



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

SARWAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former Associate Social Affairs Officer at the P-2 level in the Division for Social Policy and Development (“DSPD”), Department of Economic and Social Affairs (“DESA”), contests the decisions of “non-renewal of appointment, failure to grant continuing appointment and separation from service”. The Applicant claims that the decisions were “procedurally flawed and improperly motivated”.

2. The Respondent submits that the application is without merit, contending that the Applicant’s performance during his two-year probationary period was “less than satisfactory” and that the decision not to grant him a continuing appointment and to separate him from service was lawful.

Background

3. In a joint submission dated 19 February 2016 and filed on 22 February 2016, the parties provided a list of agreed facts. The agreed facts form the basis of the background set out below, supplemented, where necessary and relevant, by further factual findings of the Tribunal and references to relevant law.

4. By letter dated 16 December 2011, the Applicant received an offer of a two-year fixed-term appointment as an Associate Social Affairs Officer at the P-2 level, step 6, in DSPD, DESA, after successfully completing the National Competitive Recruitment Examination (“NCRE”) in 2009 and being placed on a roster. The offer stated (emphasis added):

After two years of probationary service on a Fixed-term Appointment, you will be granted a continuing appointment. *This means that you will have to demonstrate within that time that you possess the requisite qualifications to serve as a career*

staff member of the United Nations in order to receive a continuing appointment.

The offer of appointment also stated (emphasis added):

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

5. The Applicant's effective date of appointment was 19 March 2012, reflected in his Letter of Appointment, which also stated: "A fixed-term appointment, irrespective of length of service, does not carry any expectancy, legal or otherwise, of renewal or of conversion to any other type of appointment in the Secretariat".

6. The process for managing performance in the Organization is set out in ST/AI/2010/5 (Performance Management and Development System). A performance cycle runs for 12 months, from 1 April until 31 March of the following year (sec. 3.1). The function of the Performance Management and Development System is to promote communication between staff members and supervisors on the goals and key results to be achieved, and the success criteria by which individual performance will be assessed (sec. 2.2). With this in mind, staff members work with their supervisor to develop a workplan and participate in a midpoint review and final evaluation (sec. 2.3). At the end of the performance cycle, a discussion takes place between the staff member and his or her supervisor and the staff member receives an overall rating for that performance cycle (secs. 8 and 9).

7. The Applicant commenced his appointment on 19 March 2012, and on 15 February 2013, his workplan for the 2012–2013 performance cycle was entered into Inspira, a United Nations website used by staff members for various tasks, including performance management. The Tribunal notes that in accordance with sec. 6.2 of ST/AI/2010/5, workplans are to be prepared “[a]t the beginning of the performance cycle”.

8. On 5 March 2013, the Applicant met with his first reporting officer (“FRO”) and second reporting officer (“SRO”) for a midpoint review. The Tribunal notes that in accordance with sec. 7.2 of ST/AI/2010/5, the FRO should conduct a midpoint review “usually six months after the creation of the workplan”. The Respondent submits and the Applicant denies that a performance improvement plan was discussed at this meeting. Section 10.1 of ST/AI/2010/5 states that a performance improvement plan is a remedial measure that may be used to proactively assist a staff member when a performance shortcoming is identified. The Tribunal notes that unsigned minutes from the meeting, attached as an annex to the application, state (emphasis added): “[FRO] noted that [the Applicant] will continue having the support from the branch and that *they will meet again to work on his performance improvement plan*”.

9. By email dated 22 March 2013, the Applicant sent his FRO a document setting out a plan identifying written and oral communication as “skills [that] needed to be improved”. The email stated: “Thank you for your guidance on the matter. Attached please find the plan as we discussed”. The one-page document, dated April 2013, set a six-month time frame for improvement. The actions to be taken were listed as attending available in-house and outside trainings and regularly updating his FRO on progress.

10. On 24 April 2013, the Applicant completed his self-evaluation for the 2012–2013 cycle in Inspira.

11. On 21 November 2013, the Applicant’s FRO completed her evaluation of the Applicant’s performance for the 2012–2013 cycle in Inspira. The FRO provided detailed comments throughout the document.

12. On 22 November 2013, the Applicant’s SRO completed his evaluation of the Applicant’s performance for the 2012–2013 cycle in Inspira. On 22 November 2013, the Applicant met with his FRO and SRO and was informed that his performance for the 2012–2013 cycle had been rated “D – does not meet performance expectations”, the lowest rating available. The Tribunal notes that sec. 8.1 of ST/AI/2010/5 states that end-of-cycle performance discussions shall take place “[w]ithin three months after the end of the performance appraisal cycle”, i.e. by the end of June of the relevant year.

13. On 6 December 2013, the Applicant acknowledged the evaluation for the 2012–2013 cycle in Inspira. That same day, the Applicant submitted a rebuttal statement with respect to his rating for the 2012–2013 cycle.

14. On 16 December 2013, the Applicant and his FRO finalized his workplan for the 2013–2014 cycle, and the Applicant inserted it in Inspira.

15. The parties agree that on 31 December 2013, the FRO met the Applicant “to carry out the midpoint review for the 2013–2014 cycle and to finalize the performance improvement plan” (the midpoint review was not recorded in Inspira until later, on 4 April 2014). That same day, the FRO sent a performance improvement plan to the Applicant by email, copying the SRO, and stating:

Following the meeting we held at 12pm today to discuss the development of your [performance improvement plan], I am attaching the version that we reviewed today. It is our understanding from the meeting that you do not agree to a [performance improvement plan] on these areas of your work. We look forward to your response in order to move forward.

The attachment was not submitted to the Tribunal as evidence.

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

17. On 6 January 2014, the FRO approved the Applicant’s workplan for the 2013–2014 cycle in Inspira. In an email to the Applicant on the same date, she noted that a review meeting had taken place with the Applicant and his SRO on 31 December “during which we reviewed your work and discussed the final version of the [electronic performance appraisal system (“e-PAS”) report]. This meeting was the culmination of many meetings reviewing your work for this [e-PAS] cycle and developing the [performance improvement plan].”

18. By email to the Applicant dated 14 January 2014, his FRO stated that she was awaiting his reply to her 6 January 2014 email and that: “We are here to support you, yet your performance processes continues to be delayed and this is not conducive to the working environment and the work plan.” The FRO requested that the Applicant revert regarding the performance improvement plan.

