA, on 5 July 2011—from the Human Resources Administration Unit, extending her contract for a further five months and 28 days, i.e., from 7 September 2011 to 5 March 2012.

8. On 13 July 2011, a letter purportedly authored by four national colleagues of the Applicant was sent to the D/PAD bringing to his attention the "ill treatment of [the Applicant] by [her supervisor]", noting that she was not the first staff member experiencing difficulties with the same supervisor.

9. On 7 August 2011, the Applicant's supervisor transmitted to the Applicant a performance improvement plan ("PIP"), which, the Applicant claims, was established without her input and on which she was urged not to comment. The Applicant signed it with comments.

10. According to the Applicant, the D/PAD told her that he had halted her recruitment as Special Assistant to the DSRSG and, in mid-September 2011, the Chief Staff Counsellor (wife of D/PAD and close to the Applicant's supervisor) made a number of calls to the Applicant accusing her of inappropriate attitude towards her supervisor. Again according to the Applicant, the Head of the Regional Office advised her to apologise, suggesting a possible impact on the renewal of her contract.

11. On 15 November 2011, the Applicant filed a complaint with the local Conduct and Discipline Unit ("CDU"), UNAMA, for harassment and abuse of authority against her direct supervisor. In essence, she alleged that her supervisor failed to support her as a staff member since she joined the office, and sought to undermine her work and marginalize her, a pattern that increasingly grew to harassing behaviour that extended to the guest house where both the Applicant and her supervisor lived, along with a number of colleagues.

12. On 17 November 2011, the Conduct and Discipline Officer, CDU, transmitted the complaint to the Officer-in-Charge ("O-i-C"), Chief of Staff, UNAMA. By accompanying memorandum, she requested that the Applicant's allegations be investigated in accordance with the Secretary-General's bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse authority). The memorandum stated that the Applicant wished a formal investigation to be conducted since "previous interventions … were not successful and … [her supervisor] ha[d] not changed her alleged harassing conduct but [it got] worse each day".

13. At the end of 2011, the Applicant's supervisor sent several warnings for different motives to the Applicant. In particular, on 11 December 2011, the Applicant's supervisor issued a reprimand against the Applicant, mainly concerning an alleged failure to undertake an agreed travel assignment without proper justification. On 14 December 2011, the Applicant sent a comprehensive written response to the reprimand.

14. On 14 December 2011, the Acting Chief of Staff, UNAMA,—who was the Head, Office of Legal Affairs, Office of the SRSG, UNAMA—acknowledged receipt of the Applicant's complaint for harassment and advised that it had been forwarded to the Acting Head, Office of Legal Affairs, for advice.

15. By email of 23 January 2012, the Head, Office of Legal Affairs (and Chief of Staff *ad interim*) informed the Applicant that he had transmitted her complaint to the newly appointed Chief of Staff.

16. On 25 January 2012, an Administrative/Human Rights Officer, Office of the Deputy SRSG/Political Affairs Division, UNAMA, sent an email to many UNAMA staff, including the Applicant, asking for their respective performance appraisal reports, needed for "the extension of [their temporary] contract". He also enquired if they had been interviewed/scheduled for interview to be included in the Field Central Review Body ("FCRB") roster, with a view to discuss with the SRSG "how [they could] extend [them] if [they were] not able to pass the test and not scheduled for interview".

17. Also on 25 January 2012, the Applicant's supervisor sent the Applicant an appraisal of her performance in a Performance Evaluation Form ("PEF") already signed by her first and second reporting officer, and covering the period of 7 March 2011 to 6 March 2012. The Applicant was rated overall as "Does not meet performance expectations", and was given the ratings "Requires development" or "Unsatisfactory" in all but two of the competencies assessed. The Applicant signed this PEF on 29 January 2012, adding "I disagree" to her signature.

18. By memorandum dated 1 February 2012, the Applicant manifested her disagreement with the appraisal and elaborated on her achievements.

19. On 8 February 2012, the Applicant met the Deputy Chief Civilian Personnel Officer ("DCCPO"), Human Resources Management Section ("HRMS"), UNAMA. In response to a follow-up email by the Applicant, the DCCPO stated, on 12 February 2012, that HRMS had not received a recommendation for extension of her temporary appointment beyond 364 days, that such extension was subject to satisfactory performance evaluation, and that the request should include a plausible justification as to why a qualified candidate could not be identified from the Field Central Review Body roster to fill this regular post. She further clarified that there was no provision catering for a rebuttal process for staff holding a temporary appointment; however, she advised that a temporary appointment staff who disagrees with an evaluation should provide an explanatory statement to be added to the performance evaluation form.

20. On 13 February 2012, in response to a request from the Applicant for an update on her complaint, the newly appointed Chief of Staff informed her that neither him nor his office conducted investigations such as the one she had requested, but that a number of options could be envisaged for this purpose, including the convening of a fact-finding panel.

21. On 20 February 2012, the Applicant contacted the Ethics Office, at the United Nations Headquarters and, on 21 February 2012, she got in touch with the Regional Ombudsman Office in Bangkok and the Office of Staff Legal Assistance ("OSLA") in New York.

22. On 28 February 2012, the Chief of Staff informed the Applicant that his office was considering convening a fact-finding panel to investigate her complaint.

23. On 2 March 2012, OSLA declined to act as the Applicant's counsel on the filing of a suspension of action application, warning her about "potential adverse consequences" on her long-term career aspirations in the United Nations, and suggested to her, instead, to approach UNAMA for the purpose of an agreement comprising the removal of negative performance evaluations from her file as well as her reassignment. The Applicant allowed OSLA to negotiate along these lines with UNAMA; however, the negotiations were not successful.

