



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

AKHTAB

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Bart Willemsen, UNICEF

Introduction

1. By application filed on 22 September 2014, the Applicant, a former staff member of the United Nations Children’s Fund (“UNICEF”), contests the decision not to extend her fixed-term appointment (“FTA”) beyond 31 March 2014.¹

2. The Respondent filed his reply on 27 October 2014.

Facts

3. The Applicant entered the service of UNICEF at the Sylhet Zone Office in Bangladesh as a Programme Officer (NO-A) on 1 August 2012, under an FTA expiring on 31 December 2013.

4. Her Performance Evaluation Report (“PER”) for the period 1 August 2012 to 31 December 2012 was completed on 14 February 2013. The Applicant’s first reporting officer (hereinafter her “supervisor”), the Head of the UNICEF Sylhet Zone Office/Programme Specialist, UNICEF/Sylhet, noted that the Applicant had “fully met expectations” in all areas of competencies. Under “general comments”, she noted, *inter alia*, that the Applicant was a “sincere and responsible” staff member and a “good team member and work[ed] harmoniously with the counterparts and colleagues”, that she possessed the technical knowledge required for the post and that “her professional opinion [was] respected by colleagues” and “she maintain[ed] good networking with the counterparts”. The Applicant agreed with her supervisor’s conclusions and comments in the PER.

5. The Applicant’s second reporting officer, the then Chief, Field Operations, noted in an email of 14 February 2013 his input to the Applicant’s performance evaluation for the above period as follows:

¹ After the Applicant filed a rebuttal against her relevant Performance Evaluation Report, her appointment was extended twice; the latest extension was until 30 June 2014, pending the completion of the management evaluation, which, in turn, was pending the finalization of the rebuttal process.

SM brings to the job high level of energy and commitment to work. Within a very short time, she established a network of partners and facilitated the development of district level work plans for LCBCE which was consolidated into national LCBCE work plan. Her drive for result was further expressed through support to the office to cover more than one district in the division. SM has the ability to appropriate new knowledge when the concept is clear and facilitate both community mobilization and data collection during the L3M exercise. A coordinated technical support to the SM in decentralization and emergency / DRR preparedness planning will benefit the staff member towards strengthening her current level of capacity.

6. The performance planning for the Applicant's Performance Appraisal System ("PAS") for the period 1 January to 31 December 2013 was signed by the Applicant and her supervisor on 7 April 2013.

7. On 31 July 2013, the Applicant's supervisor wrote an email to the Applicant, referring to discussions they had the day before and on 24 April 2013, and stressing the need for the Applicant to focus on some areas to ensure she and her team achieve better results for the children.

8. The Applicant did not respond to this email. She submitted her mid-year assessment on 19 August 2013.

9. By memorandum dated 20 August 2013, the Chief, Human Resources, UNICEF, Dhaka, asked the Applicant's supervisor to submit her recommendation with respect to the extension of the Applicant's FTA.

10. By email of 19 September 2013, from the Applicant's supervisor to the Applicant, the former referred to the "third performance related discussion meeting on 2 September 2013", and those held on 24 April and 31 (sic) July 2013 "regarding [her] performance" in which "she ha[d] given [the Applicant] some specific suggestions to improve [her] performance".

The Applicant's supervisor further noted that "[t]hrough recent field visits of the sectoral staff members and Head of Zone it was identified that situation has not been improving which was shared in the team meeting held on 25 August 2013", and enumerated some specific areas for immediate improvement.

11. The Applicant's supervisor also informed the Applicant that it had been decided that she were responsible for the Sylhet district LCBCE program from the current month. She was also asked to prepare a plan to improve her competencies.

12. By email of 22 September 2013, entitled "Mid-year PAS", the Applicant's supervisor asked the Applicant to report on the activities completed by 30 June 2013. By email of the next day, the Applicant requested to be given more time to do so.

13. By email of 29 September 2013, the Applicant's supervisor sent her the mid-year review PAS with comments noting that they would discuss and finalize the mid-point review at their meeting later that day. By email of the next day, her supervisor thanked the Applicant for the "fruitful detailed discussion held [the day before] on [the Applicant's] mid-year PAS review", and noted that since the Applicant had said she had comments, she should send them to her.

14. Also by email of 30 September 2013, the Applicant asked her supervisor, following their discussion of the same day, to provide her with "at least one example/case" with respect to the issues she had raised in her email of 19 September 2013.

15. According to the Applicant, her supervisor sent her comments with negative remarks on her mid-year assessment on 30 September 2013 and the Applicant provided her comments thereon.

16. By email of 3 October 2013 addressed, *inter alia*, to the Applicant, her supervisor noted that she had signed the mid-year review for the Applicant's 2013 PAS, and that the Applicant would sign it and send it to Human Resources. The PAS on file does not contain the signature, nor the date of signature, of either the Applicant or her supervisor under the "Mid-year progress review" section.

17. By memorandum dated 6 October 2013 to the Chief, Human Resources, UNICEF Bangladesh—copied to the Applicant and to the Chief, Field Operations, UNICEF Bangladesh—the Applicant’s supervisor recommended not to extend the Applicant’s appointment beyond 31 December 2013 on the basis of performance shortcomings that she explained in that memorandum.

18. By email of 18 November 2013, the Applicant sent a memorandum of the same day to the Chief, Field Operations, UNICEF Bangladesh, and to the (then) Officer-in-Charge, Field Operations, UNICEF Bangladesh, copied, *inter alia*, to the Chief, Human Resources, UNICEF, Bangladesh, filing a “formal complaint of harassment, discrimination and abuse of authority” against her supervisor. In her complaint, she asked that her performance be assessed “through a second reviewer”, that allegations of misconduct and harassment against her supervisor be investigated and disciplinary action be taken based on the findings, and that her supervisor be asked to provide an explanatory note on the reasons for the non-extension of her FTA. Attached to the Applicant’s memorandum was a note for file by which she responded to each of the issues raised in a memorandum from her supervisor dated 6 November 2013.

19. By memorandum dated 24 November 2013, the Officer-in-Charge, Human Resources, UNICEF Bangladesh, offered the Applicant a three-month extension of her FTA until 31 March 2014.

20. According to an email of 2 February 2014 from the Applicant’s supervisor to the Applicant, they had the final discussion concerning the Applicant’s 2013 PAS on 21 January 2014. According to the Respondent, during that meeting the Applicant’s supervisor reiterated the Applicant’s numerous performance shortcomings and provided her with guidance on how to improve her performance.

21. In early February 2014, the Chief, Field Operations, and the Chief, HR, UNICEF Bangladesh, undertook a field trip to the Sylhet Zone Office during which they met, *inter alia*, with the Applicant and her supervisor, and other staff members of the field office. In their “Field Trip Report”, they noted, *inter alia*, that these meetings revealed that the Applicant:

- a. Did “not take constructive feedback from [her] supervisor as well as [her] colleagues”;
- b. Was “not a team player”; and
- c. Was “in constant argument with [her supervisor] during team meetings”.

22. The Chief, Field Operations, and the Chief, HR, UNICEF Bangladesh further noted that in a long meeting with the Applicant she demonstrated a “self-justifying attitude and lack of respect for [her] supervisor”.

23. By email of 5 February 2014, the Applicant’s supervisor referred to their discussion of the Applicant’s year-end PAS on 21 January 2014, and sent her the document with her comments. She asked the Applicant to include her final comments and complete the developmental outputs, so that the document could be signed the following day.

24. On the same date, the Applicant requested the possibility to revert on the next day, as her supervisor’s comments “were new to [her] as well as accusing (grievously) in nature, [she] need[ed] time to provide [her] feed-back”.

