UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/001
Judgment No.: UNDT/2018/043
Date: 22 March 2018
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

CARUSO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Daniel Trup, OSLA

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Notice: This Judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. On 9 January 2017, the Applicant, a Director of the Middle East and West Asia Division ("MEWAD") at the D-2 level with the Department of Political Affairs ("DPA") contests the decision not to renew her fixed-term appointment. As relief, the Applicant seeks that the impugned decision be rescinded or, in the alternative, that she receive compensation of 24 months of net-based salary.

2. On the same date (9 January 2017), the Registry acknowledged receipt of the application and transmitted it to the Respondent, instructing him to file a reply by 8 February 2017.

3. On 8 February 2017, the Respondent filed his reply in which he contends that the application is without merit as the decision not to renew the Applicant's appointment was lawful and fully complied with the provisions of ST/AI/2010/5 (Performance Management and Development System).

Procedural history

4. The present case was reassigned to Judge Alexander W. Hunter, Jr. on 8 January 2018.

5. On 19 January 2018, by Order No. 9 (NY/2018), the Dispute Tribunal ordered the parties to file, *inter alia*, a consolidated list of agreed upon facts, agreed legal issues, identify documents the parties seek disclosure of and asked them whether the case could be determined on the papers or if a hearing should be held. In case that a hearing was requested, the Tribunal ordered the parties to identify the reasons why, to produce a bundle of relevant documents and to provide a list of witnesses, their proposed testimony and proposed dates for the hearing.

6. The parties filed a joint submission on 26 January 2018 (incorrectly dated 26 January 2017) in response to Order No. 9 (NY/2018) in which they set out the

agreed facts. The Applicant contended that a hearing on the merits should be held, while the Respondent submitted that the case could be decided on the papers before the Tribunal. If a hearing were to be held, the parties proposed 13 February 2018 as the hearing date, also providing a list of proposed witnesses with brief statements as to their testimony.

7. On 31 January 2018, the Applicant filed a submission titled "Leave to Adduce Additional Submissions" and attached to the file some typed notes of the Applicant that had previously been submitted in a hand-written form appended to the joint submission of 26 January 2018.

8. On 2 February 2018, the Applicant filed a request seeking to withdraw a proposed witness to be replaced by another witness.

9. On 5 February 2018, the Dispute Tribunal, by Order No. 28 (NY/2018), instructed the parties to file a joint submission to select an alternative proposed date for the hearing on the merits and asked the Applicant to file additional information regarding the proposed witnesses.

10. On 7 February 2018, the Respondent filed a request for leave to submit additional written evidence, appending the relevant documents.

11. On 7 February 2018, in response to Order No. 28 (NY/2018), the parties proposed that a hearing, if required, be scheduled for the afternoon of 13 February 2018 and 14 February 2018. The Respondent reiterated that a hearing was not necessary and that the case could be decided on the papers before the Tribunal.

12. On 8 February 2018 (incorrectly dated 12 February 2018), the Applicant responded to Order No. 28 (NY/2018) and provided the additional background information.

13. On 8 February 2018, the Dispute Tribunal issued Order No. 32 (NY/2018) instructing the parties that the case would be determined on the papers before it as the witness testimony proposed by the Applicant was not relevant.

14. On 8 February 2018, the Applicant filed a motion for reconsideration of Order No. 32 (NY/2018), requesting the Dispute Tribunal to grant the Applicant's request for a hearing by providing additional and new information.

15. On 9 February 2018, in response to the Applicant's motion for reconsideration, the Dispute Tribunal issued Order No. 34 (NY/2018) and, based on the information provided in the Applicant's motion, ordered that a hearing be held on 13 and 14 February 2018 in the Dispute Tribunal's courtroom in New York.

16. On 13 and 14 February 2018, the hearing on the merits took place in New York at which time the Applicant, her First Reporting Officer ("FRO"), Mr. MJ (name redacted), and her Second Reporting Officer ("SRO"), Mr. JF (name redacted) provided their testimony. At the end of the hearing, the parties gave their closing statements.