24. By email of 3 March 2012 to the SRSG, UNAMA, the Applicant requested to have her contract extended for a few months until the investigation was completed. By email reply of the same day to the Deputy SRSG, copied to the Chief of Staff, UNAMA, the SRSG, UNAMA, agreed "with the temporary extension for some 3 months to enable the due process" and instructed that necessary arrangements be made.

25. The Applicant holds that during the following days the human resources officers did not answer any of her follow up emails, whereas the Deputy SRSG's Special Assistant advised her that the Administration was identifying a post for her reassignment. It appears from exchanges of with other colleagues that human resources staff had conveyed to colleagues of UNAMA Administration that the Applicant had already left Afghanistan. The Applicant claims that on 5 March 2012, the Special Assistant to the Chief of Staff told her over the phone that it was not wise to consult the CDU, and advised her to leave the UN compound or she would otherwise be escorted out of the premises.

26. By note dated 5 March 2012, emailed to the Applicant on the same day, the Chief of Mission Support, UNAMA, iterated the non-extension of her temporary appointment. After recalling that temporary appointments are for less than 364 days and carry no expectancy of renewal or conversion, the note stated that "extension is not possible in this case". It further read:

> In your specific case, both your supervisors in Bamyan and the Program Manager at the Political Affairs Division have recommended no further extensions. Your record shows documented, serious, performance problems which you have not addressed despite detailed performance improvement coaching by your supervisor. In addition, information received from Bamyan shows that you have been highly disruptive, constantly flouting administrative rules, and disregarding rules designed to ensure your own safety and security which have endangered not only yourself, but other UNAMA staff as well.

27. The note also referred to the Applicant's harassment complaint against her supervisor, reassuring her that the investigation would continue after her separation in accordance with normal policy and procedures.

28. Accordingly, the Applicant was separated upon the expiration of her contract on 5 March 2012. She left the duty station on 6 March 2012.

29. On 15 March 2012, the Applicant requested management evaluation of the decision not to renew her temporary appointment.

30. On 21 March 2012, the Ethics Office replied to the Applicant's email of 20 February 2012 advising her that it did not find a *prima facie* case of retaliation, and emphasizing that performance and interpersonal issues with her supervisor existed prior to the Applicant's report of misconduct to CDU.

31. On 22 March 2012, in response to a follow-up email from the Applicant, the Ethics Office suggested that the submitted documents seemed to indicate a pattern of harassment and abuse of authority, rather than a case of retaliation.

32. By memorandum dated 17 April 2012, the Chief of Staff, UNAMA, informed the Applicant that a fact-finding panel had been convened on 16 April 2012. The fact-finding panel interviewed the Applicant on 26 April 2012.

33. By letter of 30 April 2012, the Management Evaluation Unit replied to the Applicant's management evaluation request, upholding the contested decision.

34. The Applicant filed the present application before the New York Registry of the Tribunal on 11 July 2012, where it was registered under Case No. UNDT/NY/2012/063. The Respondent filed his reply on 13 August 2012. On 19 August 2012, the Applicant submitted observations on the Respondent's reply.

35. By Order No. 258 (NY/2012) of 7 December 2012, the Tribunal rejected a motion filed by the Applicant on 20 November 2012, to have her case heard in an expedited manner.

36. Also on 7 December 2012, the Applicant filed an application with the New York Registry of the Tribunal, contesting the decision to disband and not to reinstate the fact-finding panel formed in February 2012 to investigate her complaint of harassment and abuse of authority by her supervisor that she had submitted in 2011. By Judgment No. UNDT/2013/033, rendered on 26 February 2013, the Tribunal found that this application was moot, since UNAMA had convened a new fact-finding panel on 6 January 2013.

37. On 30 August 2013, the Applicant filed a second motion for expedited consideration. After some written submissions by the parties, the Tribunal convened a case management hearing, which took place on 18 October 2013, to determine any outstanding issues in the case, and subsequently issued Order No. 270 (NY/2013) of 25 October 2013. Thereafter, on 20 November 2013, the parties filed a joint submission where:

a. they agreed not to attempt informal resolution of the matter; and

b. they informed the Tribunal that, despite their efforts to prepare a consolidated list of agreed and disputed facts and legal issues, they could agree on very little; hence, they set out their respective positions separately.

38. Also, pursuant to Order No. 270 (NY/2013), on 11 December 2013, the parties filed a list of witnesses, proposed dates for a hearing on the merits, and an agreed bundle of documents, subsequently completed/amended by a further joint submission dated 12 December 2013.

39. A second case management hearing was held on 23 January 2014.

40. On 16 January 2014, the O-i-C, UNAMA and Designated Official *ad interim*, emailed the Applicant his memorandum dated 14 January 2014, informing her of the SRSG decision, following the fact-finding panel's investigation, to close the case with no further action, based on the finding that no prohibited conduct took place. On 17 January 2014, the Applicant requested from the O-i-C, UNAMA, full disclosure of the fact-finding panel's report, while expressing her concerns that the panel might "have conducted a hasty process".

41. On 3 February 2014, the Applicant moved for the Tribunal to order UNAMA the full disclosure of the fact-finding panel's report. On the same day, the Tribunal issued Order No. 24 (NY/2014), ordering that:

a. the scope of Case No. UNDT/NY/2012/063 was limited to whether the non-renewal of the Applicant's contract was unlawful, and whether it was marred by failure to act in a prompt manner in relation to her complaint;

b. the motion for disclosure of the investigation report was dismissed, considering that, should the Applicant wish to contest any aspect of the fact-finding investigation, she should initiate separate proceedings; and

c. the parties file a joint submission proposing a revised agreed list of witnesses, with a series of detailed related information, which they did by joint submission of 5 March 2014.