25. The Applicant’s supervisor provided the Chief, Field Operations, and the Chief, HR, UNICEF Bangladesh with a “Note for Record” dated 6 February 2014, recommending not to offer the Applicant any extension of her FTA beyond 31 March 2014.

26. By email of 10 February 2014, the Applicant’s supervisor requested that she send her final 2013 PAS on the next day. The Applicant responded, noting that her supervisor’s comments were defamatory and abusive, and requested clarifications and one month time to comment on these “allegations”. She also reiterated IT issues with sending attachments and requested her supervisor’s support.

27. By another email of the same day, the Applicant’s supervisor asked the Applicant to complete and sign the PAS 2013 by the next day.

28. Several further email exchanges ensued between the Applicant and her supervisor, until the former's PAS for the period 1 January 2013 to 31 December 2013 was completed on 13 February 2014. In it, under "Competency Progress" the supervisor noted that the Applicant needed "to give rigorous efforts to improve her competencies. She needs to prepare an action plan against each of the competencies areas for further improvement. She is advised to share the action plan with her supervisor".

29. Furthermore, in the final evaluation, the Applicant's supervisor gave her an overall rating of "Did not Achieve Outputs" for "Work Plan Outputs", and of "Developing Proficiency" for "Core Competencies" as well as for "Functional Competencies"; some of the individual core competencies and functional competences were even rated as "not proficient". The Applicant's supervisor also noted that her core and functional competencies were "developing".

30. Finally, the Applicant was rated as having only partially met her "Developmental Outputs", and under "Final Comments and Signature", the Applicant's supervisor noted, *inter alia*, that the Applicant had "failed to demonstrate integrity and commitments as UN staff member [sic] in many occasions" and that "[the Applicant's supervisor] and other colleagues have experienced numerous challenges with [the Applicant] due to her lack of commitments, not producing results and nonprofessional relationship and behaviour with the government counterparts and colleagues".

31. In conclusion, the Applicant's supervisor recommended, *inter alia*, that the Applicant "prepare an action plan to improve [her] performance".

32. The Applicant signed her 2013 PAS on 13 February 2014, noting:

The document is signed in line with the guideline provided by HR. However, signing of this [PAS] does not indicate the agreement between [staff member] and [her supervisor]. Through submitting this [PAS], [staff member] requests for detail fact of the comments/allegations made by [her supervisor] against [her] and request for independent review of [her] [PAS] by the second reviewer. [Staff member] also expects and requests to HR for ensuring [staff member's] right to dignity and to defend against the

allegations brought by [her supervisor] through an impartial investigation process.

33. In an email of 13 February 2014, by which she sent the signed PAS to her supervisor, the Applicant reiterated that the comments made by the former throughout the document came as a surprise to her, and that no discussion on them had taken place in the mid-year and end-year period. By response email of the same day, the Applicant's supervisor noted that the comments made by her in the PAS were not new to the Applicant, that they had discussed all those issues several times, and that they had "a very long discussion on both in mid-year (29/09/2013) and end-year (21/01/2014) PAS review period". She further thanked the Applicant for having signed the PAS.

34. The Representative, UNICEF Bangladesh, informed the Applicant on 19 February 2014 that she would not be offered an extension of her FTA upon its expiration on 31 March 2014.

35. On 24 February 2014, the Applicant wrote to the Representative, UNICEF, Bangladesh, referring, *inter alia*, to the "systemic harassment" she "ha[d] been undergoing".

36. By email of 3 March 2014, addressed, *inter alia*, to the Director, Division of Human Resources ("DHR"), and the "hotline" of the Office of Internal Audit and Investigations ("OIAI"), the Applicant referred to her complaint against her supervisor filed on 18 November 2013, and the imminent expiration of her FTA.

37. On 6 March 2014, the Chief of Investigations, OIAI, informed the Applicant of her right to request management evaluation of the decision not to extend her FTA.

38. On 7 March 2014, the Applicant wrote to the Deputy Executive Director, UNICEF, referring to the complaint she had filed against her supervisor on 18 November 2013 and requesting (i) protection against "further retaliation and mistreatment"; (ii) assistance concerning a formal rebuttal against the 2013 PAS; and (iii) management evaluation of the decision not to renew her FTA after 31 March 2014.

39. By letter dated 10 March 2014, the Chief, Policy and Administrative Law Section, DHR, informed the Applicant that UNICEF had 45 calendar days to respond to her request for management evaluation. With respect to the Applicant's request for assistance for rebuttal of her 2013 PAS, the Chief, Policy and Administrative Law Section, DHR, referred the Applicant to sec. 7 of Administrative Instruction CF/AI/2011-001 (Amend.1).

40. On 20 March 2014, the Applicant sent an email entitled 'Formal rebuttal of my PAS 2013' to the Regional Chief, Human Resources and Secretary to the regional Rebuttal Panel. At the end of her email, she noted that "detailed comments against each assessment made by [her supervisor] [would] follow along with documentary evidences [sic] following the substantive information from the [her supervisor] pertaining to her assessment". The Applicant attached to her email a "Note for File" indicating that she was seeking formal rebuttal of her 2013 PAS, and requesting "support in submitting a formal rebuttal of [her] PAS 2013". The Applicant further stated that she would provide "[d]ocumentary evidences [sic] including transcript of [her] meetings with [her] supervisor" and noted, *inter alia*, that although she had requested a review by the second reviewer, she had received no response in this regard from the Chief, HR, and the CFO (second reporting officer) as of the date of her rebuttal. She also referred to having provided comments in track changes against each of her supervisor's comments on her PAS, but that all individual comments were ultimately removed from the final version, upon her supervisor's advice.

41. On 24 March 2014, the Applicant filed a request for suspension of action of the decision not to renew her FTA with the Dispute Tribunal, which was transmitted to UNICEF by the UNDT the following day. Also on 25 March 2014, the Applicant wrote to the Deputy Executive Director, requesting a suspension of the implementation of the decision not to renew her FTA.

42. By letter dated 26 March 2014, the Chief, Policy and Administrative Law Section, DHR, referring to the Applicant's request for management evaluation, informed her that since the contested decision was based on serious concerns relating to her performance—and therefore closely connected to her 2013 PAS

and the pending rebuttal process—it had been decided that the implementation of the decision not to extend her appointment be suspended until the completion of the management evaluation, and that the latter be suspended, in turn, until the completion of the rebuttal process. He further noted that the management evaluation would resume once the rebuttal process was completed, and that the time-limit to file an application with the Tribunal would run from the date she would be notified of the outcome of the management evaluation.

43. Also on 26 March 2014, the Tribunal rejected the Applicant’s request for a suspension of the implementation of the contested decision, since it had become moot.

44. By memorandum dated 27 March 2014, the Applicant was informed of the extension of her FTA for a period of two months, until 31 May 2014.

45. On 5 May 2014, the Applicant wrote to the Chief of Investigations, OIAI, expressing her concern that the rebuttal process was prejudiced and requesting guidance on the “next course of action/status with regard to [her] complaint of harassment”.

46. In an email to the Regional Chief, Human Resources, also dated 5 May 2014, the Applicant requested the latter’s guidance on several issues concerning the rebuttal process; upon receipt of such guidance, the Applicant confirmed her agreement with the constitution of a rebuttal panel in an email of 7 May 2014. She also expressed concern that the “overall mistreatment that [she had] been receiving at the zone office ... might jeopardize the rebuttal process, particularly in obtaining the views of colleagues and counterparts with regard to the issues as alleged by [her] supervisor”.

47. By email dated 8 May 2014, the Regional Chief, Human Resources, referred the Applicant to point 6 of her rebuttal statement, in which she had mentioned that “a separate note against each comment made by [her supervisor] in the PAS with available evidence [would] follow”, and asked her to send such note to her without delay.