19. On 28 January 2014, the rebuttal report was finalized in regard to the Applicant's initial performance evaluation for the 2012–2013 performance cycle ("First Rebuttal Report"). The rebuttal panel concluded in its report that the overall rating should be changed to "C – partially meets performance expectations". The panel concluded that the rating for the core competency of "Professionalism" should be changed from "D – unsatisfactory" to "C – requires development" as should the competencies of "Communication", "Planning and organizing" and "Creativity". The panel concluded that the rating for the competency of "Teamwork" should be changed from "C – requires development" to "B – fully competent".

20. The First Rebuttal Report included the following statements (emphasis added):

a. "The Panel has observed with great concern that the timing of the e-PAS 2012–2013 review has not complied with the established guidelines as described in sections 6, 7 and 8 of ST/AI/2010/5";

b. "The explanation for the non-compliance offered by the FRO and SRO is that the staff member delayed the process of drafting the Plan from March 2012 to February 2013. *This observation is however contrary to the evidence and not credible*";

c. "The lack of compliance with the established timelines has nearly incapacitated the FRO's ability to properly use the [e-PAS] cycle as a management tool for planning, feedback, and evaluation";

d. "As weekly meetings to address performance issues with the staff were set up only late into the cycle, there is only limited evidence

that the FRO sufficiently and promptly advised, supported and coached the staff in a timely manner”;

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

g. “The Panel disagrees with the observation in the e-PAS by the FRO that ‘the staff member does not meet the standards necessary for this organization’, as it believes that it is too early to arrive at such a conclusion without sufficient support. In the view of the Panel, and based on its observations above, the overall appraisal of ‘requires development’ appears an appropriate rating. The Panel expresses the hope that this rating has prompted the staff member to pay more attention to the expectations from him, and from his supervisors to guide him, and to prevent a recurrence of a negative evaluation during the second year of his career. The FRO and SRO deserve praise for effectively managing a programme with much work pressure and growing demands from the highest levels of the organization. Yet, in order to be a more inclusive work unit, its management is invited to consider setting timely, precise and realistic expectations on its staff, that are more in line with the existing practice of engaging junior staff

at the P-2 level in other units of the Department and the Organization; and are commensurate with the seniority of the staff involved”.

21. On 31 January 2014, the DESA Executive Office sent the First Rebuttal Report to the Applicant.

22. By email to the Applicant dated 4 February 2014, the Applicant’s FRO requested that he inform her if he wanted to add any comments to the midpoint review for the 2013–2014 performance cycle so that it could be finalized. By email response later the same day, the Applicant thanked her for her suggestions, feedback and support on performance issues in a meeting the previous day. He also disputed a comment that she had apparently entered into Inspira which stated that he had not agreed to the performance improvement plan she had developed for him. He stated “I didn’t disagree on a [performance improvement plan], rather I wanted to work on a [performance improvement plan] that was informed by systematic discussions on my performances and based on my agreed [e-PAS] for the said period.”

23. On 12 February 2014, the FRO sent the Applicant an amended performance improvement plan, to be in effect from 12 February to 25 March 2014.

24. On 18 March 2014, the Applicant’s appointment was extended for six months.

25. On 25 April and 2 May 2014, the FRO met the Applicant for the end-of-cycle discussion. On 5 May 2014, the FRO completed her evaluation of the Applicant’s performance for the 2013–2014 cycle in Inspira, assigning an overall rating of “D – does not meet expectations”.

26. On 30 May 2014, the SRO approved the assessment of the Applicant's performance for the 2013–2014 cycle and on 13 June 2014, the Applicant acknowledged the rating.

27. On 25 June 2014, the Applicant submitted a rebuttal statement in respect to his evaluation for the 2013–2014 performance cycle.

28. On 19 September 2014, the Applicant's fixed-term appointment was extended until 31 October 2014.

29. In a report dated 14 October 2014 ("Second Rebuttal Report"), the second rebuttal panel upgraded the Applicant's rating for the 2013–2014 performance cycle to "C – partially meets performance expectations". The report included the following statements (emphasis added):

a. "The Panel has observed that the timing of the e-PAS 2013–2014 review has not fully complied with the established guidelines as described in sections 6, 7 and 8 of ST/AI/2010/5";

b. "Overall, the late initiation of the work plan by the staff member and the late initiation follow-up actions by the FRO constrained the full implementation of ST/AI/2010/5. At the same time, these delays did not inhibit the possibility to evaluate the performance of the staff member";

c. "From November 2013 onwards, the Panel has observed that the FRO clearly assigned various tasks in writing, rather than only orally. This created a paper trail of evidence for a negative e-PAS performance rating, which could be expected to be negative by all concerned";

d. “It appears that the FRO and SRO have made much more effort to provide adequate support for these tasks. The Panel believes that in some cases the FRO and SRO have reduced their performance expectations of the staff member”.

30. On 20 October 2014, the Applicant submitted a formal complaint of harassment, discriminatory treatment and abuse of authority to the Under-Secretary-General of DESA. The fact-finding panel interviewed the Applicant on 28 January 2015.

31. On 30 October 2014, the Director, DSPD, DESA, addressed a letter to the Applicant conveying the decision not to grant him a continuing appointment and to separate him from service upon the expiration of his fixed-term appointment on 30 November 2014. The letter stated:

In accordance with your offer of appointment dated 16 December 2011, you were required to prove within the probationary period of your appointment that you had the qualifications to be a career staff member of the United Nations.

...

Based on the results of the rebuttal panels for the past two e-Performance cycles, it was determined that your service only partially meets expectations. In this regard, it was decided to give you a thirty-day notice and to extend your appointment until 30 November 2014, which will represent the final extension of your appointment.

32. On 7 November 2014, the Applicant requested management evaluation of the decision to separate him from service. He also submitted a letter to the Secretary-General requesting suspension of action of the decision.

33. By letter dated 18 November 2014, the Under-Secretary-General for Management (“USG/DM”) informed the Applicant that the Secretary-General

had decided to grant his request for suspension of action and extend his appointment until 7 December 2014.

34. By letter dated 4 December 2014, the USG/DM informed the Applicant that the Secretary-General had decided to uphold the decision to separate him from service.

35. On 7 December 2014, at the close of business, the Applicant was separated from service upon the expiration of his fixed-term appointment.

Hearing

36. A hearing on the merits was held on 19 and 20 July 2016. At the commencement of the hearing, Counsel for the Applicant stated that he had no objection to the admission of witness statements filed by the Respondent on 18 July 2016 and the Tribunal admitted the statements, subsequently confirmed by the witnesses under oath, as evidence. Counsel for the Respondent raised a concern regarding the legibility of the handwriting in medical statements submitted by the Applicant to the Tribunal on 18 July 2016. The Tribunal considers that this documentation is sufficiently legible in the material respects and has therefore admitted the statements into evidence.