42. Also in her 3 February 2014 motion, the Applicant requested consideration of transferring the case to the Nairobi Registry of the Tribunal, as the time difference with New York had revealed to pose serious difficulties; this request was reiterated on 24 March 2014.

43. Having sought and received the parties' observations, and after consultation with the Tribunal's Judges based in Nairobi and Geneva, the case was transferred to the Registry in Geneva, by Order No. 81 (NY/2014) of 21 April 2014.

44. On 1 May 2014, the Applicant filed a new application contesting the findings of the fact-finding panel report and UNAMA's non-disclosure of said report. This application is currently pending with the Tribunal, under Case No. UNDT/GVA/2014/017.

45. By motion dated 2 May 2014, the Applicant again requested the Tribunal to give her case expedited consideration and, as temporary relief pending final outcome of the case, to order removal of all adversary materials from all her personnel files.

46. Pursuant to Order No. 62 (GVA/2014) of 5 May 2014, the Respondent commented on the Applicant's request for temporary relief on 5 May 2014, seeking its rejection. On 6 May 2014, the Applicant filed comments on the Respondent's submission.

47. By Order No. 64 (GVA/2014) of 9 May 2014, the Tribunal rejected the motion for temporary relief, while instructing the Respondent, as a matter of case management, to make arrangements to give the Applicant access to her Official Status File ("OSF") under the conditions set forth in administrative instruction ST/AI/108 (Annual Inspection of Official Status File).

48. After reviewing her OSF through a designated agent on 16 May 2014, the Applicant, by motion dated 20 May 2014, requested the Tribunal, *inter alia*, to allow her access to "**all** her other files" (emphasis in the original) and order Counsel for the Respondent to recuse himself for conflict of interest, given that his spouse works at the Organization and had accessed her OSF immediately after Counsel for the Respondent had it in its possession for two years.

49. On 27 May 2014, and pursuant to Order No. 70 (GVA/2014) of 21 May 2014, the Respondent filed comments on the above 20 May 2014 motion.

50. By Order No. 76 (GVA/2014) of 28 May 2014, the Applicant's motion of 20 May 2014 was rejected in its entirety.

51. Pursuant to Order No. 110 (GVA/2014) of 17 July 2014, the Respondent filed, on 18 August 2014, the following additional information:

a. The email dated 3 March 2012, by which the SRSG, UNAMA, had requested that arrangements be made for the temporary extension of the Applicant's appointment for some three months—which was not implemented since the SRSG "withdrew" it once he had been advised on the matter by his team;

b. The number of Political Officers in UNAMA who reached the 364-day service ceiling on a temporary contract in 2012 (nine in total), and the number of such Political Officers who were not extended beyond 364 days (three in total, including the Applicant); and

c. That the Respondent's reply referred by mistake to a notification to the Applicant dated 20 February 2012 about the expiration of her contract. Reference should have been made, instead, to an email from the DCCPO, HRMS, UNAMA, to the Applicant, dated 12 February 2012.

52. A hearing on the merits of the case was held in the presence of the parties on 23 September 2014. No witnesses were heard.

Parties' submissions

53. The Applicant's principal contentions are:

a. The lack of action following her complaint of 15 November 2011 empowered the Applicant's supervisor to continue her harassment and abuse of authority and to retaliate against her by placing adverse material in her OSF; this led subsequently to the non-extension of her contract. If the Organization just "brushes aside" a complaint for harassment without giving reasons, a staff member may justifiably conclude that the Organization is breaching one of the essential components of his/her contract (*Nogueira* Order No. 137 (NBI/2010); *Fiala* Order No. 136 (NBI/2010));

b. She should not have been separated before the completion of an investigation into her harassment complaint as per the Tribunal's finding in *Applicant* UNDT/2012/091:

> The Secretary-General had promulgated ST/SGB/2008/5 in which the misconduct of workplace harassment belongs in a special class of prohibited conduct. It is to be expected that where a harassment complaint is filed against a manager, urgent and necessary steps must be taken to address it. Where in fact a staff member has filed such a grievance, it is both illegal and unethical to separate him or her without entertaining the complaint. The separation of a complainant with a pending complaint of prohibited conduct is a

mockery of the Secretary-General's efforts to protect staff members and a subversion of the rule of law;

c. While acknowledging that her complaint was presented in November 2012, the Administration falsely portrayed the investigation as ongoing, when in fact no action was underway;

d. In reporting misconduct by her supervisor, the Applicant was fulfilling her duty under sec. 1.1 and 1.2 of ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperation with duly authorized audits or investigations). According to sec. 2.2 of the same bulletin, when a staff member has made a report of possible misconduct in good faith, the Administration "must prove by clear and convincing evidence that it would have taken the same action absent the protected activity";

e. By undertaking no prompt action in response to her complaint, the Administration violated its duty, which gives her an entitlement to compensation. While temporary contracts entail limitations, any staff member has the right to carry out duties free from harassment and abuse of authority, a right that the Applicant has been continuously denied;

f. In the absence of a system to protect staff on temporary contracts, supervisors who engage in behaviour disrespectful of the rules and procedures are empowered in their actions, confident that no repercussions will follow. Unavailability of means allowing a staff member to rebut a derogatory performance appraisal is in itself discrimination based on the contractual status. Placing a response to the performance appraisal in her file is not sufficient to restore her reputation and counter adverse effects on her career;

g. The Administration based its decision not to renew her appointment on the performance assessment made by her supervisor (PEF issued on 25 February 2012). This PEF, however, was issued *after* she had filed an official complaint against her supervisor. It is preposterous to enable a