Factual background

17. The facts, as agreed to by the parties in their joint submission dated 26 January 2018, are as follows:

> … The Applicant served as the Director of the MEWAD in the DPA, at the D-2 level for the period going from September 2012 to January 2017 on fixed-term appointments ranging from two years, to one year or less.
>
> … MEWAD is responsible for some of the most important fluid and complex political situation under the purview of DPA. There are frequent sensitive and highly urgent demands made of the Division from the Secretary-General, the Deputy Secretary-General and other senior officials, such as for briefing, advice, media talking points, senior official and notetaker representation at meetings. Issues under the Division's responsibility are frequently before the Security

Council, requiring the Division to prepare briefing materials at short notice and sometimes under intense media scrutiny.

… MEWAD has over thirty (30) New York based staff members, and it manages the backstopping [the Tribunal takes judicial notice that MEWAD serves as a support, reinforcement for the two Special Political Missions in Iraq and Afghanistan] for two of large and complex Special Political Missions ["SPMs"] in the United Nations Mission for Iraq ("UNAMI"), the United Nations Assistance Mission in Afghanistan ("UNAMA"), as well as the Office of the United Nations Special Coordinator for the Middle East Peace Process ("UNSCO"), the Office of the United Nations Special Coordinator for Lebanon ("UNSCOL"), Special Envoys for Yemen and Syria, and the planning processes on Syria and Yemen.

… Prior to the Applicant's entry into the United Nations she was the founder and Director of the "Track II" project Ipalmo [the Tribunal takes judicial notice that Ipalmo is an Italian institute, "Istituto tra l'Italia e Paesi dell'Africa, America Latina e Medio Oriente"]/United States Institute of Peace dialogue on National Reconciliation in Iraq.

… In September 2014, the Applicant's fixed-term appointment was extended until September 2015.

… On 17 November 2014, the Applicant's supervisors completed the end-of-cycle appraisal for the 2013-2014 period. The Applicant's supervisors rated her performance as "partially meets performance expectations", identifying performance shortcomings in managerial competencies. The Applicant did not rebut this rating.

… In December 2014, the Applicant was introduced to a management coach arranged and funded by DPA. The coach was referred by the Office of Human Resources Management ("OHRM"). The Applicant attended meetings with this management coach.

… At the beginning of 2015, DPA also arranged for mentoring from an Under-Secretary-General-level staff member outside of DPA. The Applicant met with this mentor on four (4) occasions. Due to the confidential nature of the arrangement, the Respondent is not able to confirm the actual number or substance of the meetings.

… On 9 July 2015, the Applicant's supervisors rated the Applicant's performance for the 2014-2015 period as "successfully meets performance expectations." The Applicant's supervisors noted however that the Applicant faced continued challenges in the managerial competency of leadership.

… In August 2015, DPA renewed the Applicant's appointment until 2 September 2016.

… On 17 May 2016, the Applicant was provided with her performance review for the period 2015-2016. The document was completed by the ["FRO"] and the ["SRO"], the Under-Secretary-General ("USG") for Political Affairs in DPA. The Applicant's supervisors rated her performance as "partially meets performance expectations." The Applicant's supervisors identified continued performance shortcomings in the area of the managerial competencies.

… On 7 March 2016, the Applicant and the FRO had a Mid-Point Review meeting during which the FRO suggested to establish a Performance Improvement Plan ["PIP"]. The FRO subsequently issued a document entitled "Note to [Mr. JF]: Performance review discussion with D/MEWAD [the Applicant]" on 18 March 2016. A hard copy of the document was sent to the Applicant and signed by her on 18 March 2016 with a comment from her reading as "[r]eceived it, 18 March 2016."

… On 18 May 2016, the Applicant's FRO presented the Applicant with a hard copy of a first draft of the time-bound PIP. An electronic copy was provided to the Applicant the day before (17 May 2016) by email.