48. The Applicant replied to the Regional Chief, Human Resources, on 12 May 2014, noting that it was “difficult” to provide her views without the “basic facts” on each of her supervisor’s comments, and requested the support of the rebuttal panel to advise her supervisor to provide such basic facts in support of her “allegations”, and to be provided with adequate time and support to defend herself against them.

49. In an email also dated 12 May 2014, the Applicant requested her supervisor to provide her with the “basic facts” in relation to her “allegations” concerning the Applicant’s performance.

50. On 14 May 2014, the Chief, Human Resources, informed the Applicant that the “allegations” were simply critical comments with respect to the Applicant’s performance, as reflected in her 2013 PAS. He indicated that the evaluation would be reviewed by the rebuttal panel, and that during the rebuttal process, the Applicant would have an opportunity to rebut her supervisor’s comments.

51. By email also of 14 May 2014, the Regional Chief, Human Resources, responded to the Applicant’s email of 12 May 2014, noting that her request (not advice) had been that the Applicant send her the separate note against each comment made by her supervisor in her PAS, with available supporting evidence, as noted in the Applicant’s rebuttal statement. She further asked the Applicant whether in the absence of such note, she should share her email of 12 May 2014 with the rebuttal panel.

52. By response email of 15 May 2014 to the Regional Chief, Human Resources, the Applicant expressed her wish to hear from the rebuttal panel whether she had a right to be provided with “substantive information (with example) against each comment made by [her supervisor] prior to defend the comments”, and noted that “in case [she was] not entitled to receive substantive information prior to defend the assessment ... [she would] provide a NFF on this pertaining to the generalized assessments made by [her supervisor] in 23 pages document”.

53. The Regional Chief, Human Resources, responded on the same day, noting that in her “rebuttal statement” the Applicant had indicated that she would provide “detailed comments”, and that this had triggered the request by the rebuttal panel to be provided with a “separate note”. She also asked the Applicant whether she could share the latter’s email with the rebuttal panel, and indicated that in case the panel would require further explanation it might contact the Applicant directly.

54. Also on 15 May 2014, the Applicant asked the Regional Chief, Human Resources, in writing, to share a number of emails with the Rebuttal Panel. The Applicant further stressed that any “detailed comments” from her against each assessment of her supervisor were subject to her receiving “substantive information” from the latter and that, in her view, the emails to be shared with the panel “[could] not fulfil the purpose of the separate note for each assessment”. The Applicant highlighted two paragraphs in her earlier email of 15 May 2014 for further advice from the panel. The Regional Chief, Human Resources, replied in turn that she would share the Applicant’s emails with the rebuttal panel.

55. On 21 May 2014, the Chief of Investigations, OIAI, informed the Applicant that after assessing the information she had provided, OIAI was not at that time investigating her complaint, since the facts the Applicant had presented “appear[ed] to be more in line with differing opinions on [her] performance”.

56. By memorandum dated 29 May 2014, the Representative, UNICEF, Bangladesh, informed the Applicant of the extension of her FTA for a period of one month, until 30 June 2014.

57. By email of 12 June 2014, the Regional Chief, Human Resources, sent the rebuttal panel’s report dated 12 June 2014 to the Applicant. The report provided the following:

- A desk review of all documentation provided to the panel by the Regional HR Advisor had been reviewed by the 29th of May. The Panel also conducted telephone discussions with the [Applicant], her supervisor, [K.D.A.I], and the second reporting officer in 2012 and first part of 2013, [T.O.].

- The rebuttal submission statement (or ‘Note for File’ as it is called by the staff member) is predominantly highlighting issues with the procedures that were not appropriately followed with regard to the PAS process but does not discuss or “rebut” the content of the PAS in any sufficient detail. The staff member instead requests further information from the supervisor *before* she is in a position to do this.
- The panel also observes that there are numerous comments by the supervisor under the different work outputs where examples of weak performance are provided. Such comments are related to specific reports not being produced on time (or at all), meetings and activities not being held etc. The panel believes that the staff member could have made an attempt to defend herself against these concrete comments by presenting evidence to counteract them i.e. by submitting the actual reports, meeting minutes etc. Thus, the rebuttal statement presented does not appear to meet the requirements as detailed in CF/AI/2011-001, paragraph 7.12(f).
- In conclusion the Panel does not feel that it has received enough documented evidence in the course of its work that would justify a change in the supervisor’s ratings on work outputs and competencies in staff member’s 2013 PAS.

58. By email of 17 June 2014 to the Chief, Policy and Administrative Law Section, DHR, the Applicant referred to the “final conclusions” of the rebuttal panel; she reiterated her concerns about the process as well as the substance of her performance evaluation, and asked, *inter alia*, whether the rebuttal of the PAS was already completed and, if not, what should be the next step in the rebuttal process and whether the interview records of the rebuttal panel could be shared with her.

59. The Chief, Policy and Administrative Law Section, DHR, responded by email of 19 June 2014, noting that the transmittal of the rebuttal panel’s report constituted the conclusion of the rebuttal process and the final decision on her rebuttal case.

60. On 23 June 2014, the Deputy Executive Director, UNICEF, responded to the Applicant’s request for management evaluation of 7 March 2014, “of the decision not to extend [her] appointment upon its expiration on 31 March 2014”.

He stressed that after she had filed her rebuttal statement on 20 March 2014, her appointment had been renewed twice, “pending the completion of the current management evaluation”. He informed the Applicant that the decision not to offer her an extension of her FTA for performance reasons was an appropriate exercise of discretion and, hence, he confirmed the decision. He noted that his reply constituted “the final decision on [her] request for management evaluation” and that “should [she] wish to file an appeal against [it] with the [UNDT], [she] [could] do so within 90 (ninety) calendar days from the date of receipt of [his] letter...”. The Applicant states that she received the letter of 23 June 2014 on 24 June 2014.

61. In an email of 27 June 2014 to the Deputy Executive Director, UNICEF, entitled “request for review of the management evaluation”, the Applicant noted that the management evaluation decision was taken on the grounds of an improper PAS and rebuttal process, in violation of ST/AI/2010/5. She therefore sought support “in reviewing the attached management evaluation” and asked to be allowed the rebuttal process in accordance with ST/AI/2010/5.

62. On 1 July 2014, the Applicant was separated from the Organization.

63. By email of 2 July 2014, the Deputy Executive Director, UNICEF, responded to the Applicant that “as to [her] request for a review of the decision on [her] request for management evaluation ... [the Applicant] ha[d] the right to file an appeal with the [UNDT] within the applicable time-limits, which is 90 (ninety) calendar days from the date of [her] receipt of that letter”.

64. In a note for the record dated 17 September 2014, the Applicant stated that she had not received a copy of a note for the record dated 6 February 2014 of her supervisor until the management evaluation decision of 24 June 2014. She also noted that it was only upon her reading of the rebuttal panel’s conclusions that she came to know that the rebuttal panel statement did not meet the requirements set in sec. 7.12 (f) of CF/AI/2011-001.

Procedural history

65. The Applicant filed her application with the Tribunal on Monday, 22 September 2014, and the Respondent filed his reply on 27 October 2014.

66. A case management discussion was held on 15 September 2015, and a hearing on the merits was held on 24 and 25 November 2015. During the hearing, upon the Applicant's request, the Tribunal granted her until 4 December 2015 to file further evidentiary submissions, and ordered the Respondent to file comments thereon by 18 December 2015.

67. By motion of 1 December 2015, the Applicant requested a one-week extension to make the above-mentioned evidentiary submission, adducing medical reasons; she attached a medical certificate to her motion in support of her request. The Tribunal granted the Applicant's motion by Order No. 245 (GVA/2015) of 1 December 2015 and, on 2 December 2015, the Respondent filed additional documentation and information pursuant to the Tribunal's directions at the hearing.