person under investigation to issue a PEF over the person who launched the complaint triggering an investigation, and to expect such appraisal to be unbiased. In doing so, the Administration failed to upheld its duty to protect her;

h. She was provided with a copy of her PEF as a *fait accompli*. Moreover, the rating "Did not meet performance expectations" was granted without being substantiated. The foregoing notwithstanding, the evaluation was used as a basis for not extending her contract, and this was done without conducting an investigation to ascertain whether her allegations of prohibited conduct were founded;

i. It is prescribed that all staff members are allowed to rebut an evaluation if they disagree with it. Despite that, she was denied this opportunity based on administrative instruction ST/AI/2010/4 (Administration of temporary appointments). In addition, whereas the Respondent claims that the first renewal of her contract (effective September 2011) was intended to allow her an opportunity to improve her performance, none of the letters of appointment mentions that, nor does any correspondence with the Administration and her hierarchy. On the contrary, she was being praised for her work. The PIP was used as a form of harassment; had it been done in good faith, her input would have been requested;

j. The Administration not only failed in its duties, but also alleged wrongdoing on her part (e.g., in the 5 March 2012 note), without any investigation. These serious claims were never substantiated. Moreover, the Administration provided false information to the MEU, which she had no chance to counter;

k. She had every expectation of renewal of her contract. At various venues the Administration assured the staff on temporary contracts that, albeit temporary hirees, chances were that due to the special political mission status of UNAMA and continued lack of political staff, they would be "regularized" beyond 364 days. To this end, she was advised to apply for

multiple field posts, which she did—as well as for other UNAMA temporary posts. UNAMA later denied this in its response to MEU. Further, the message of 25 January 2012 from an Administrative/Human Resources Officer carried the expectation that her contract be renewed. Lastly, the SRSG decision to extend her appointment was a promise that created a legitimate expectation of renewal;

l. The Respondent fails to indicate why the UNAMA Administration went against the SRSG decision although she had presented an impending claim of harassment at the workplace, despite a practice in the Organization of extending temporary appointments to enable due process while a situation such as hers is ventilated (*Eldam* UNDT/2012/133). Instead, UNAMA hastily removed her from the mission area;

m. In spite of her having launched several initiatives that could benefit from her continued work and which were assessed as extraordinary achievements, the Administration took a decision not to extend her appointment, ignoring the SRSG approval for a three-month extension of her contract. For several days after the SRSG instruction, the Administration misinformed certain officials that she had already left the country, that a contract extension was, hence, irrelevant, and told her that they were identifying a post for her to continue working. The Administration then kept silent until the evening of 5 March 2012, when it sent the Applicant the note informing her of the impugned non-renewal decision. The Administration later put forward that the Applicant might have misrepresented facts to the SRSG to her advantage;

n. No investigation took place to prove her allegations wrong; the officials who informed her of the non-renewal decision made humiliating comments and deterred her from using the internal justice system. The Administration acted in bad faith when it kept assuring the Applicant that a position was being identified for her reassignment, until she received the note of 5 March 2012, on the last day of her contract;

o. Her hasty removal from the mission area in the circumstances described above, as well as the fact that the Organization dragged its feet in taking action on her complaint, supports that the reason behind such removal was a deliberate attempt by the Administration to condone harassing and abusive conduct;

p. The operational and staffing needs of UNAMA in early 2012 permitted, rather than prevented, an extension of her temporary appointment beyond 364 days. Since her separation, UNAMA has continuously issued vacancy announcements specifically for political posts. Furthermore, no budgetary constraints affected the post she encumbered, as the DCCPO affirmed that the post would be filled via the roster. Although according to the statistics submitted by the Respondent, three out of nine UNAMA Political Officers who reached 364 days of service on temporary contracts in the same year did not have their contract extended, the Applicant was the only one among them who did not leave on her own will;

q. The Administration has provided confusing information as to the reasons behind the contested decision, as it invoked, on the one hand, that the Applicant had reached the maximum duration on a temporary appointment and, on the other hand, her negative performance, despite the latter being founded on an inaccurate evaluation against which no rebuttal was permitted;

r. ST/AI/2010/4 stipulates that an extension of up to 729 days can be approved in exceptional cases. Such extensions were granted to other temporary staff members who arrived before or at the same time as the Applicant; some of them were even extended beyond 729 days. The note of 5 March 2012 reads: "… extension is not possible in <u>this</u> case" (emphasis in the original), thereby confirming that her situation was treated differently. The Administration's argumentation based on the type of contract and the downsizing of the mission does not stand. The downsizing started only in the summer of 2012, and the post of Political Affairs Officer in Dai Kundi

(abolished only in December 2012) was vacant for several months after the Applicant's separation;

s. Her candidacy for other posts, especially UNAMA posts, was blocked. The Respondent fails to comment on that contention. She has been blacklisted since 2012. As a result, she has failed to secure employment with the Organization, despite her numerous applications. Her difficulty to secure a job is compounded by the fact that any application for a UN vacancy must include the two last performance evaluations, which she is not in a position to provide;

t. In issuing an evaluation based on false information, MEU failed to meet its duty of objectively assessing her case, in breach of any staff member's right to have an administrative decision properly reviewed, including at the management evaluation stage (*Obdejn* UNDT/2011/032);

u. Despite clear evidence, the Ethics Office failed to find a *prima facie* case of retaliation by her supervisor. It only sought material supporting her supervisor's position . The Ethics Office has found a *prima facie* case of retaliation only in two out of 134 complaints received, which shows that it does not carry out its obligations in accordance with ST/SGB/2005/21. Nevertheless, the Ethics Office acknowledged that there was sufficient evidence to warrant an investigation into allegations of harassment and abuse of authority;