… On 23 May 2016, the Applicant rebutted the "partially meets performance expectations" rating. DPA provided a response to the Applicant's submission within the specified fourteen (14) days. This was shared with the Applicant on 27 July 2016.

… On 2 June 2016, the Applicant met with her FRO and SRO to discuss the draft content of the PIP. The Applicant provided her comments on the PIP, and requested that the PIP's length be extended from a three-month to a six-month period. The FRO and SRO agreed to this request and the PIP's duration was thus from 2 June 2016 to 30 November 2016.

… The PIP defined tasks that required action by the Applicant. During the period of the PIP, the Applicant continued to perform her functions.

… The FRO arranged for the provision of a management consultant to assist the Applicant in facilitating the first activity listed in the PIP, namely the MEWAD retreat.

… The office of the FRO provided the Applicant with the details of the management consultant and also obtained proposed dates from her for the retreat, which were provided to the Applicant on 7 June 2016. The office provided the Applicant with proposed dates for the retreat and offered further support. The Applicant indicated on 14 July 2016 to the FRO's office that she was in touch with the consultant and did not require further support.

… The Applicant was on mission from 7 June 2016 to 20 June 2016 for meetings in Paris, a conference in Brussels and meetings in Beirut and, thereafter, she was on sick leave. She returned to the office on 11 July 2016.

… On 22 July 2016, the Applicant met with her FRO.

… The Applicant was on mission from 27 July to 29 July 2016. The Applicant went on annual leave from 4 August to 26 August 2016, returning to the office on 29 August 2016.

… The Applicant's appointment was due to expire on 2 September 2016. It, however, was extended until 30 November 2016 to permit the completion of the PIP.

… On or about 28 or 29 September 2016, the Applicant met with her FRO to discuss the progress of her PIP.

… On 3 October 2016, the FRO's office contacted the Applicant to schedule the next discussion on the PIP, proposed to take place on 6 October 2016.

… On 6 October 2016, a MEWAD retreat was conducted by an external facilitator (the management consultant). This was the first item in the agreed PIP.

… The FRO attended the MEWAD retreat on 6 October 2016 and met with the Applicant, Deputy Director and MEWAD team leaders on 1 November 2016 as a follow-up to the retreat.

… The Applicant was on mission from 7 October to 14 October 2016 and returned to the office on 17 October 2016.

… On 10 October 2016, the rebuttal panel issued its report regarding the rebutted/contested 2015-2016 electronic performance appraisal system ["e-PAS"] report. The rebuttal panel upheld the performance rating, and found "evidence of shortcomings in the staff member's managerial performance, contributing to failure to fully achieve some of the goals in her work plan."

… On 28 October 2016, the Applicant requested authorization to attend meetings in Cairo and Jeddah for the period 28 November 2016 to 8 December 2016 as part of her responsibilities in MEWAD. The request was sent to the Applicant's FRO and SRO who declined authorization for these trips on the basis that they coincided with the end of the Applicant's PIP.

… On 3 November 2016, the Applicant met with her FRO to discuss her mid-point review and the successes of MEWAD.

… On 10 November 2016, the Applicant received an email from the FRO which summarized the discussion of 3 November 2016 in relation to the mid-point review performance and PIP. The document highlighted areas where improvement had been achieved, and areas which still required attention.

… On 14 November 2016, the Applicant met with her FRO and continued their discussion on the PIP.

… The PIP ended on 30 November 2016.

… The Applicant's appointment was extended until 31 December 2016.

… On 1 December 2016, the Applicant received an email from her FRO with the subject "Mid-Point Review, PIP" containing the information that the FRO had entered into the mid-term review of her performance document in Inspira [a United Nations online performance system], including the conclusion that the Applicant had not "demonstrated performance at the level of a D-2 in the area of managerial competencies, such as the provision of strategic guidance." She also received notification in this email that she would be separated from the United Nations.