37. The Applicant gave evidence on the first day of the hearing. Ms. Nicola Shepherd, the Applicant's FRO during his time with the Organization, also gave testimony. On the second day, three witnesses gave testimony—Mr. Jean-Pierre Gonnot, the Applicant's SRO; Mr. Joop Theunissen, the chairperson of both rebuttal panels; and Ms. Daniela Bas, the Director of DSPD, DESA. The Applicant was also recalled, with no objection, to give further clarifications and evidence.

Consideration

Receivability and scope of the case

38. In his application the Applicant contests “non-renewal of appointment, failure to grant continuing appointment and separation from service”. In his request for management evaluation dated 7 November 2014, he requested review of the decision to separate him from service.

39. Article 8 of the Statute of the Dispute Tribunal states that an application shall be receivable only if an applicant has previously submitted the contested administrative decision for management evaluation, where required. Consequently, the Tribunal considers that it only has jurisdiction to consider the Applicant’s challenge to the decision to separate him from service. To the extent that the Applicant challenges, as a separate administrative decision, the decision not to grant him a continuing appointment, the Tribunal considers that this element of the application is not receivable, as the decision was not submitted for management evaluation.

Issues

40. Having considered the facts of the case, the submissions of the parties, and the agreed and disputed legal issues set out by the parties in their joint submission dated 19 February 2016, the Tribunal considers that the following issues arise in this case:

- a. Did the Applicant have a legitimate expectation that his fixed-term appointment would be renewed?
- b. Did the Administration comply with the provisions of the Organization’s Performance Management and Development System?

c. Was the decision to separate the Applicant from service improperly motivated or tainted by bias or discrimination?

d. If the decision to separate the Applicant from service was unlawful, what remedies is the Applicant entitled to?

Did the Applicant have a legitimate expectation that his fixed-term appointment would be renewed?

41. The Applicant submits that he had a legitimate expectation of renewal of his fixed-term appointment based on the terms of his offer of appointment dated 16 December 2011, specifically the reference to the managed reassignment programme and assignment to a second post/function. He submits that the NCRE programme was designed in anticipation of career service and “envisages a managed reassignment process precisely to give newly recruited staff an opportunity to demonstrate their suitability in more than one post and under more than one supervisor. Clearly, if the managed reassignment is to be carried out, there has to be an extension of service beyond the initial two year appointment”. The Applicant also submits that there were specific undertakings to transfer him to another assignment with different supervisors, which would have, of necessity, entailed an extension of his appointment.

42. The Respondent submits that ST/AI/2001/7/Rev.1 (Managed Reassignment Programme for staff in the Professional category at the P-2 level recruited through the national competitive examination or the General Service to Professional category examination), dated 10 May 2013, does not create a legitimate expectation that staff members will be retained beyond the term of their fixed-term appointment should they fail to demonstrate satisfactory performance during their first two years of service. Moreover, the Respondent

contends that the Applicant was not made any express written promise or given any firm commitment of a continuing appointment.

43. Section 2.1 of ST/AI/2001/7/Rev.1 states that the managed reassignment programme shall be mandatory for staff that have been appointed through the NRCE programme and have completed two years of service. In accordance with sec. 2.4(b), staff members that have not completed two years of service may request early participation in the program provided they have completed at least one year of service, and subject to their supervisor's approval.

44. The Applicant testified that, following the completion of the First Rebuttal Report on 31 January 2014, he asked to be transferred to another unit. In his witness statement and testimony, the Applicant's SRO stated that it was in fact he who proposed a reassignment or transfer and that the Applicant responded positively. He did not recall exactly when the discussion took place, but thought that it was at some point during the second performance cycle. He stated that he discussed the proposal with the Director, DSPD, DESA, who was open to reassigning the Applicant to another unit of the Division. However, after having consulted with the Office of Human Resources Management ("OHRM"), the Executive Office of DESA informed the SRO that it was not advisable to move the Applicant in the middle of a performance cycle. Consequently, no further action was taken. In her oral testimony, the Director, DSPD, DESA, recalled that a discussion took place regarding moving the Applicant and that the advice received from OHRM was that it was not advisable to transfer the Applicant while a rebuttal process was ongoing. However, she stated that her recollection of the details was "foggy".

45. Both the provisions of ST/AI/2001/7/Rev.1 and the offer of appointment dated 16 December 2011 illustrate that the Applicant would generally have to complete two years of satisfactory service before

participating in the managed reassignment programme. The Applicant's offer of appointment stated that after "two or three years in your initial post", the Applicant would participate in such a program. While sec. 2.4(b) of ST/AI/2001/7/Rev.1 allows staff members to request early participation in the managed reassignment programme, this is at the discretion of the staff member's supervisor. The mere fact of having discussed the possibility of a transfer with the Applicant did not create a legitimate expectation that he would be transferred to another function, still less that he would receive an extension of his appointment in order to facilitate such a move. Further, there is no evidence that the proposed transfer was discussed in the context of the managed reassignment programme. In this regard, the Tribunal notes that sec. 10.1 of ST/AI/2010/5 identifies transfer to more suitable functions as a proactive remedial measure that may be taken when a performance shortcoming is identified. In any event, it is clear from the evidence that, after receiving advice from the Executive Office, DESA, ultimately the Applicant's supervisors decided not to transfer him to another function. Consequently, the contention of a legitimate expectation of renewal of the Applicant's fixed-term appointment on this basis cannot succeed.

46. The Applicant's offer of appointment dated 16 December 2011 clearly stated that he would have to demonstrate during two years of probationary service that he possessed the requisite qualifications to serve as a career staff member in order to receive a continuing appointment. A continuing appointment is an open-ended appointment (staff rule 4.14(a)), in contrast to a temporary or fixed-term appointment, both of which are time-bound. Staff rule 4.14(b) states that staff members recruited upon successful completion of a competitive examination shall be granted a continuing appointment after two years on a fixed-term appointment, subject to satisfactory service. The Applicant's Letter of Appointment also stated that a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or

of conversion to any other type of appointment in the Secretariat (see also staff rule 14.3(c)).

47. In the matter of *Obdeijn* UNDT/2011/032 (affirmed in *Obdeijn* 2012-UNAT-201, with variation to compensation), at para. 40 the Tribunal stated:

The practice of inserting disclaimers into fixed-term contracts to the effect that an employee has no expectation of renewal is not conclusive proof that the employee could not reasonably have expected his or her contract to be renewed ... What constitutes a reasonable expectation will be a question of fact in each particular case.