68. After an additional request for extension, granted by the Tribunal, the Applicant filed a "witness statement", together with more than twenty attachments on 8 January 2016. By submission of 22 January 2016, the Respondent informed the Tribunal that he would not submit or request to call any further evidence.

69. Pursuant to Order No. 28 (GVA/2016), the parties filed their closing submissions respectively on 15 and 29 February 2016, and the Applicant filed a reply to the Respondent's closing submission on 7 March 2016.

Parties' submissions

70. The Applicant's principal contentions are:

- a. Despite her continued follow up on the allegations made against her, until the date of her application, no basic facts were received
- b. She was subjected to mistreatment by her supervisor and abuse of authority by the latter and UNICEF Administration;

c. The Rebuttal Panel was not formed in line with the relevant administrative instruction of the United Nations (ST/AI/2010/5); upon the Panel's request, the Applicant provided it with some information and gave it the assurance that she could provide further comments/records, in line with the guidance sought from the Panel;

d. At the short interview with the Rebuttal Panel, on 28 May 2014, which was frequently interrupted because of the poor network, the Applicant addressed some concerns and issues raised in annexes 1 to 7 to her rebuttal statement, of which the Panel seemed not to be aware, she requested the Panel to review them and to provide her with the required level of information, which the Panel assured the Applicant it would do; the Applicant did not hear from the Panel again;

e. Her supervisor and several other senior managers at UNICEF, Bangladesh, did not ensure that the relevant administrative guidelines relating to performance appraisal and prohibited conduct be adhered to; management evaluation was not done in a fair and transparent way and, hence, the decision is unlawful;

f. Her supervisor failed to abide by the following obligations under CF/AI/2011-001:

i. To provide clarification on individual performance expectations (sec. 2.2(b));

ii. To conduct the mid-year progress review as well as the end-year appraisal, and to provide ongoing feedback (sec. 2.4);

iii. To rate the Applicant as outlined in sec. 4.1;

iv. To assist the Applicant to remedy her performance shortcomings, after identifying them in the Applicant's performance, through e.g., counselling, assignment of more suitable tasks, additional training, and/or establishment of a time-bound improvement plan (sec. 5.1);

- g. Her supervisor failed to apply the remedies provided for under secs. 10.1 and 10.2 of ST/AI/2010/5, including the preparation of a written performance improvement plan;
- h. Her second reporting officer, the Chief of Field Operations, failed to address disagreements between her and her supervisor, and to hold the latter accountable for not ensuring a fair and consistent appraisal of the Applicant's performance and competencies;
- i. The management evaluation was based on the improper conclusion of the rebuttal panel and of the office of investigation;
- j. The Panel failed to examine the various issues detailed in the rebuttal statement (e.g., non-adherence to the PAS procedures; abusive and defamatory comments; false allegations and lack of justification; overall inconsistency between comments and ratings; absence of coaching; discrimination);
- k. To examine whether her negative rating should have been upheld, it is important to examine what justifications and documentary evidences [sic] the Panel was provided with by the Applicant's supervisor; while the Tribunal cannot substitute its assessment to that of the supervisor, it has to consider whether the documents before it properly corroborate the negative performance evaluation given to her in support for the non-renewal;
- l. The Panel and management evaluation used "adverse material" (e.g., note of 6 February 2014 recommending non-renewal of contract; field trip report of 5 February 2014), although that material had not been shown to the Applicant, who informed the rebuttal panel and the office of the Deputy Executive Director thereof; this is a violation of ST/AI/292 (Filing of adverse material);

m. Although the meeting of formal requirements is a precondition to appoint a panel under sec. 7.15 of CF/AI/2011-001, the Panel was designated although she later found that the rebuttal statement did not meet the requirements provided for under sec. 7.12(f) of said instruction; as such, the Panel drew its conclusion based on an improper assessment; although the competence to ascertain whether formal requirements have been met lies with the Secretary of the rebuttal panel, it was the panel itself that did that assessment;

n. The comments made by her supervisor were abusive, inconsistent, vague and at times repetitive; the Panel did not assess the overall quality of the assessments and comments; the Applicant was excluded from project reports and was stopped from interacting with her counterparts for a period of nine months, which she reported to senior management and the rebuttal panel;

o. The 2013 PAS mid-year assessment has to be seen in light of the positive evaluation received for the year 2012 only four months earlier; these inconsistencies show that she was subjected to harassment; both in the mid-year and final assessment, the supervisor provided her comments and asked the Applicant to sign the document, while giving her only a few hours' notice;

p. She was given notice of her separation in March 2014 despite the complaint for abuse of authority she had filed against her supervisor; this constitutes a violation of the presumption of innocence, and an abuse of discretionary authority by the Administration; her harassment complaint was neglected;

q. She requests:

i. Compensation for the moral damage and the injury caused to her dignity, reputation and career, as a result of the mistreatment and "propaganda" against her, the unsubstantiated performance assessment and her job loss;

- ii. Reinstatement with retroactive effect or appointment to another post at the same level;
- iii. Expunging from her official status file of her PAS for 2013 and the rebuttal report, as well as any other adverse material that had not been shown to her, given that she was denied an effective rebuttal;
- iv. Compelling the Administration to investigate her harassment complaint;
- v. Reimbursement of medical fees she incurred as a result of the treatment she received; and
- vi. Referral of several senior managers, UNICEF, for accountability under art. 10.8 of the Tribunal's Statute.

71. The Respondent's principal contentions are:

- a. An FTA does not carry any expectation to an extension; when the Administration takes a decision not to extend an FTA, it must act in a fair, just and transparent manner; its actions will be found to be illegal when motivated by bias, prejudice or improper motive and the staff member carries the burden of proof in this respect;
- b. The decision not to extend the Applicant's FTA was taken on the grounds of her supervisor's assessment of her performance, which she found to be inadequate and did not change despite her supervisor's support;
- c. The Administration acted fairly, and in a transparent manner, and fully respected the relevant regulations, rules and policies, including the Applicant's due process rights. The Applicant was put on notice with respect to her performance shortcomings early on; however, she did not accept her supervisor's criticism and rather misconstrued it as harassment, instead of taking action to improve her performance;

d. The Applicant's supervisor had no other option but to reflect the negative performance in the PAS, and to recommend that her FTA not be renewed; when the Applicant rebutted the performance report, the Administration duly extended her appointment during the rebuttal process;

e. In spite of the efforts of her supervisor to assist her, the Applicant refused to address the specific assessments of her supervisor, and instead insisted that she needed more information before she could address them. As a consequence, the rebuttal panel was left with no other choice but to confirm the report, which, in turn, left the Deputy Executive Director, UNICEF, with no other choice but to affirm the non-renewal decision;

f. The Applicant was provided with "a more than fair chance to repair her performance inadequacies"; however, she was reluctant to cooperate in accordance with established procedures and unable to accept any criticism;

g. According to sec. 5.2 of CF/AI/2010-001 (separation from service), applicable at the time, extension of an FTA is subject to, *inter alia*, satisfactory service; thus, once a staff member's performance has been found to be unsatisfactory, extension of that staff member's appointment is not an option;

h. Unsatisfactory service is defined in sec. 10.2(b) of CF/AI/2010-001 as "(i) an overall rating for work plan outputs of 'did not achieve outputs' or an overall rating of competency proficiency of 'not proficient' in a given reporting cycle; or (ii) an overall rating of work plan outputs below 'fully achieved outputs' or an overall rating of competency proficiency below 'proficient' in each reporting cycle, over two consecutive reporting cycles";

i. In her 2013 PAS, the Applicant was given an overall rating for competency proficiency as "developing proficiency", and an overall rating of "did not achieve outputs" for work plan outputs; as a consequence, without prejudice to her right to rebut the PAS, in light of the above-referenced provisions, it was not an option to extend the Applicant's FTA,