v. OSLA, while failing to protect her from abuse of authority, also acknowledged the Administration's failure to provide an environment free from harassment and felt that she was wronged by UNAMA;

w. In sum, the contested non-renewal was due to improper and extraneous motivations—in the absence of which she could expect her contract to be extended—and was also a consequence of the Administration's failure to meet its duty to properly investigate her complaints. The Appeals Tribunal has found that the prejudice caused by such failure warranted compensation (*Appellant* 2011-UNAT-143);

x. Proof of prejudice is rendered unnecessary when procedural requirements have not been observed. That said, the decision not to extend her contract caused her economic loss in terms of salary, especially since she turned down expressions of interest from other offices for the sake of continuity and good performance at UNAMA. The failure to provide her with an environment free from harassment and to protect her from retaliation is a violation of her terms of appointment. She suffered a stressful working environment, which added to the challenging situation in the country of deployment. In addition, false allegations that she had engaged in misconduct, that she had breached administrative rules and had compromised her and her colleagues' security, caused her moral damage and negatively affected her reputation in UNAMA. The manner in which she was hastily removed caused her emotional distress;

y. The remedies sought, as amended at the oral hearing, are as follows:

i. Rescission of the decision not to renew her appointment;

ii. Appropriate compensation for material and other damage suffered; and

iii. Initiation of a system that protects the rights of staff members on temporary appointments, or recommendation thereof.

54. The Respondent's principal contentions are:

a. There were no operational or staffing needs in UNAMA to justify the exceptional extension of the Applicant's temporary appointment. She was recruited to temporarily encumber a normal budgeted post until UNAMA could place a staff member on a fixed-term contract against the post. Temporary appointments in UNAMA were intended to alleviate a particularly acute vacancy rate in Political Affairs, given that, although a recruitment campaign had been carried out to fill the FCRB roster in this area, the final rostering was anticipated to take several months. The Applicant was well aware of the temporary nature of her appointment and

had every opportunity to apply with a view to being rostered through the FCRB process;

b. There were no surge requirements or unexpected operational needs to justify a request for extension on an exceptional basis under sec. 14 of ST/AI/2010/4/Rev.1. Thus, the conditions under which an exception could be made to extend a staff member's temporary appointment beyond 364 days were not met. From early 2012, FCRB-rostered candidates were recruited for vacant positions in UNAMA and, following budgetary cuts, serving staff on fixed-term appointments whose posts were abolished due to the closure of several UNAMA provincial offices, were reassigned to other posts;

c. A P-3 Political Officer from the Sari Pul provincial office—which was planned to close on 31 December 2012—was reassigned to the post formerly encumbered by the Applicant as from 1 July 2012. Contrary to the Applicant's contention that a vacant P-3 Political Affairs Officer post existed in Dai Kundi province, this post was scheduled to be abolished by 31 December 2012 due to the closure of that office;

d. The Applicant's performance was properly assessed. Her supervisor did not retaliate against her by giving her a poor performance assessment. The record reveals that performance issues were raised with the Applicant prior to the filing of her complaint of harassment and abuse of authority against her supervisor. The Applicant's First Reporting Officer ("FRO") made the Applicant aware of her performance shortcomings and provided her guidance as to how to improve, including by initiating a PIP on 7 August 2011, although he was not obliged under sec. 6 of ST/AI/2010/4/Rev.1 to address performance issues of staff serving on temporary appointments. The Applicant's supervisor provided an evaluation of her performance towards the end of her temporary appointment, in accordance with sec. 6.1 of said administrative instruction, and the Applicant submitted a written explanatory statement, as per sec. 6.2 of same;

e. The email of 3 March 2012 from the SRSG, UNAMA, to the Applicant does not constitute a promise of renewal of her contract. This brief informal email sent over the weekend is not a legally binding document. It cannot be construed as anything more than a recommendation or opinion by the SRSG, which he gave being aware that it required the approval of several other officials. Moreover, the SRSG did not have the authority to make such promise. The person competent to make a decision of that kind is the Assistant Secretary-General for Human Resources Management, who may delegate this authority. Once the SRSG was advised by the competent officers that the suggested extension would be legally wrong, he withdrew his recommendation;

f. The Applicant submits a series of complaints that were not submitted for management evaluation and are, therefore, not receivable, to wit, that:

i. she was denied access to her OSF;

ii. Management blocked her candidacy for posts in UNAMA;

iii. OSLA failed to protect her rights;

iv. the Ethics Office failed to protect her from retaliation;

v. the investigation of her complaint of harassment and abuse of authority has been unduly delayed; and

vi. MEU failed to objectively assess the case she presented to it;

g. The Applicant was not successful in her applications for generic job openings for field positions within UNAMA since she had not passed the exam for the P-4 Special Assistant position administered on 11 May 2011.