… On the same day (1 December 2016), the SRO and FRO held a meeting with the Applicant in which they discussed the overall evaluation of the PIP. The SRO informed the Applicant that based on the performance rating of the 2015-2016 performance cycle which was confirmed by the rebuttal panel and the PIP that had been put in place, he had decided not to renew the Applicant's appointment beyond 31 December 2016. A record of the conversation and the PIP with the conclusions of the FRO and SRO was shared with the Applicant on 7 December 2016.

… On 6 December 2016, the Applicant submitted a management evaluation request to the Management Evaluation Unit ["MEU"] challenging the decision regarding the non-renewal of her appointment.

…. On 7 December 2016, after the Applicant had submitted the management evaluation request, she received a copy of the PIP and minutes from the meeting dated 1 December 2016 with the FRO and SRO.

… After the Applicant filed an application for [m]anagement [e]valuation, on 8 December 2016, the Applicant was informed that her contract would be extended until 7 January 2017 to allow for the completion of the MEU's response.

> … On 6 January 2017, the MEU upheld the contested decision of the Administration not to renew the Applicant's appointment and stated as follows:
>
> > The MEU considered that [the Applicant's] contentions regarding inconsistencies and contradictions in this case related to substantive issues of [the Applicant's] performance, [for] which […] the MEU found no legal basis to substitute its opinion for that of [the Applicant's] managers.

18. Following the MEU's decision of 6 January 2017, the Applicant was separated from the Organization on 7 January 2017.

Consideration

Scope of the case

19. Under the Appeals Tribunal decision in *Chaaban* 2016-UNAT-611, the Tribunal is to define the issues of the case based on the parties' submissions. The basic question of the present case is whether it was lawful for the Administration not to renew the Applicant's fixed-term contract based on poor performance. Based on the parties' submissions, the Tribunal has identified the following issues to be determined:

a. Was the institution of a PIP justified and what was its purpose, and was it established in a fair manner and without bias?

b. Was the PIP implemented in a reasonable and equitable manner in accordance with applicable law/rules?

c. Was the decision to separate the Applicant from service lawful?

The limited judicial review

20. According to the consistent jurisprudence of the Appeals Tribunal, the judicial review of a non-renewal decision is limited. For instance, in *He* 2016-UNAT-686, the Appeals Tribunal found in para. 39 that:

> … Our jurisprudence holds that a fixed-term appointment has no expectation of renewal. Nevertheless, an administrative decision not to renew a fixed-term appointment can be challenged as being unreasonable on the grounds that the Administration has not acted fairly, justly or transparently, or was motivated by bias, prejudice or improper motive against the staff member. The staff member carries the overall burden of proof to show that such factors played a role in the administrative decision [*Said* 2015-UNAT-500, para. 34, citing *Asaad* 2010-UNAT-021, para. 10]. Such a challenge invariably will give rise to difficult factual disputes. The mental state of the decision-maker usually will be placed in issue and will have to be proved on the basis of circumstantial evidence and inference drawn from that evidence.

21. Further, in *Islam* 2011-UNAT-112 (paras. 29-32), the Appeals Tribunal noted that when a justification is given by the Administration for the exercise of its discretion, it must be supported by the facts.

Applicable law

22. ST/AI/2010/5, sec. 10, on identifying and addressing performance shortcomings and unsatisfactory performance states that:

> 10.1 During the performance cycle, the first reporting officer should continually evaluate performance. When a performance shortcoming is identified during the performance cycle, the first reporting officer [("FRO"), in consultation with the second reporting officer [("SRO")], should proactively assist the staff member to remedy the shortcoming(s). Remedial measures may include counselling, transfer to more suitable functions, additional training and/or the institution of a time-bound performance improvement plan [("PIP")], which should include clear targets for improvement, provision for coaching and supervision by the [FRO] in conjunction with performance discussions, which should be held on a regular basis.