since her performance, in the relevant cycle, had been rated as “unsatisfactory”;

j. The Applicant was put on timely notice about her performance inadequacies on at least four occasions, and was provided with specific feedback and support; documentary evidence shows that the Applicant was treated with respect by her supervisor; the mid-term review took place on 29 September 2013;

k. By memorandum of 6 October 2013, addressed to the Chief, Human Resources, and although not required but for the sake of transparency copied to the Applicant, her supervisor recommended that her contract not be renewed due to performance issues;

l. The above shows that the Applicant was put on timely notice and, although this was not requested by the rules (CF/AI/2010-001), she was even requested to prepare a performance improvement plan, which she failed to do, holding that her performance was impeccable;

m. The rebuttal procedure was correctly followed and the conclusions by the Panel were justified. The Panel reviewed the pertinent documentation and interviewed the Applicant, as well as her first and second reporting officer, concluding that it had received insufficient information justifying a change of the assessment by the supervisor. In particular, the Panel took into account the Applicant’s reluctance to address her supervisor’s comments with respect to her performance shortcomings, and found that she could have made an effort to rebut them. For a rebuttal process to function properly, it is indispensable that the staff member set forth the grounds why he/she should have received a higher rating; the Applicant’s attitude during the rebuttal procedure mirrored the one that she had vis-à-vis her supervisor, her team and UNICEF counterparts. The Panel found, correctly so, that the 2013 PAS contained numerous specific comments concerning performance shortcomings, which were open to rebuttal; it was the Applicant’s choice not to rebut them, leaving the rebuttal panel with no choice but to find that it

did not have sufficient indication that her supervisor's assessment was incorrect;

n. The Applicant did not request management evaluation of the decision by OIAI not to conduct an investigation hence, the inaction did not impact the administrative decision under appeal.

o. The application should be rejected in its entirety.

Considerations

72. Staff regulation 4.5(c) provides “[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service”.

73. Staff rule 4.13 Fixed term appointments states:

(a) A fixed-term appointment may be granted for a period of one year or more, up to five years at a time, to persons recruited for service of a prescribed duration, including persons temporarily seconded by national Governments or institutions for service with the United Nations, having an expiration date specified in the letter of appointment.

(b) A fixed-term appointment may be renewed for any period up to five years at a time.

(c) A fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service, except as provided under staff rule 4.14 (b).

74. Administrative instruction CF/AI/2009-005 (Types of appointment and categories of staff) of 22 July 2009, provides in its relevant parts that:

1.7 A fixed-term appointment does not carry any expectancy of renewal or conversion, irrespective of the length of service. Notwithstanding this, a fixed-term appointment may be extended under certain conditions, as specified in sec. 4 of this instruction.”

...

4.1 Temporary and fixed-term appointments expire on the date specified in the letter of appointment. They do not carry any expectancy of renewal. Notwithstanding this, temporary and fixed-term appointments may be extended, subject to, and in accordance with, the provisions of this instruction.

...

4.7 A fixed-term appointment may be extended for any period, up to two years at a time, subject to organizational needs, satisfactory service and availability of funds. A fixed-term appointment may be thus extended any number of times. (emphasis added)

75. Administrative instruction CF/AI/2010-001 (Separation from service) of 10 March 2010 states, in sec. 5.2, that “[n]otwithstanding the provisions of para. 5.1, a temporary or fixed-term appointment may be extended, subject to organizational needs, satisfactory service² and availability of funds, and in accordance with the provisions of CF/AI/2009-005 on Types of Appointment and Categories of Staff, sec. 4.

76. The Applicant relies on ST/AI/2010/5 (Performance Management and Development System) of the United Nations Secretariat. In this respect, the Tribunal recalls what the Appeals Tribunal held in *Mashhour* 2014-UNAT-483, referring to ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances): “[a]dministrative issuances shall not apply to the separately administered funds, organs and programmes of the United Nations, unless otherwise stated therein, or unless the separately administered funds, organs and programmes have expressly accepted their applicability”. It follows that administrative instruction ST/AI/2010/5 does not apply to this case.

77. Rather, the applicable administrative instruction relating to performance evaluation and management at UNICEF is CF/AI/2011-001 (Performance appraisal and rebuttal process), dated 17 January 2011.

² See section 10 for a definition of “unsatisfactory service”.

78. The Appeals Tribunal made it clear that while a non-renewal decision may be based on poor performance and the Administration has broad discretion in this regard (*Morsy* 2013-UNAT-298; *Ahmed* 2011-UNAT-153, *Said* 2015-UNAT-500), a non-renewal decision “can be challenged on the grounds that the Agency has not acted fairly, justly or transparently with the staff member or was motivated by bias, prejudice or improper motive against the staff member (*Ahmed*), who has the burden of proof in this respect (*Said*).

79. The Appeals Tribunal further recalled in *Said* that it is not the role of the Tribunal to review *de novo* the Agency’s decision, and to place itself in the position of the decision maker and determine whether it would have renewed the contract based on the performance evaluation.

80. The Appeals Tribunal also ruled in *Assale* 2015-UNAT-534 that there is no requirement under the applicable rules to finalise an e-PAS before deciding on the non-renewal of a fixed-term appointment, and that it suffices if the staff member has been informed of performance issues and has had the opportunity, between the mid-point review and the end of contract, to improve his/her performance.

81. Finally, the Appeals Tribunal held in *Said* that:

There is no need for the Appeals Tribunal to define the term “poor performance.” This Tribunal has already determined that a PER does *not* need to rate a staff member as “unsatisfactory” in order to support an agency’s decision not to renew an appointment for poor performance. We have also held that a staff member whose performance was rated as “partially meeting performance expectations” had no legitimate expectancy of renewal of his contract and the non-renewal of another staff member with a similar performance rating was lawful.

82. With these standards in mind, the Tribunal will now examine the various issues arising in the present application.

Did the Administration comply with UNICEF Performance Management and Appraisal System regarding performance evaluation, and was the Applicant's poor performance established through a fair and transparent process?

Did the Applicant's supervisor comply with her obligation under CF/AI/2011-001?

83. Pursuant to CF/AI/2011-001, the supervisor is responsible for:
- (a) developing the work plan outputs with the staff member;
 - (b) conducting the mid-year progress review and year-end appraisal;
 - (c) providing ongoing feedback on the overall work of the staff member throughout the performance cycle;
 - (d) advising, guiding, supporting and coaching the staff member on professional development and in the development of a personal development plan, and, where applicable, supporting the staff member in the case of performance shortcomings or underperformance.
84. More specifically, secs. 5.1 and 5.2 provide the following:
- 5.1 During the performance cycle, the supervisor should continuously evaluate performance. When a performance shortcoming is identified during the performance cycle, the supervisor should, to the extent possible, assist the staff member to remedy his/her performance shortcomings. Such measures may include counselling, assignment of more suitable tasks, additional training and/or the institution of a time-bound improvement plan, which should include clear targets for performance improvement, provision for coaching, and supervision in conjunction with regular performance discussions.
- 5.2 If the performance shortcoming is not rectified following the remedial actions indicated in para. 5.1 above, a number of administrative actions may ensue, including the withholding of a within-grade salary increment, the non-renewal of an appointment or the termination of an appointment for unsatisfactory service in accordance with United Nations staff regulation 9.3 (see also CF/AI/2010-001 on Separation from Service particularly sections 5 and 20). (emphasis added)

85. The Applicant's 2013 work plan was signed by her and her first reporting officer (her supervisor) on 7 April 2013; the mid-point review was finalised in September 2013, and the final evaluation was concluded on 13 February 2014.