h. The OSF of all international staff members are centralized at the United Nations Headquarters, while field missions, at times, keep working personnel files. The Applicant's OSF does not contain any correspondence from her supervisor; her performance evaluation and explanatory statement have not yet been filed in her OSF;

i. OSLA is under no obligation to protect the Applicant's rights, but rather to provide legal assistance to staff members in an independent and impartial manner. OSLA actions are not within the Tribunal's jurisdiction *ratione materiae*. OSLA did not "intentionally or unintentionally support the Administration", nor did it admit any failure by the Administration to provide an environment free from harassment and abuse of authority. OSLA acted expeditiously and provided the Applicant with the various options at her disposal. OSLA provided the Applicant, on 1 March 2012, with a draft request for management evaluation and a draft application for suspension of action, that the Applicant was free to file without OSLA having to designate counsel;

j. As to the Applicant's associated request for the Tribunal to review the Ethics Office's determination that her case did not raise a *prima facie* case of retaliation, the recommendations of the Ethics Office are not an administrative decision within the meaning of art. 2.1 of the Tribunal's Statute. The Ethics Office ensured that her request for protection against retaliation was given due and timely consideration by the Organization. After reviewing her report, it determined that the performance issues and the pattern of hostility and harassment allegedly exhibited by the Applicant's supervisor pre-dated her report of misconduct. At no point did the Ethics Office state that it had found evidence sufficient to warrant an investigation into harassment and abuse of authority, and in any case, it has no mandate to make such assessment or determinations;

k. The management evaluation of the contested decision is not an administrative decision within the meaning of art. 2 of the Statute. Further, the Applicant failed to establish that MEU determinations were procedurally or substantively flawed or that they caused her prejudice;

l. The Applicant's claims relating to her complaint of harassment and abuse of authority are not properly put before the Tribunal in this case;

m. Inasmuch as the Applicant has not established any violation of her terms of reference or contract of employment, no compensation is warranted. Should the Tribunal be inclined to grant compensation on the basis of the SRSG email of 3 March 2012, such compensation must be limited to three months, as this is the extension period contained in said email.

Consideration

Preliminary questions

Scope of the case

55. The contested decision in this case is the non-renewal of the Applicant's temporary appointment. This was unambiguously stated in the application and was made abundantly clear in Order No. 24 (NY/2014).

56. The Tribunal's role is to examine the legality of the contested decision only. Other decisions, acts or omissions of the Administration in its dealings with the Applicant fall outside the scope of the present case. They may be taken into account, at best, as part of the factual context of the case, but are not subject to judicial review.

57. Any issues concerning the action taken (or failure to do so) by the Ethics Office, OSLA and MEU in response to the Applicant's complaints or requests are different and separate from the non-renewal decision. Additionally, assuming that each of them may be construed as an appealable administrative decision, they did not undergo the pre-requisite management evaluation.

58. Likewise, the claims that the Applicant's candidacy for other posts has been blocked also concern distinct decisions—non-selection decisions—which have not been put to management evaluation either. For similar reasons, the Tribunal shall not address the Applicant's request to remove adverse materials from her personnel files, also because, after accessing her OSF in the process of this case's management, she did not identify any specific document that she

described as adverse. In fact, to the best of the Tribunal's knowledge, the negative evaluation of February 2012 and the notes prepared by the Applicant's supervisor on her performance have not yet been incorporated into her OSF.

59. In addition, the Applicant has a separate case currently pending before the Tribunal on the findings of the investigation launched further to her complaint for harassment and the decision not to take action thereon. Any issues regarding the fact-finding investigation on the Applicant's complaint, the disclosure of the investigation report and the decision not to take further action are to be dealt with in the framework of Case No. UNDT/GVA/2014/017.

60. It follows from the above that the Tribunal will exclusively examine the legality of the decision not to renew the Applicant's temporary appointment beyond 5 March 2012 and will not pronounce itself on the matters mentioned in paras. 57 to 59 above.

Witnesses

61. By joint submission of 5 March 2014, the parties filed an agreed list of witnesses they wished to call to the bar, including details on the evidence these witnesses would provide. The Applicant reiterated at the substantive hearing her request for witnesses to be heard.

62. Pursuant to art. 18.1 and 18.5 of the Tribunal's Rules of Procedure, the Dispute Tribunal shall determine the admissibility of any evidence and may exclude evidence which it considers irrelevant. After careful consideration of the witnesses proposed, and the issues on which they would be able to give evidence, the Tribunal is of the view that their testimonies would not be apt to provide new evidence pertinent for determining the issues at stake.

63. As will be shown below, the Applicant's allegations regarding her having been harassed or unfairly treated by means of *inter alia* the performance evaluation process are not relevant for the assessment of the legal questions in this case. Consequently, the Tribunal decided not to hear the proposed witnesses.

Merits

Legal framework for extension of temporary appointment

64. The Tribunal takes note of the undisputed fact that the Applicant held a temporary appointment, a contractual status that carries no expectancy of renewal or conversion to another type of contract. This is a well settled principle consistently upheld by jurisprudence (e.g., *Abdalla* 2011-UNAT-138) and clearly enunciated in staff regulation 4.5(b) and staff rule 4.12(c); it is also expressly stipulated in each of the Applicant's letters of appointment.

65. General Assembly resolution 63/250 reads:

> [T]emporary appointments are to be used to appoint staff for seasonal or peak workloads and specific short-term requirements for less than one year but could be renewed for up to one additional year when warranted by surge requirements and operational needs related to field operations and special projects with finite mandates.

66. According to staff rule 4.12(a) and sec. 2.1 of ST/AI/2010/4/Rev.1, "a temporary appointment may be granted for a single or cumulative period of less than one year".

67. Under sec. 2.5 of ST/AI/2010/4/Rev.1:

> Subsequent to the initial temporary appointment, new and successive temporary appointments may be granted for service in the same office or in a different office, for any duration, provided that the length of service does not exceed the period of 364 calendar days.

68. Finally, sec. 2.7 of same provides:

> Upon reaching the limit of service under one or several successive temporary appointments … the staff member shall be required to separate from the Organization.