48. As the Dispute Tribunal stated in *Ahmed* UNDT/2010/161 (affirmed in *Ahmed* UNAT 2011-UNAT-153), an expectancy of renewal may also be created by countervailing circumstances, such as a violation of due process, arbitrariness or other extraneous motivation on the part of the Administration (paras. 9 and 12). In order for a staff member's claim of legitimate expectation of a renewal of appointment to be sustained, "it must not be based on mere verbal assertion, but on a firm commitment to renewal revealed by the circumstances of the case" (*Abdalla* 2011-UNAT-138; *Munir* 2015-UNAT-522). It is also trite law that not only must the expectation be "legitimate" or have some reasonable basis, but the fulfilment of the expectation must lie within the powers of the person or body creating the expectation (see *Candusso* UNDT/2013/090, not appealed). Although there was inconsistency regarding the reasons for the apparent inability to transfer the Applicant, the Tribunal does not find that there is sufficient evidence that a legitimate expectation was created by the circumstances, or that the Administration made a firm commitment or express promise to renew the Applicant's fixed-term appointment; although it does indicate that the Applicant could have been placed elsewhere where his immediate capabilities could be utilized and realized.

Did the Administration comply with the provisions of the Organization's Performance Management and Development System?

49. The reasons given for the decision contested by the Applicant was conveyed in the 30 October 2014 letter from the Director, DSPD, DESA. The letter referred to the requirement for the Applicant to prove himself within the two-year probationary period and stated that, based on the results from the rebuttal panels for the last two performance cycles, it had been determined that his performance only partially met expectations.

50. The Applicant submits that the purpose of the Performance Management and Development System is not only to ensure that the overall performance rating is determined in a manner that respects due process, but also that staff members are afforded a reasonable opportunity to improve any shortcomings over time. In respect to the management of the Applicant's performance, it is submitted that delays in the process were highly prejudicial to him and that the six-week performance improvement plan initiated towards the end of the 2013–2014 performance cycle “appears to have been merely a step to justify a rating of [does not meet performance expectations]”. According to the Applicant's submission, he was “set up to fail”.

51. Staff rule 4.13(c) provides that “[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)”. The exception identified under staff rule 4.14(b), referred to above, is that, *subject to satisfactory service*, staff members recruited upon successful completion of a competitive examination shall be granted a continuing appointment after two years on a fixed-term appointment.

52. It is settled jurisprudence that “poor performance ... may be the basis for the non-renewal of [a] fixed-term appointment” (*Said* 2015-UNAT-500, para. 34, referring to *Morsy* 2013-UNAT-298, para. 18; *Ahmed* 2011-UNAT-153, para. 49). The Appeals Tribunal has also held that “a staff member whose performance was rated as ‘partially meeting performance expectations’ had no legitimate expectancy of renewal of his contract” (*Said*, para. 41, referring to *Dzintars* 2011-UNAT-176, paras. 30–31).

53. A non-renewal decision—even one based on poor performance—can be challenged on the grounds that the decision was arbitrary or procedurally deficient, the Administration did not act fairly, justly or transparently, or if the decision is motivated by bias, prejudice or improper motive against the staff member. The staff member has the burden of proving that such factors played a role in the administrative decision (*Said*, referring to *Ahmed*; *Morsy*; *Obdeijn* 2012-UNAT-201; *Asaad* 2010-UNAT-021).

54. In a witness statement submitted to the Tribunal, and confirmed under oath, the Director, DSPD, DESA, who made the contested decision, stated:

This decision was based on the feedback I had received from [the Applicant’s FRO and SRO].

...

[The SRO] recommended that [the Applicant’s] appointment not be extended. The recommendation was based on the two e-Passes (as amended by the rebuttal panel) that found that [the Applicant’s] performance only partially met expectations.

55. In *Ncube* UNDT/2016/069 (under appeal), the Dispute Tribunal stated (footnotes omitted):

121. When a decision not to renew a contract is taken on grounds of non-performance, the process of establishing that a staff member has not performed must scrupulously comply with the legislation governing performance management. ...

...

126. When a staff member's appraisal is so fraught with irregularities, that staff member has been denied due process to which he/she is entitled. It is rudimentary that a breach of due process taints decisions that follow from a flawed or irregular process.

127. It is not the role of the Dispute Tribunal to review de novo the Respondent's rating of the Applicant. The Tribunal should not place itself in the role of the decision-maker and determine whether it would have renewed the contract, based on the performance appraisal. This is not the role of a reviewing tribunal under the UNDT Statute as was held in *Said*. The role of the Tribunal is to determine whether the proper procedures had been applied. In this case it was not; and a finding based on an irregular procedure cannot be acted upon.

56. Given that the Applicant's separation from service was based on a conclusion that his performance was not satisfactory, the Tribunal will consider the process by which his performance was managed and assessed. It is not the Tribunal's role to re-assess the Applicant's performance but rather to examine the process by which it was determined that his performance was unsatisfactory. The Tribunal will consider whether the proper procedures were applied in managing and evaluating the Applicant's performance in the first and second performance cycles.

First performance cycle: 2012–2013

A. Lack of compliance with established timelines

57. The Applicant's FRO was on mission the week that the Applicant joined the Organization. According to the SRO, he was the first staff member that the Applicant met when he arrived. He stated that later on when the communication problem became obvious he and the FRO encouraged the Applicant to take training in oral and written communication skills, public speaking, and UN specific writing skills, which he apparently did.

58. The Applicant's FRO stated that both she and the SRO noticed that the Applicant's work was not up to standard in the early stages of his appointment. She stated that soon after he reported for duty she initiated discussions with him regarding his work and what would be expected of him in his new role. However, his performance did not meet the expectations of a P-2 staff member. She stated that she informed the Applicant of this "definitely by June/July". Given that both the Applicant's FRO and SRO had concerns about his performance from an early stage, it would be expected that they would closely adhere to the performance management system.

59. However, with respect to the 2012–2013 performance cycle, the First Rebuttal Report found that "the lack of compliance with the established timelines [for performance management] has nearly incapacitated the FRO's ability to properly use the [e-PAS] cycle as a management tool for planning, feedback, and evaluation". At the hearing on the merits, the Applicant's FRO and SRO stated that it was the Applicant who was responsible for delaying the implementation of the performance management and development system according to the timelines established in ST/AI/2010/5, particularly through his delay in submitting a workplan in Inspira. However, this contention was rejected by the rebuttal panel in the First Rebuttal Report, which concluded that there was "clear evidence that the staff member, despite being new to the United Nations, submitted his work plan well in time" and that "there is full evidence that he sought and participated in discussions with his FRO to develop the work plan in a timely manner".