86. The evidence discloses that several meetings were held between the Applicant and her supervisor. The Tribunal notes that the Applicant disputes the content of the meetings between her and her supervisor of 24 April, 30 July and 2 September 2013. It is apparent that after the meetings in July and September, the Applicant's supervisor wrote detailed emails to the Applicant, respectively dated 31 July and 19 September 2013, explicitly referring to the performance related meetings they had had on 24 April, 30 July and 2 September 2013, and enumerating specific areas for improvement that the Applicant was asked to address. The Tribunal finds that the available written record is reliable evidence to show that the Applicant was put on notice, early on and regularly throughout the performance cycle, through specific advice provided by her supervisor, that there were serious concerns about her performance, and in respect of which areas.

87. In light of the foregoing, the Tribunal does not find it appropriate, nor relevant, to allow the Applicant to produce the audio-records she made of said meetings without her supervisor's knowledge and consent. The Tribunal further finds that the email record with respect to the above-referenced meetings between the Applicant and her supervisor, which remained unanswered by the Applicant in July, is sufficient proof that she was put on notice, at the latest in July 2013, if not in April 2013, that there were concerns about her performance, which were quite specific.

88. On 30 September 2013, the Applicant received her supervisor's comments on the mid-year review, which followed yet another meeting held on 29 September 2013. The mid-year review again contained a negative evaluation of the Applicant's performance. The Applicant, in an email of 30 September 2013, noted that the way the performance appraisal had been done was "demoralizing", thus leaving no doubt that she was again made aware of concerns about her performance at that time.

89. The Applicant's supervisor also copied her on the memorandum of 6 October 2013 in which she recommended not to renew the Applicant's FTA beyond 31 December 2013, which yet again contained criticism on the Applicant's performance in the handling of her portfolio in respect of a number of matters.

90. The final PAS evaluation by the Applicant's supervisor reads, in part, as follows:

- a) Work Plan Output Appraisal: Overall rating for work plan outputs by supervisor: Did not achieve outputs.
- b) Competency Proficiency: In the areas of core competencies she rated as - Communication (DP³), Working with People (NP⁴) and Drive for Results (DP). Her functional competencies were rated as - Formulating Strategies and Concepts (DP), Analysing (DP), Applying Technical Expertise (NP), Learning and Researching (DP), Planning and Organizing (DP).

91. The supervisor further noted in her final evaluation that the Applicant "received capacity building support through a series of different training from BCO and zone, as well as coaching and mentoring support from her supervisor, and from other colleagues from the beginning of her joining".

92. In light of the available record, the Tribunal is satisfied that beyond the criticism to which the Applicant was confronted throughout the performance cycle, her supervisor consistently offered her support and coaching to allow her to improve her performance. One concrete measure she took was to assign the Applicant to another district, *inter alia*, to allow her to be closer to management and get further support in order to improve her handling of her portfolio.

93. The Tribunal finds that the foregoing demonstrates that the Applicant's supervisor made considerable efforts to let her know, from an early stage in the performance cycle, in which areas she had to improve and to provide her with the necessary support. Although no performance improvement plan was elaborated,

³ Developing Proficiency

⁴ Not Proficient

the Tribunal notes that this is not mandatory under the relevant rules, and, although requested to elaborate an action plan to improve her performance, it appears that the Applicant failed to take appropriate action in this respect.

94. In light of the foregoing, the Tribunal is satisfied that the Applicant's supervisor complied with her obligations under sec. 2.4 and the specific responsibilities with respect to performance management under sec. 5.1 of CF/AI/2011-001.

Did the second reporting officer fulfil her role properly?

95. The Tribunal is concerned as to whether the second reporting officer ("SRO") for the performance cycle 2013, namely the then Chief, Field Operations, UNICEF, Bangladesh, actually fulfilled her obligations under the administrative instructions on performance management.

96. CF/AI/2011-001 relevantly provides in sec. 2.1 that:

[t]he performance appraisal process is a shared responsibility between the staff member and his/her supervisor, and is overseen by second reporting officers and management teams.

97. Sec. 2.6 (d), states that:

The second reporting officer is responsible for considering disagreements between the staff member and the supervisor in the implementation of the PER or e-PAS.

98. Finally, sec. 7.1 provides that:

A performance appraisal rebuttal may be submitted following a serious attempt by the staff member to seek a resolution of the disagreement regarding performance rating(s) by utilising at least one of the following alternative remedies that are available prior to a rebuttal:

(a) Discussion with supervisors to resolve disagreements: Staff members who are not in agreement with their performance ratings should raise their disagreement at the time of their performance review in order to seek a resolution. If the supervisor has not scheduled any such discussion, the staff member may seek a discussion to permit him/her to raise any disagreement with regard

to the appraisal of their performance and to seek a resolution. Should the staff member continue to disagree with the ratings assigned by the supervisor, he or she may seek the assistance of the relevant second reporting officer to resolve the disagreement (see paragraph 2.6(d)).

99. When the Applicant filed her complaint for abuse of authority against her supervisor on 18 November 2013 with the Chief, Field Operations, UNICEF, Bangladesh, and the O-I-C, Field Operations, UNICEF, Bangladesh, she clearly raised her concern about the performance evaluation by her supervisor and their disagreement in this regard. Through that complaint, the Applicant also explicitly requested that the PAS be assessed by a second reviewer. Further, when signing her PAS on 13 February 2014, the Applicant reiterated that in view of her and her supervisor's disagreement, she requested an "independent review by the [Second Reporting Officer ('SRO')]"]. The SRO failed to respond to the request or in any form to "mediate" the disagreement. No explanation was provided by the Respondent as to why there was no response.

100. The Tribunal finds that the Applicant's SRO, although she had to be aware of and had been expressly alerted by the Applicant about the disagreement, is totally absent from the formal performance evaluation of the Applicant for the cycle 2013.

101. There is no evidence of the SRO properly and fully discharging her responsibilities under sec. 2.6(d) of CF/AI/2011-001. In fact, the SRO appears on the record only with respect to a field trip, which she and the Chief, HR, UNICEF Bangladesh, undertook to the Sylhet zone office in February 2014. The Tribunal is particularly concerned that not only did this field trip not fall under any of the provisions contained in the administrative instruction with respect to the formal performance evaluation, more importantly, that it became clear at the hearing that the Applicant had not been informed about the actual terms of reference of this trip. While it was claimed to be a trip with the aim of "familiarization" the Field Trip Report clearly and almost exclusively refers to the behaviour of the Applicant, in relation to what can only be understood as a surreptitious evaluation of her performance.

102. The Tribunal finds that the SRO failed to take up her role, as provided for under the above-referenced provisions of the instruction, to mediate the disagreement between the Applicant and her supervisor. Rather, for reasons unexplained, the SRO intervened in a completely unauthorised manner, inconsistent with the processes set forth in the applicable administrative instruction and, thus, outside the scope of any formal performance evaluation.

103. The Tribunal is also greatly concerned that the Field Trip Report generated by the SRO was subsequently used in the formal performance evaluation of the Applicant, when it was put before the Rebuttal Panel for its consideration, and not shown or disclosed to her. The fact that the Applicant was not informed about the purpose and rationale behind the field trip, as being part of and used for her performance evaluation, is found to constitute a significant violation of the Applicant's due process rights with respect to a fair and transparent performance evaluation.

Was the rebuttal process properly conducted/was the Applicant provided with an effective rebuttal?

104. While under the applicable legal framework, UNICEF may have been under no obligation to complete the Applicant's PER before deciding not to renew her appointment (cf. *Assale* 2015-UNAT-534 with respect to the administrative instruction applicable at the time; cf. also sec. 5.2 of CF/AI/2011-001 above, applicable to the case at hand), by renewing the FTA—pending management evaluation, which, in turn was put on hold pending the outcome of the Rebuttal process—the Administration was bound to finalise the rebuttal process, as it did, and to do so following a proper procedure. The Tribunal will therefore examine whether the rebuttal process, and outcome, was procedurally correct, and, if not, whether that had any impact on the legality of the non-renewal decision.