69. The Applicant reached 364 days of service on a temporary appointment. Hence, pursuant to the above-cited provisions, her service with the Organization was normally due to come to an end. A further extension was envisaged only exceptionally and under restrictive conditions, as per the terms of sec. 14 of ST/AI/2010/4/Rev.1:

> **Exceptional extension of a temporary appointment beyond the period of 364 days**
>
> 14.1 A temporary appointment may exceptionally be extended beyond 364 days, up to a maximum of 729 days, under the following circumstances:
>
> (a) Where a temporary emergency or a surge requirement related to field operations unexpectedly continues for more than one year;
>
> (b) Where a special project in the field or at a headquarters duty station unexpectedly continues for more than one year;
>
> (c) where operational needs related to field operations, including special political missions, unexpectedly continue for more than the initial period of 364 days.

70. This wording makes it clear that an exceptional extension under sec. 14 may only be granted on the basis of unexpected operational needs. It must be emphasized that is for the Organization to determine if these exceptional circumstances are present. As a matter of principle, the Tribunal shall not substitute its judgment to that of the Secretary—General in this respect.

71. The Applicant submits that she had launched valuable initiatives that needed continuous support, and that a post in another regional office identical to the one she had encumbered remained vacant for several months after her separation. She also holds that the fact that UNAMA kept issuing vacancy announcements for Political Officer positions demonstrates that the operational need for her services continued to exist.

72. In the Tribunal's view, regardless of the possibility that the Applicant may have had the skillset to make positive contributions to UNAMA mandate, it is the Organization's discretion to determine whether unexpected operational needs require a departure from the general rule that temporary appointments are not to be extended beyond 364 days. In the case at hand, the Organization determined that the criteria of sec. 14 were not met and, hence, that it was not justified to exceptionally extend the Applicant's temporary appointment beyond 364 days.

73. The foregoing notwithstanding, the Tribunal sought to ensure that the Organization did not make a stricter than usual interpretation of the requirements of sec. 14 of ST/AI/2010/4/Rev.1 in the Applicant's specific case, in violation of the principle of equal treatment. To this end, the Respondent was instructed to provide details on Political Officers serving with UNAMA on temporary contracts having reached the 364-day limit during 2012. The information submitted revealed that, out of nine UNAMA Political Officers with temporary appointments, three—including the Applicant—had not been renewed beyond 364 days of service. Considering that a non-negligible portion, i.e., one third, of these staff members were not extended, the Tribunal is satisfied that the Applicant was not unduly singled out.

74. It follows from the above that the decision not to extend the Applicant's contract was, based on the applicable rules, a legitimate outcome of the Organization's assessment of its operational needs under sec. 14. Since it is neither for the Applicant nor for the Tribunal to determine whether the conditions of sec. 14 of ST/AI/2010/4/Rev.1 were fulfilled, the Organization could legally refuse to exceptionally extend the Applicant's temporary appointment.

75. In the note of 5 March 2012, reference is made to the Applicant's letter of appointment, which, in its para. 3, states that a temporary appointment may only be extended when warranted by surge requirements and operational needs related to field operations. Even if other reasons may allegedly have contributed to the non-renewal decision, the negative assessment of the crucial criteria provided for in sec. 14 of ST/AI/2010/4/Rev.1, i.e., the absence of continuing

unexpected operational needs, is self-sufficient to justify the non-extension of a temporary appointment. Therefore, the Tribunal considered that any such other considerations, referred to by the Applicant, were irrelevant, and it did not examine them.

Countervailing circumstances

76. The foregoing notwithstanding, in view of the material on file, the Tribunal was compelled to examine whether the Organization created a legitimate expectancy of renewal of the Applicant's contract. Indeed, by virtue of the principle of fair dealings with staff members, a decision not to extend an appointment is rendered unlawful when the Administration, by its own actions, created a legitimate expectation of renewal.

77. The Applicant asserts that since her joining the Organization she was repeatedly given assurances that her service would in all probability continue beyond the maximum duration of a temporary contract. She points to certain email communications, particularly the Administrative/Human Resources Officer's email of 25 January 2012, that, she contends, gave her to understand that she would be extended or regularized. However, having reviewed these emails, the Tribunal does not see any genuine assurance of renewal or conversion; rather, they contained instructions or advise as to what the Applicant should do to secure a better contractual status.

78. The Appeals Tribunal has progressively identified a series of conditions to ascertain what may or may not be regarded as a promise binding the Administration. In *Ahmed* 2011-UNAT-153, it held that a promise should be "express". In *Abdalla* 2011-UNAT-138, it ruled that a legitimate expectation of renewal of appointment must not be based on mere verbal assertions, but on a firm commitment to renewal revealed by the circumstances of the case. More recently, in *Igbinedion* 2014-UNAT-411, the Appeals Tribunal required such promise to be in writing.

79. In view of the foregoing, while oral or vague statements in human resources-related communications do not meet the above conditions, the Applicant did in fact receive an express promise in writing that her contract would be renewed: on 3 March 2012, in response to an email request from the Applicant, the SRSG, UNAMA, wrote: "I agree with the temporary extension for some 3 months to enable the due process. Please make the necessary arrangements."

80. Contrary to the Respondent's contention, this message, though brief, is unequivocal. It is not an opinion or advise; it is a clear commitment towards the Applicant, coupled with a specific instruction to implement it. The fact that the exchanges between the SRSG and the Applicant took place over the weekend shortly before the expiration of her appointment in no way invalidates or lessens that unambiguous commitment.

81. The Respondent's denial of the authority of the SRSG to make such promise, arguing that he was not competent to extend a temporary appointment beyond 364 days under sec. 14 of ST/AI/2010/4/Rev.1, is misplaced. Indeed, the promise of contract extension by the SRSG was not based on unexpected operational needs, pursuant to ST/AI/2010/4/Rev.1, but on granting due process to the Applicant. With this in mind, it is hardly relevant to examine if the conditions set in sec. 14 of said instruction were met.