60. A workplan is a key document for the performance management of staff. Section 6.3(a) of ST/AI/2010/5 states: "The format of the workplan may vary depending on the functions of the staff member, but must include results-oriented elements such as goals/key results/achievements; actions to undertake to achieve each goal/key result/achievement; and measurement through

a statement of success criteria, performance expectations and behavioural indicators to evaluate performance at the end of the cycle”. Without agreeing and finalizing such a workplan in a timely manner, it is difficult for a staff member to have clarity as to the expectations for the performance cycle, and thus the overall performance rating for the cycle—which relates to the degree to which a staff member has met or failed to meet “performance *expectations*” (emphasis added)—is of questionable validity.

61. The First Rebuttal Report stated that the Applicant sent a draft work plan to the FRO on 2 May 2012 and another version in July 2012 after the FRO sent an email on 28 June 2012 to all staff reporting to her requesting that a workplan be submitted. With regard to date that the workplan was entered into Inspira, the First Rebuttal Report noted: “The workplan can only be entered after it is cleared by the FRO, and no evidence of any such clearance before March 2013 was presented. Also, at no other point in the cycle did the FRO use the opportunity to approve the proposed and submitted work plan to get the e-PAS cycle beginning at the proper time.” The Tribunal accepts the findings of the rebuttal panel in this regard.

62. In *Simmons* 2012-UNAT-221, the Appeals Tribunal affirmed the Dispute Tribunal’s finding that “it is the Organization, through its head of department or office and supervisory managers (including the first reporting officer), which remains ultimately responsible for the implementation of the e-PAS system, including the work plan” and that even in instances where staff are uncooperative, “the responsibility for implementing the work plan remains with the Organization”. Although these pronouncements were made by reference to the provisions of ST/AI/2002/3 (Performance Appraisal System), which is no longer in effect, having been abolished and replaced by ST/AI/2010/5, the Tribunal has reviewed and compared the relevant provisions in the two issuances, and considers that the above-quoted statements are still

good law. In addition, the Tribunal notes that in accordance with sec. 4.2 of ST/AI/2010/5, if a staff member does not take the required action on time to advance or complete his e-performance document, then the evaluation process may proceed outside the electronic application.

63. The delay in finalizing and approving a workplan seems to have had a knock-on effect on the rest of the stages of the performance management cycle. The midpoint review between the Applicant and his FRO and SRO took place on 5 March 2013, less than a month before the end of the performance cycle. As noted by the rebuttal panel “it is not possible for any staff to correct or improve his or her performance in such a short time span”. Although it appears that some form of performance improvement plan was at least discussed at the 5 March 2013 meeting, the resulting plan, drafted by the Applicant himself, was sent to the FRO on 22 March 2013, approximately one week before the end of the performance cycle. As noted by the rebuttal panel: “Had [a performance improvement plan] been initiated in the middle of the cycle, for example in September or October 2012, the staff would have had a real opportunity to improve his performance within the cycle”.

64. On 21 and 22 November 2013, respectively, after more than half of the next performance cycle (2013–2014) had passed, the Applicant’s FRO and SRO entered into Inspira their evaluations of the Applicant’s performance for the 2012-2013 performance cycle. They held an end-of-cycle discussion with the Applicant on 22 November 2013. When asked about the reason for the delay at the hearing, the Applicant’s FRO stated that she and the SRO did not know how to handle the process in relation to a staff member with performance issues. She had never supervised a staff member who performed so poorly and had never given an end-of-cycle performance rating that indicated dissatisfaction with a staff member’s performance.

65. Both the FRO and SRO testified before the Tribunal as to the Applicant's poor performance. They also each testified that it was apparent to them from an early stage that his performance did not meet their expectations. It is therefore surprising that they did not adhere to the timeframes and processes established by ST/AI/2010/5. The midpoint review is a key stage of the performance management system. In accordance with sec. 7.2, "usually six months after the creation of the workplan", the FRO should conduct the review after discussing with the staff member their progress towards achieving the goals and results set out in the workplan. While feedback from supervisors is intended to be ongoing, the midpoint review allows for more formal, structured feedback at roughly the midpoint of the performance cycle. Given that the midpoint review was conducted less than a month before the end of the 2012-2013 performance cycle, there was little chance for the Applicant to act on this formal, officially documented feedback.

66. The Tribunal finds that the lack of compliance with the established timelines for performance management in the 2012-2013 performance cycle had a prejudicial effect on the Applicant. It was his first year with the Organization and the first of two years in which he had an opportunity to prove whether he had the requisite skills and qualifications to receive a continuing appointment. Given these circumstances, the expectations on the Applicant should have been promptly and formally agreed in a workplan in the first half of 2012, and any concerns about his performance should have also been formally documented in a midpoint review carried out with sufficient time for the Applicant to respond to the feedback received. This was not done and the Tribunal concludes that the process for managing and evaluating the Applicant's performance in 2012-2013 was both materially flawed and prejudicial to his interests.

B. Unreasonable or unrealistic expectations

67. In addition to the delays in implementing the various stages of the performance management and development system, the Tribunal also notes with concern, the finding in the First Rebuttal Report that “some of the tasks that [the Applicant] was assigned required a level of experience that could simply not be expected from him”.

68. The rebuttal panel reviewed each of the four goals set out in the Applicant’s work plan for the 2012–2013 performance cycle and found that there may have been unrealistic expectations placed on the Applicant in respect of three of these goals, as follows:

a. Goal 1: “It is particularly disconcerting to note that these two tasks, focused on crucial aspects of a flagship publication, were given to a junior officer who had started his assignment at the United Nations only weeks earlier, with the expectation that this would be delivered immediately and to the full satisfaction of management. Such a task does not match with the Panel’s own experience in the Secretariat in relation to the gravity of functions that are assigned to a new P-2 officer. In other words, the Panel believes that the expectations set by FRO and SRO were simply too high, and the support provided may have lacked clarity”;

b. Goal 2: “The Panel took note with some concern that the staff, in his first year of service, was requested to assist member State representatives directly, and outside the presence of FRO and SRO during a number of negotiating session, together with another junior staff member ... the tasks assigned required preparation and coaching by the FRO, and could possibly be inconsistent with the responsibilities

of a P-2 officer, with less than a year of experience, in other parts of the UN Secretariat”;

c. Goal 4: “As was observed in other tasks, it appears that there was little or no instruction on how to obtain an output that would satisfy the FRO’s expectation. And as also observed before, the tasks assigned may simply be too difficult to achieve for a newcomer”.