105. As a preliminary matter, the Tribunal notes that sec. 7.12(d) of the CF/AI/2011-001 provides that “[t]he rebuttal statement must be submitted within 30 calendar days as of the finalization of the staff member's PER/e-PAS”, and that the Applicant failed to respect that time limit. The Respondent conceded at the case management discussion, the Administration, in a letter dated

10 March 2014, referred the Applicant to the wrong administrative instruction (CF/AI/2011-001/Amend.1, which was not applicable) with respect to the rebuttal process, which provides for a deadline of 45 days to file a rebuttal statement. Therefore, the (un)timeliness of the rebuttal statement was not raised by the Administration and is not at issue here.

106. Thus, the Tribunal recalls that the Appeals Tribunal held in *Das* 2014-UNAT-421, para. 35, namely, that “an effective rebuttal mechanism is an integral part of a performance evaluation process”, confirming the Dispute Tribunal’s finding that since Applicant *Das* had been deprived of a meaningful opportunity to rebut her PER, the Dispute Tribunal “could not place any reliance on it” (cf. paras. 34, 35 of said judgement).

107. With respect to the rebuttal process, sec. 7 of CF/AI/2011-001 provides in its relevant parts:

7.12 When submitting a rebuttal statement, the following formal requirements apply:

(a) The rebuttal statement must be in writing and should be concise.

(b) The rebuttal must be submitted by the staff member concerned. The submission of rebuttal statements on behalf of others is not permissible.

(c) The rebuttal statement must be addressed to the Regional Chief of Human Resources or, in the case of staff members serving at New York Headquarters, the respective DHR Business Partner.

(d) The rebuttal statement must be submitted within 30 calendar days as of the finalization of the staff member’s PER/e-PAS. An incomplete PER/e-PAS shall not be considered by the Rebuttal Panel.

(e) The rebuttal statement must demonstrate that at least one of the remedies available prior to rebuttal (see paragraph 7.1) were initiated by the staff member prior to the submission of the rebuttal statement, however without a resolution of the disagreements.

(f) The rebuttal statement shall clearly set forth the specific reasons why the staff member should have received a higher rating.

7.13 The Secretary of the Rebuttal Panel shall ascertain that the formal requirements for each rebuttal statement have been met.

7.14 Should the Secretary determine that a rebuttal statement fails to meet the formal requirements, he/she shall submit a brief report stating that the rebuttal statement is not receivable, to the Chairperson of the Rebuttal Panel for endorsement, and inform the staff member accordingly.

7.15 If the formal requirements for the rebuttal statement are met, the Secretary shall submit the rebuttal statement to the Chairperson (or, in his/her absence, a Deputy Chairperson), who shall designate three Panel members to serve on the case.

...

7.18 The Panel shall consider the written documentation and hear the staff member, the supervisor and, at the discretion of the Panel, other individuals who may have information relevant to the review of the appraisal rating, either in person or by other means of communication, where geographic distance so dictates. Furthermore, the supervisor shall be given the opportunity to submit his/her written comments to the staff member's rebuttal statement to the Rebuttal Panel.

7.19 The Rebuttal Panel shall prepare a brief report, normally within two months after referral to the Panel. It shall contain a decision on whether the original rating(s) should or should not be maintained; in the latter case, it shall contain a decision on (a) different rating(s); and set forth the reasons for the decision.

...

7.21 The report of the Panel shall constitute the final decision on the case.

7.22 The ratings or comments resulting either from an appraisal that has not been rebutted or from the rebuttal process are not subject to appeal. However, administrative decisions that stem from any final performance appraisal and that negatively impact the terms and conditions of service of the staff member, may be appealed, beginning with a request for management evaluation.

108. The Tribunal notes that under the above-referenced provisions, more specifically secs. 7.13 to 7.15, the authority to decide whether a rebuttal statement meets the formal requirements falls on the Secretary, who, if he/she is satisfied that it does, shall designate a Rebuttal Panel. On the other hand, when the Secretary concludes that the rebuttal statement was not complete (hence not receivable), the Secretary shall so inform the Chairperson of the Rebuttal Panel and seek his/her endorsement, and accordingly inform the staff member.

109. In this case, the Secretary was satisfied that the Applicant's rebuttal statement met the formal requirements under sec. 7.12 and, accordingly, constituted the Rebuttal Panel. It follows that the Applicant was not put on notice that her statement was insufficient at that stage and she could have properly and reasonably believed, in good faith, that the formal requirements were met.

110. The Tribunal finds that it was only upon receipt of the Panel's report of 12 June 2014, that the Applicant learned that the Rebuttal Panel considered that her rebuttal statement did not meet the requirements of sec. 7.12(f) of the instruction. By making that determination, the Rebuttal Panel acted *ultra vires*, that is, beyond its power, as that determination fell exclusively under the authority of the Secretary. Controversially, after finding that the statement did not meet the formal requirements, the Rebuttal Panel nevertheless proceeded to make a final determination on the Applicant's rebuttal statement, concluding that it had not received enough evidence to change the rating by the Applicant's supervisor.

111. The Tribunal finds that by not informing the Applicant, before the Rebuttal Panel was constituted, that her statement failed to comply with the requirements of sec. 7.12(f), the Applicant was denied, by the Secretary, the opportunity to correct her rebuttal statement and to make it more concise at the outset. The Tribunal notes, in this respect, that email exchanges between the Secretary of the Rebuttal Panel (Ms. K.) confirm that the Applicant was advised that if the Rebuttal Panel were to find that it needed further explanation, it would contact her directly.

112. The written record before the Tribunal does not show that at any point before the Rebuttal Panel's report of 12 June 2014 had the Rebuttal Panel requested the Applicant to provide additional information, or was she informed that her rebuttal statement was found to not have met the formal requirements.

113. Ms. P., one of the Rebuttal Panel members, gave evidence at the hearing that the Panel asked the Applicant, during their interview with her, to rebut the various specific shortcomings raised by her supervisor, but that the Applicant had stated that unless she was provided with further particulars, she was not in a position to respond thereto. However, while the key interview notes state that the Applicant gave some examples of where she felt the comments in the PAS were unwarranted and that she felt offended by broad statements such as that her integrity was questionable, which she felt were not substantiated by evidence. The key notes also referred to the Applicant feeling unable to defend herself against the comments made in the year-end 2013 appraisal before receiving full explanation and evidence from the supervisor on each comment; they do not however, refer to the Panel having clearly requested the Applicant to rebut each of the allegations made against her, with further evidence.

114. Further, the key interview notes mention the Applicant having referred to "the impact of the political situation in 2013 on work productivity (including limited ability to travel etc.), and the Panel's view that while "[t]his [was] not mentioned in the PAS by the supervisor and as the panel [did] not have a detailed understanding of the impact of the unrest to the work in the zonal office, this would need to be clarified". The Respondent, however, did not demonstrate that the Rebuttal Panel did indeed seek any further clarification in this respect.

115. The Tribunal is further particularly concerned by the fact that the Rebuttal Panel had before it documents that had not been shown to the Applicant or of which she was not even aware existed. This was conceded by the Respondent, who noted that "it was correct that the panel appears to have been furnished with documentation the Applicant had not seen", stressing, however, that the Panel member who gave evidence at the oral hearing had unambiguously stated that that documentation did not impact or influence the final conclusion by the Panel,

which was based on the unwillingness by the Applicant to respond to targeted questions and to rebut her supervisor's specific comments.