> 10.2 If the performance shortcoming was not rectified following the remedial actions indicated in section 10.1 above, and, where at the end of the performance cycle performance is appraised overall as "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]. The [PIP] may cover up to a six-month period.
>
> 10.3 If the performance shortcoming was not rectified following the remedial actions indicated in section 10.1, a number of administrative actions may ensue, including the withholding of a within-grade salary increment pursuant to section 16.4, the non-renewal of an appointment or the termination of an appointment for unsatisfactory service in accordance with staff regulation 9.3.
>
> 10.4 Where at the end of the performance cycle performance is appraised overall as "does not meet performance expectations", the appointment may be terminated as long as the remedial actions indicated in section 10.1 above included a [PIP], which was initiated not less than three months before the end of the performance cycle.
>
> 10.5 Should unsatisfactory performance be the basis for a decision for a non-renewal of a fixed-term appointment and should the appointment expire before the end of the period covering a performance improvement plan, the appointment should be renewed for the duration necessary for the completion of the [PIP].

23. The Guideline on "Addressing and Resolving Underperformance – A Guide for Managers" ("the Guideline") dated April 2011 provides on p. 10-11 as follows:

> Formal ways to improve performance shortcomings
>
> When a performance shortcoming is identified managers should proactively assist the staff member to remedy the shortcoming(s). Depending on the nature of the job and the staff member's experience, it may be appropriate to offer assistance in a variety of ways. In the previous section, we discussed the option of counselling. Sometimes, additional assurance is required, such as additional training. If such methods do not work, a time-bound performance improvement plan may need to be considered. A [PIP] should include clear targets for improvement, provision for coaching and supervision by the [FRO] in conjunction with regular performance discussions.
>
> The performance improvement plan
>
> The development of a [PIP], on which the staff member and [SRO] should be consulted, provides a formal opportunity for the staff

> member to improve his or her performance. The duration of the performance improvement plan may vary depending on the nature of the performance issue. [PIPs] may cover up to a period of six months (see Section 10.2 of ST/AI/2010/5).
>
> A structured and agreed [PIP] provides a mechanism that allows the staff member an opportunity to clearly demonstrate improved performance.
>
> The staff member's performance should be monitored and documented regularly within this period. This period is designed to give the staff member an opportunity to bring his or her performance up to an acceptable level. It is also the manager's opportunity to clearly express his or her expectations and the consequences of not meeting those expectations. If the staff member fails to improve to an acceptable level by the end of the [PIP], further action may be warranted.
>
> If a staff member fails to perform satisfactorily by the end of the [PIP] or improves but then fails again within the given period, the manager has the option to recommend […] non-renewal of the staff member's appointment […] for unsatisfactory performance.
>
> Steps for providing a formal opportunity to improve are:
>
> Staff member's performance is determined to be marginal or inadequate.
>
> Inform the staff member of performance shortcomings, what is needed to bring performance up to an acceptable level, what assistance will be provided, and the consequences of failing to improve during the [PIP]. A [PIP] is developed and agreed upon by both the staff member and the supervisor.
>
> The staff member must bring performance up to an acceptable level. The duration of a [PIP] may vary and can be up to six months, depending on the performance issue. Be sure to document the staff member's progress and to provide any appropriate assistance.
>
> Consider the evidence of performance and compare with goals and expectations outlined in the performance improvement plan.
>
> …

The Tribunal's rulings on evidence

24. The Tribunal admitted as evidence all the documents that were submitted before it by both parties prior to the hearing, as well as evidence produced during the witness examinations and cross-examinations, and noted that it would weight each

piece of evidence provided and would determine the legal value attached to it, if any. The Tribunal considers that all the facts should be taken in consideration to determine whether the decision not to renew the Applicant's contract was taken solely based on the results of the PIP implementation or on all the evidence and facts submitted before it. The Tribunal takes note that the documents submitted contained evidence related to events/accounts starting from September 2012 to January 2017, which included three e-PAS reports and evidence related to them (including the rebuttal and the rebuttal panel's decision to uphold the grade of "partially meets expectations"), the PIP and evidence related to its establishment and implementation, as well as evidence related to the Administration's decision to separate the Applicant on the ground of poor performance.

Was the institution of a PIP justified and what was its purpose, and was it established in a fair manner and without bias?

Was it predetermined before the initiation of the PIP that the Applicant's fixed-term contract would not be renewed?