69. In a section titled “Observations on managerial feedback and performance support”, the panel invited the Applicant’s supervisors to consider setting “realistic expectations on its staff, that are more in line with the existing practice of engaging junior staff at the P-2 level in other units of the Department and the Organization; and are commensurate with the seniority of the staff involved”.

70. Although the rebuttal panel upgraded the Applicant’s end-of-cycle rating for 2012–2013 from “does not meet performance expectations” to “partially meets performance expectations”, this outcome does not fully take into account the effect on the Applicant of the mismanagement of his performance in his first year with the Organization. As a result of the failure to adhere to the timelines set out in ST/AI/2010/5, the setting of unrealistic expectations, and the apparently inadequate support he received, the Tribunal finds that the Applicant was not given a reasonable opportunity to demonstrate his suitability for the position for which he had been recruited, and a reasonable opportunity to improve on his weaknesses, in his first year with the Organization.

Second reporting cycle: 2013– 2014

71. The Applicant did not receive his end-of-cycle rating for the 2012–2013 performance cycle until more than half way through his second performance cycle, on 22 November 2013. This left him very little time—just

over four months—to respond to the rating and comments before the end of his two-year probationary period on 31 March 2014. In addition to this delay in completing the performance assessment for 2012–2013, there were further delays in the process for performance management for 2013–2014.

72. In her written witness statement, the Applicant’s FRO stated that at the beginning of the 2013–2014 performance cycle, in March 2013, she discussed the work required for the year ahead in team meetings and “often reminded the team that their e-PAS needed to be drafted as soon as possible and sent to [her] for review and discussion”. She stated that the Applicant was present in these meetings “but failed to respond to the request timeously despite numerous reminders”. She further stated that “[a]fter a seven month delay” she sent the Applicant an email on 25 October 2013 asking him for an update.

73. The Tribunal notes that, according to her witness statement, the Applicant’s FRO was the head of a team that consisted of herself and five other staff members. While the Tribunal does not have the relevant documentary evidence before it, the Second Rebuttal Report found that in fact the FRO sent a similar email on 25 October 2013 to four staff members regarding their workplans. A reminder was sent to the same four staff members on 4 November 2013. The Applicant responded on 4 November 2013 with a draft workplan that the FRO considered required “considerable work”. She then engaged the Applicant in discussions throughout November 2013. After several meetings and further drafts, the Applicant’s workplan was finalized on 16 December 2013.

74. Given that they had serious concerns about the Applicant’s performance, and that the 2012–2013 performance cycle suffered from significant delays, it is again surprising that the Applicant’s supervisors did not pay close attention to setting out clear, formal expectations of him for his second year with the Organization, through the finalization of a workplan at

the *very beginning* of the 2013–2014 performance cycle, i.e. in April or May 2013. In the Second Rebuttal Report, the rebuttal panel stated that the late initiation of the workplan by the Applicant “constrained the full implementation of ST/AI/2010/5” but “did not inhibit the *possibility* to evaluate the performance of the staff member” (emphasis added). However, the late initiation of the workplan must be seen in the context of the previous delays and failures in the management of the Applicant’s performance. It also appears that there may have been a more systemic issue regarding the late finalization of workplans for the 2013–2014 performance cycle, given the references in the Second Rebuttal Report to emails sent to four staff members—most of the Applicant’s team—on 25 October and 4 November 2013, more than half way into the performance cycle.

75. The midpoint review for the 2013–2014 cycle took place on 31 December 2013, three months before the end of both the performance cycle and the two-year probationary period. Again, the Applicant was left with little time to respond to feedback.

76. The record shows that there were attempts to initiate a formal performance improvement plan in meetings held with the Applicant on 5 March 2013 and 31 December 2013, however, a plan was not formally implemented until the last six weeks of the 2013–2014 performance cycle, from 12 February to 25 March 2014. Section 10.2 of ST/AI/2010/5 states that if performance shortcomings are not rectified following remedial actions as indicated in sec. 10.1, and where the overall rating at the end of the performance cycle is “partially meets performance expectations”, a written performance improvement plan shall be prepared by the FRO. This shall be done in consultation with the staff member and the SRO. However, since the Applicant’s overall rating for the 2012–2013 performance cycle was not finalized until November 2013, and the rebuttal panel review was not

completed until 31 January 2014, there was little time remaining to implement the plan.

77. ST/AI/2010/5 does not provide for a minimum duration for a performance improvement plan, stating only that it may cover up to a six-month period (sec. 10.2). However, the Tribunal considers that given the purpose of a performance improvement plan, it should not be implemented as a mere formality, but should provide the staff member a genuine opportunity to improve. While the Applicant may have been partially responsible for the delays in initiating a plan which was designed to help him improve his performance, the Tribunal also considers that the overall delays in adherence to the performance management system affected the late implementation of this measure. In the Tribunal's view, a six-week performance improvement plan, instituted at the very end of both the performance cycle and the two-year probationary period did not provide the Applicant with a genuine opportunity to improve.

78. The Tribunal recalls that enquiries were made regarding the possibility of transferring the Applicant to another unit. The Tribunal considers that the willingness of the Applicant's SRO and the Director, DPSD, DESA, to transfer the Applicant to another unit towards the end of his probationary period illustrated that there was some indication that he could do better in a different environment and function. It must be recalled that a transfer to more suitable functions is one of the remedial measures that may be taken under sec. 10.1 of ST/AI/2010/5. An appointment may not be renewed or may be terminated for unsatisfactory service, if the performance shortcoming is not rectified following the remedial actions indicated in sec. 10.1 (see section 10.3 of ST/AI/2010/5), including a transfer to a more suitable function. However, ultimately, the Applicant was not accorded such an opportunity, for reasons that are not consistent nor entirely clear.

Conclusion

79. Having considered the evidence, including the testimony of the Applicant and his FRO and SRO, as well as the other witnesses, the Tribunal finds that the Administration failed to comply with the provisions of ST/AI/2010/5. The management and assessment of the Applicant's performance was procedurally flawed. He was not given a fair opportunity to demonstrate his suitability for the position for which he was recruited, including through setting clear expectations through promptly agreed and approved workplans; providing documented feedback at the true midpoint of the performance cycles; remedial actions to formally identify, in a timely and specific manner, his areas of weakness; and providing a documented process for him to improve in those areas, with the benefit of appropriate support and guidance.