116. The Tribunal's finds that to allow the Applicant to exercise an effective rebuttal, it was essential that she have been given all pertinent documents provided to the Rebuttal Panel. Indeed, it is a matter of procedural fairness and natural justice (cf. *Asariotis* 2013-UNAT-309; *Ansa-Emmim* 2011-UNAT-155, in which the Appeals Tribunal referred to the principle of natural justice) to give a staff member the possibility to respond to all relevant material before the Rebuttal Panel. Even more so, when the reason for a Rebuttal Panel to uphold the rating given by a supervisor is that the staff member did not provide enough evidence to allow a conclusion to the contrary, she must, first, be given all relevant material so as to be able to fully respond to the evidence against her.

117. By depriving the Applicant from having access to most relevant documents, particularly to the Field Trip Report – Sylhet 4-5 Feb 2014—which was obtained in a way that was procedurally unfair (cf. considerations under paras. 101 to 103 above) and the note for file of February 2014 by her supervisor, the Applicant's right to fully respond to the criticism to her performance was seriously violated.

118. The Tribunal is aware that under the relevant administrative instruction, “the supervisor shall be given an opportunity to submit his/her written comments to the staff member's rebuttal statement to the Rebuttal Panel”, and that the instruction does not foresee that such comments be shared with the staff member. This is an express regulatory exclusion of a due process right to answer matters which may be said against a person. Being thus expressed, the failure to provide such to a staff member cannot be the subject of complaint. On the other hand, however, for reasons of due process, procedural fairness and natural justice as outlined above, any relevant documents referring to the Applicant's performance, that were established prior to the rebuttal statement, and which were made available to the Rebuttal Panel, had to be shared with the Applicant for the purpose of the rebuttal. The Applicant had a clear right to know of all matters which were before the Rebuttal Panel so she could address them. The reference in sec. 7.18 of CF/AI/2011-001 to “[t]he Panel shall consider the written documentation” is

clearly a reference to the documentation in existence at the commencement of the Rebuttal Panel's work. Due process requires the disclosure of all such material to staff members seeking rebuttal. They have a right to know the full case that they must rebut at the commencement of the process. In the Tribunal's view, failure to make full and proper disclosure, in this case, is a major procedural flaw in the performance evaluation, at the level of the rebuttal process.

119. The Tribunal further notes that the Rebuttal Panel interviewed only the Applicant's SRO for the 2012 cycle, and not the SRO for the 2013 cycle. While the relevant administrative instruction does not require the Rebuttal Panel to interview the SRO for the relevant performance cycle, the Tribunal believes that in light of the Applicant having requested a review by the SRO, it would have been reasonable, and a matter of fairness, to interview the Applicant's SRO for the purpose of the rebuttal process.

Does the "discrepancy" between PAS 2012 and 2013 have an impact?

120. The Tribunal considers that the striking discrepancy between the PAS 2012 and 2013 does not, *per se*, have an impact on the legality of the non-renewal decision on the basis of poor performance. In this respect, the Tribunal was satisfied by the explanation provided by the Applicant's supervisor at the hearing, who noted that as the Applicant was a newcomer to UNICEF, who she had asked to start with substantive work only a few months after her joining UNICEF, she gave her the benefit of the doubt and made an effort to rate her positively for the e-PAS 2012, which covered only a few months.

121. The Tribunal finds that the Rebuttal Panel, while it found that the two assessments (2012 vs. 2013)—which were made by the same supervisor—were "strikingly different", improperly failed to inquire into that discrepancy. The Tribunal finds that it was proper and reasonable for the Panel to seek further explanations in order to understand the striking shift in the Applicant's evaluation by the same first reporting officer, within such a short period. The Tribunal finds that the Rebuttal Panel failed to take this relevant matter into account.

Was the decision motivated by extraneous factors?

122. The burden of proof that the non-renewal was based on extraneous factors falls on the Applicant. The Tribunal considers that the Applicant did not provide evidence allowing it to conclude that the decision was based on ulterior motives. Rather, as stated above, the Tribunal finds that the Applicant's supervisor made genuine efforts, as early as April 2013, to address what she perceived as performance issues on the part of the Applicant. The Tribunal also notes that the OIAI found that the Applicant's complaint of harassment did not warrant an investigation, since the facts presented by her "appear[ed] to be more in line with differing opinions on [her] performance" and that the Applicant did not formally contest that decision.

Remedies

123. Having found that the rebuttal process was marked by serious procedural flaws, the Tribunal rules that the final decision on the rebuttal, confirming the Applicant's e-PAS rating for the cycle 2013, was illegal and cannot stand. Therefore, and since the decision not to extend the Applicant's appointment beyond 30 June 2014 was taken on the basis of the outcome of a fundamentally flawed rebuttal process, the Tribunal concludes that the non-renewal decision on the grounds of the Applicant's poor performance was equally illegal, and has to be rescinded.

124. Pursuant to art. 10.5(a) of its Statute, when a decision concerning appointment, promotion or termination is rescinded, the Tribunal shall set an amount of compensation to be paid as an alternative to the rescission of the contested administrative decision.

125. The Appeals Tribunal has ruled that "any consideration of an award of damages for persons who are recruited on fixed-term contracts must take into account, among other things, the term of the contract and the remainder of the said term, if any, at the time of any alleged breach"; consideration has also been given to the length of expectancy of renewal (*Andreyev* 2015-UNAT-501; *Gakumba* 2013-UNAT-387).

126. The Applicant's initial fixed-term contract ran from 1 August 2012 to 31 December 2013, that is, for a period of one year and five months. It was subsequently extended, twice, initially for a period of three months, until 31 March 2014, and, subsequently, until 30 June 2014, pending finalization of the management evaluation, which, in turn was pending the finalization of the rebuttal process.

127. The Tribunal finds that in light of all the circumstances, and the length of her previous appointments with UNICEF, the Applicant's expectancy of renewal could not reasonably be set at more than six months. Accordingly, the Tribunal finds it appropriate to set the amount of compensation to be paid to the Applicant, in lieu of rescission of the decision not to renew her appointment, at the amount of six months net base salary.

128. The Applicant further requests compensation for moral damage. In *Asariotis* (2013-UNAT-309), the Appeals Tribunal held that:

To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:

(i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a fundamental nature, the breach may of itself give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.

(ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

129. The Tribunal understands from this Appeals Tribunal's holding that a moral injury could be inferred from the fact that a staff member has sustained a fundamental breach of his or her substantive or due process entitlements.

130. In light of its conclusions above, the Tribunal notes that the procedure followed with respect to the Applicant's performance evaluation, which resulted in her non-renewal, contained various breaches of her due process rights, which are of a fundamental nature. These clearly affected the Applicant, have an ongoing impact on her reputation, and may result in a difficulty to be re-employed in the Organization. The Tribunal finds it appropriate to grant moral damages in the amount of USD3,000.

131. Further, in light of its conclusions that the rebuttal process was illegal and that the Applicant's performance record cannot be relied on, the Tribunal orders the Respondent to expunge the Applicant's 2013 PER as well as all the material relating to the rebuttal, including the rebuttal panel's report, from the Applicant's Official Status File.

Conclusion

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

- a. The decision not to renew the Applicant's FTA beyond 30 June 2014 is rescinded;
- b. The amount of compensation that the Respondent may elect to pay to the Applicant as an alternative to the rescission is six months net base salary;
- c. The Applicant shall be paid moral damages in the amount of USD3,000;

- d. The above shall be paid within 60 day from the date this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional 5% shall be added to the US Prime Rate until the date of payment;
- e. The Applicant's 2013 PER and the material relating to its rebuttal be expunged from her Official Status File; and
- f. All other claims are rejected.

(Signed)

Judge Rowan Downing

Dated this 6th day of June 2016

Entered in the Register on this 6th day of June 2016

(Signed)

René M. Vargas M., Registrar, Geneva