82. Even in the hypothesis that the SRSG acted *ultra vires*, it stands that the Applicant received a clear express written commitment from the Head of UNAMA mission, who she could legitimately believe to be vested with the required powers to do so. Hence, the SRSG promise created a legitimate expectation, countervailing the general absence of a right to renewal. This finding is in line with *Kasmani* UNDT/2012/049 and *Munir* UNDT/2014/029, where the Tribunal considered the assurances given respectively by an FRO and a managerial group at the country office level to constitute valid promises of contract renewal.

83. Lastly, the Respondent holds that the SRSG withdrew his promise once he was advised that it was a wrongful course of action. On this point, without entering in the question of whether such a promise may be withdrawn, it is sufficient in this case to stress that since it is required for a promise to come into effect that it be express and in writing, its reversal must at the very least be done likewise and be duly communicated to its beneficiary, which was not done in the case at hand.

84. In conclusion, the SRSG email of 3 March 2012 constituted a promise that conferred the Applicant a legally recognized expectation to have her appointment renewed for three months. This promise was never validly withdrawn. By not renewing the Applicant's appointment, the Administration failed to honour the obligation contracted by way of that promise.

Remedies

85. The disregard of the promise made to the Applicant is of such nature as to warrant rescission of the contested decision.

86. Pursuant to art. 10.5(a) of the Tribunal's Statute, inasmuch as the impugned decision, namely the non-renewal of the Applicant's contract, concerns her appointment, the Tribunal must set an amount of compensation that the Respondent may elect to pay as an alternative to rescission (see *Azzouni* 2010-UNAT-081). In determining the amount of alternative compensation, the Tribunal takes into account the material damage derived from the non-renewal decision.

87. As a result of the non-renewal decision, the Applicant lost the remuneration and benefits she would have received had she remained in employment as a Political Officer with UNAMA, at the same step and salary rate that she enjoyed up to the expiration of her temporary appointment. The promise, however, was not indefinite; on the contrary, the SRSG gave a clear indication of the duration of the extension he intended to grant, as he explicitly mentioned "some 3 months" in his email. Based on this plain wording, the Tribunal takes three months as the benchmark for compensation purposes.

88. The Applicant put forward that by being separated as it occurred, she was deprived of an opportunity to remain in the service of UNAMA or of another UN mission. The Tribunal holds that this loss of opportunity is too uncertain and speculative to justify compensation on this account, especially bearing in mind that the Applicant held a type of contract meant to last for 364 days, at most, and that under no circumstance could go beyond 729 days. Assuming that she would have served longer means taking as a fact that she would have benefitted from a contract conversion or have been recruited for a different position. There are no elements on file allowing the Tribunal to come to such a conclusion.

89. In sum, the material loss suffered by the Applicant is equivalent to the full emoluments she would have been paid during three months had she remained employed at the same grade and conditions that she had up to the expiration of her temporary appointment. Full emoluments is the sum of:

a. gross salary and the post adjustment applicable to Afghanistan, minus the relevant staff assessment;

b. hardship element of mobility and hardship allowance;

c. non-family hardship element of mobility and hardship allowance;

d. medical insurance subsidy;

e. the Applicant's own contributions as a participant of the United Nations Joint Staff Pension Fund;

f. danger pay for the entire period of three months;

g. any entitlement for which she would have been eligible except for those designed exclusively to cover expenses that the Applicant did not incur precisely since she left her duty station, such as indemnities for Rest & Recuperation or Daily Subsistence Allowances.

90. The resulting amount is the sum that the Administration may elect to pay as an alternative to effectively rescinding the contested decision pursuant to art. 10.5(a) of the Tribunal's Statute. If the Administration opts for compensation in lieu of rescission, it shall add interests on this amount at the applicable US Prime Rate as from 6 June 2012, date on which a further three-month appointment would have expired, until the date of payment.

91. Moreover, the Tribunal considers that the Applicant sustained emotional distress occasioned by her hasty removal from her duty station, as she was informed of her separation on the very last day of her appointment (i.e., the day before her departure), while she relied on a promise of renewal. The breach of a direct promise of renewal constitutes a breach of a fundamental nature of a substantive entitlement of the Applicant, which, in line with *Asariotis* 2013-UNAT-309, warrants the award of moral damages. The amount to be paid under this head is USD3,000.

92. Turning to the Applicant's request that the Tribunal make at least a recommendation for the introduction of a legal regime to better protect the rights of staff members hired on temporary contracts, the Tribunal notes that such recommendation exceeds its power as provided for in the Tribunal's Statute. The modalities of relief it may afford are circumscribed in art 10.5(a) and (b) of its Statute, namely rescission of the contested decision, specific performance and financial compensation. Making positive recommendations on which regime should govern a certain type of contract is not within the Tribunal's purview.

Conclusion

93. In view of the foregoing, the Tribunal DECIDES:

a. The decision not to renew the Applicant's temporary appointment was unlawful and, as such, is hereby rescinded;

b. In case the Respondent elects to pay compensation instead of rescission, the amount of compensation to be paid to the Applicant is the equivalent to three months of full emoluments at the position she used to hold within UNAMA, as defined in para. 89 above, plus interest at the applicable US Prime Rate as from 6 June 2012 until the date of payment;

c. The Applicant shall also be paid moral damages in the amount of USD3,000;

d. The aforementioned compensation shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of the said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable;

e. All other claims are rejected.

(Signed)

Judge Thomas Laker

Dated this 20th day of November 2014

Entered in the Register on this 20th day of November 2014

(Signed)

René M. Vargas M., Registrar, Geneva