80. Indeed, even the Respondent's witnesses accepted the contention that the rationale behind the NCRE program was to recruit young staff from diverse countries and backgrounds to guide and mentor them towards the opportunity of a UN career. In other words, this category of staff members requires more counselling, mentoring and guidance than full-fledged staff members as recognized by the rebuttal panel member who testified. To this extent, the Tribunal notes that staff rule 9.6(e)(ii) on termination due to abolishment of posts states that staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment, are given preference for retention after continuing appointment staff members. This illustrates that these probationary positions are of such importance for the inclusivity and participation of all nations, with regard to the principle of equitable geographical distribution, that they have to be protected and given priority of retention even on abolishment of post.

81. Even if the Tribunal were to accept the evidence of the FRO and SRO that the Applicant himself contributed to the delays in implementing the performance management and development system, as stated in *Simmons* 2012-UNAT-221, it is the Administration that is ultimately responsible for the implementation of this process. Supervisors may proceed with the evaluation process outside of Inspira where a staff member does not take the required action (sec. 4.2 of ST/AI/2010/5).

82. In the present case, the Applicant was a newly recruited staff member in a junior position, struggling to find his way in the Organization. It was ultimately for his supervisors to ensure that they managed his performance in a fair, timely, and well-documented manner. The Tribunal considers that they did not do so, and that this significantly affected the Applicant's ability to demonstrate his suitability and qualifications as a junior professional for the position, including through addressing performance shortcomings and weaknesses.

83. The Tribunal's role is to assess whether the Administration complied with ST/AI/2010/5 and, if not, whether this renders unlawful the decision not to renew his appointment. The Tribunal finds that management of the Applicant's performance was procedurally flawed. The decision to separate the Applicant from service was based on a finding that his service only partially met expectations, and therefore he had not proven himself within the two-year probationary period. The decision to separate the Applicant from service was therefore based on an assessment that was procedurally flawed, and the decision was thus unlawful.

84. The Tribunal has considered the case of *Dzintars* 2011-UNAT-176, which the Respondent stated in his closing submission is "directly on point". In *Dzintars*, the Appeals Tribunal stated:

30. ... There is no provision for an automatic non-renewal even if a staff member receives two consecutive ratings of “[p]artially meets performance expectations”. ST/AI/2002/3 [subsequently replaced by ST/AI/2010/5] is quite clear in that respect.

31. However, this will make no difference to the outcome of this appeal because a staff member who has received two consecutive ratings of “[p]artially meets performance expectations” has no legitimate expectation of renewal of contract at the end of the contract period. If at all, his only grievance can be the denial of due process. The non-renewal in his case was based on the 2006-2007 [e-PAS] rating that was subsequently upgraded. Therefore, the decision of non-renewal ought to have been taken on the basis of the upgraded [e-PAS] rating. The relief that Mr. Dzintars is entitled to is compensation for moral damages caused by the denial of his due process rights ...

85. In the case of *Dzintars* the Appeals Tribunal found that the only grievance the applicant in that case could have was the denial of due process as his non-renewal was based on a performance rating whereby the Administration failed to consider its subsequent upgrading. In that case the applicant’s midpoint reviews were timely, a nine-point improvement plan was put in place in the first year, and in the second year he was again placed on an improvement plan in five areas of responsibility. The Tribunal considers that the facts in the present case are clearly distinguishable from those in *Dzintars* in that the present case involved significant and repeated delays in the implementation of the various stages of the performance management system, as well as unrealistic expectations imposed on the Applicant in his first year of service, with little room for improvement due to the untimeliness and lack of guidance. The Tribunal has already found that the Applicant did not have a legitimate expectation of renewal of his appointment. Rather, the Tribunal finds that the management of his performance, particularly in his first year at the Organization, was so procedurally flawed and fraught with

irregularities that it tainted and rendered the decision not to renew his fixed-term appointment unlawful.

Was the decision to separate the Applicant from service improperly motivated or tainted by bias or discrimination?

86. The Applicant submitted in his application that the contested decision was “improperly motivated”, that the performance management process was tainted by bias and discriminatory treatment, and that there was “a pattern of behaviour aimed at marginalizing and harassing [the Applicant]”. However, his submissions before the Tribunal have not addressed the claim of improper motivation, bias and discrimination in any detail. In his testimony before the Tribunal the Applicant alleged that, following the rebuttal panel’s findings in the First Rebuttal Report, he detected a certain change in the attitude of his reporting officers. The Applicant also alleged in his submissions, as well as in his complaint of harassment, discriminatory treatment and abuse of authority dated 20 October 2014, that his supervisors exhibited cultural insensitivities, which both rebuttal panels also found examples of.

87. In his testimony before the Tribunal, the Applicant’s SRO took objection to the findings of cultural insensitivity by the two rebuttal panels, stating that the panels accepted the hearsay evidence of the Applicant without interviewing anybody else and there was no clear burden of proof. He considered there had been a breach of ethics in the panels making such findings. The Tribunal notes that the rebuttal reports did not make any allegations or findings of misconduct but simply stated that the FRO and SRO had “an apparently limited appreciation ... of cultural explanations for the problems between them and the Applicant”. Indeed, the SRO noted that the Applicant’s verbal and communication skills were much improved when he was mostly relaxed and comfortable. Given their concerns about his

communication skills, it is surprising that he was asked to give an opening presentation at an International Youth Day event and then criticized by his FRO for his presentation. On the other hand, the rebuttal panel (a member of which was apparently present at the event and came up to congratulate the Applicant) found that he delivered a brief but appropriate and interesting statement.

88. Furthermore, the Tribunal formed the impression from the evidence that there appeared to be some suspicion from the outset that the Applicant was not the person initially interviewed. The SRO stated in his oral testimony that he was “shocked” during this first interaction that the Applicant’s oral communication skills were completely at odds with what his colleagues who had conducted a phone interview with the Applicant had described. When the Tribunal enquired of the SRO regarding the Applicant’s alleged inability to perform despite his having three master’s degrees, the witness stated that the Applicant had apparently obtained one of these whilst working a full-time job “at the other end of the planet”. Within the UN with its cultural diversity, feelings of insecurity, discomfort, hurt and loss of confidence can easily arise from daily interactions, misunderstandings and matters that are sometimes lost in translation, cultural differences and nuance, and which often times are unintended.

89. The burden of proving improper motives, such as abuse of authority, discrimination, retaliation or harassment rests with the person making the allegation (*Nwuke* 2015-UNAT-506, para. 49). The Tribunal finds no direct evidence in the written documentation or oral testimony that the contested decision was improperly motivated or that there was a pattern of behaviour aimed at deliberately marginalizing and harassing the Applicant. However, the Tribunal finds, like the rebuttal panels, that there may have been

difficulties experienced in the communication between the parties, which could have affected the Applicant's confidence and application to tasks.

Relief

90. The Applicant requests rescission of the contested decision, reinstatement, and full compensation for three years' pay pursuant to his expectation for completion of "the five year programme". He also requests that his performance reports be declared null and that he be given consideration for a continuing appointment. Finally, the Applicant requests that he be awarded one year's net base pay in compensation for moral damages.

91. Article 10.5 of the Tribunal's Statute provides:

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

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

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

Rescission and reinstatement

92. The remedy of rescission of an administrative decision generally entails the undoing of the decision. The Tribunal has found that the Organization failed to comply with the requirements of ST/AI/2010/5 and that the decision

to separate him from service based on his performance evaluations was therefore flawed.

93. By its nature, a probationary period is one of trial in which it is determined whether a person is capable of carrying out the duties of a post. However, where expectations are both unreasonable and poorly communicated, a staff member's ability to demonstrate their suitability is inevitably affected.

94. Although the Tribunal has found that the Applicant was not provided with a fair opportunity to demonstrate that his fixed-term appointment should be renewed or converted, the Tribunal is also mindful of the inherent practical difficulties of ordering that the Applicant be reinstated to a position with the Organization in the particular circumstances of this case. The Tribunal notes that the employment relationship may have irreconcilably broken down.

95. The Tribunal considers it appropriate to order the rescission of the decision to separate the Applicant from service, as it was procedurally flawed. In accordance with art. 10.5(a) of the Statute, the Tribunal will set an amount of compensation that the Respondent may elect to pay as an alternative to rescission of the decision. The Tribunal sets this amount at twelve months' net base salary.

Performance reports

96. The Applicant availed himself of the rebuttal process in respect to his rating for the 2012–2013 and 2013–2014 performance cycles resulting in two very detailed reports from a duly constituted rebuttal panel. In both instances, his initial rating was upgraded from “does not meet performance expectations” to “partially meets performance expectations”.

97. The rebuttal reports included detailed comments on both the process followed to assess the Applicant's performance, and the conclusions reached by his supervisors, including assessments of his work on specific assignments. Mr. Theunissen, the chairperson of both rebuttal panels, noted in his witness statement that: "Interviews for both rebuttal processes took many weeks and were supported by extensive documentation from both parties". In his oral testimony, he stated that the panel reviewed many emails, "hundreds", as well as the work that the Applicant had completed.

98. In accordance with sec. 15.5 of ST/AI/2010/5 the performance rating resulting from a rebuttal process is binding on both the head of the department and the staff member concerned, subject to the ultimate authority of the Secretary-General. The report of the rebuttal panel is to be placed on the staff member's official status file as an attachment to the completed performance document (sec. 15.4).

99. Given that the rebuttal reports form part of the official record of the Applicant's performance, and are to be placed on his official status file, the Tribunal finds no reason to order that his performance appraisals for 2012–2013 and 2013–2014 be declared null. This request is rejected. However, the Tribunal orders that a copy of this Judgment be placed on the Applicant's official status file.

Compensation

Pecuniary damages

100. The Tribunal has found that the Applicant had no legitimate expectation of renewal of his fixed-term appointment as there was no evidence that the Administration made a firm commitment or express promise in writing

in this regard. There is therefore no basis for awarding the Applicant three years' net base pay in pecuniary damages.

Non-pecuniary damages

101. In *Asariotis* 2013-UNAT-309, the Appeals Tribunal stated:

36. 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.

102. As stated by in art. 10.5(b) of the Statute, the Tribunal may only award compensation for harm that is supported by evidence (see also *Ademagic* et al. 2016-UNAT-684, para. 63).

103. At the hearing on the merits, the Applicant gave oral testimony regarding the effect of the contested decision, and the alleged harm caused.

He stated that he felt “humiliated and broken”. His dignity, pride and self-esteem had been affected. He had difficulty accepting the decision and convincing himself and his family that he was not suitable for service with the Organization. He also stated that he had difficulty preparing himself mentally for work again, and suffered a loss of confidence. His family life suffered. He stated that he had turned down offers in order to join the Organization and that when separated from service he had to begin again. His reputation was tarnished.

104. He stated that, as a young professional, he was supposed, by law, to receive support and guidance, which was never provided. He referred to the report of the first rebuttal panel in this regard. He stated that he was recruited through a fair and rigorous process and lost his employment only because of the personal preference of his supervisors. He stated that the performance evaluations were the basis for his separation from service, but these evaluations were unjustified.

105. The Applicant submitted further written evidence regarding medical consultations for stress and anxiety in June and November 2014. As stated earlier in the Judgment, the material portions of the documents provided are legible and indicate that the Applicant was treated for the above conditions at the stated times. Having considered the evidence on record, including the testimony of the Applicant, the medical reports he submitted, and the other documentary evidence regarding the evaluation of his performance during his time with the Organization, the Tribunal is satisfied that the Applicant suffered some harm. The Tribunal has found that the Organization failed to comply with the requirements of ST/AI/2010/5, such that the process of the management and appraisal of the Applicant’s performance, being fraught with delays and irregularities, tainted the decisions flowing from such a flawed process. The Applicant was not given a fair chance. The decision to separate him from service based on a performance evaluation process that was deeply

flawed, resulted in a stress, anxiety, and loss of confidence for a newly recruited, junior staff member.

106. In all the circumstances, and based on the evidence, the Tribunal considers that the Applicant is entitled to receive compensation for non-pecuniary damages in the amount of USD5,000.

Conclusion

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

- a. The application succeeds in part.
- b. The decision to separate the Applicant from service is rescinded. As an alternative to the rescission of the decision the Respondent may elect to pay the Applicant twelve months' net base pay.
- c. The Respondent is ordered to pay to the Applicant USD5,000 as compensation for non-pecuniary damages.
- d. The aforementioned compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of 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.

(Signed)

Judge Ebrahim-Carstens

Dated this 28th day of September 2016

Entered in the Register on this 28th day of September 2016

(Signed)

Hafida Lahiouel, Registrar, New York