25. It follows from the Guideline that "[a] structured and agreed [PIP] provides a mechanism that allows the staff member an opportunity to clearly demonstrate improved performance" and that the PIP period "is designed to give the staff member an opportunity to bring his or her performance up to an acceptable level." If the outcome of the PIP was predetermined even before its institution, for instance the non-renewal of the staff member's fixed-term appointment, this would render the entire process futile and therefore improper.

26. The Applicant contends that the FRO told her during a meeting held with him on 7 March 2016 that her SRO did not want to renew her contract (due to expire on 2 September 2016) and that they wanted to institute a three months PIP following which they would separate her. The Respondent contends instead that the FRO informed the Applicant during that meeting that due to the grading of "partially meets

expectations" for her e-PAS report for the 2015-2016 cycle, a PIP would be put in place for three months.

27. The Tribunal notes that, on 26 January 2018, the parties jointly submitted a document titled "Note to [Mr. JF] – Performance review discussion with D/MEWAD [the Applicant]" relating what happened at the 7 March 2016 meeting, and that the Applicant signed this document with the handwritten mention "received it, 18 March 2016" and did not add any written comments on it. The Tribunal further notes that the document focuses on a performance discussion undertaken between the Applicant and the FRO, that it refers to the establishment of a three-month PIP, and that it indicates that the PIP would be created in close consultation with the Applicant, the SRO and the FRO. However, the document does not mention that the FRO allegedly told the Applicant that her contract would not be renewed following the PIP implementation, and the Applicant provided no comment on the 18 March 2016 note, nor did she send any email or provide any evidence to corroborate her allegation.

28. The Tribunal observes that the Applicant submitted some of her hand-written notes attached to the 26 January 2018 joint submission which she subsequently typed and submitted on 31 January 2018. One of these notes, dated 1 December 2016, contains information related to a meeting conducted between the Applicant and the FRO on that date and at which the Applicant referenced to another meeting held on 7 March 2016: "[…] [the Applicant] referred to the conversation [she] had with [the FRO] in March [2016] in which he clearly told [her] that [the SRO] did not want to renew [her] contract and that after [a] three months PIP [she] would be out of the [United Nations] home. When [the Applicant] went back to see him […], he stated that [she] should go and find a new job". The Tribunal further observes that this hand-written note, although dated 1 December 2016, was not attached to any email and there is thus no date proving when this note was actually written. In light of the above-mentioned facts, the Tribunal considers that this note does not carry any evidentiary value.

29. Moreover, the Tribunal notes that at the hearing, the Applicant stated that during the 7 March 2016 meeting, her FRO had informed her that the SRO had decided not to renew her contract, to put her on a three months PIP. She also mentioned that the FRO had asked her if she would accept a transfer, and that, after her refusal, he allegedly told her "[she]'d better start looking for a new job." The Tribunal notes that the Applicant was unable to provide evidence at the hearing to corroborate any of these claims, as she stated that she "[d]idn't have a chance to reply anything" when she received the note. The Tribunal is of the opinion that the Applicant could have objected to the content of the note and provided some comments to it or in an email or even orally, but she did not bring any such proof. In light of the above-mentioned evidence submitted before the Dispute Tribunal with regards what happened during the 7 March 2016 meeting, the Tribunal considers that the credibility of the Respondent's contention prevails over the Applicant's.

Was it proper to establish the PIP?

30. The parties agree that a PIP was established following a negative mid-term review performance discussion, but they disagree on the FRO's and SRO's motive and on the PIP's purpose.

31. The Applicant submits that "[…] the Administration's imposition of a PIP, a mandated provision prior to separating a staff member, should be viewed on this occasion as an act of 'form over substance'. Effectively, the creation on paper of the PIP was never intended to remedy any perceived shortcomings but rather a method to separate the Applicant from service."

32. The Respondent contends that the PIP was set up as a remedial action agreed between the Organization and the Applicant, following two negative e-PAS reports and one e-PAS report (for the 2014-2015 cycle) which contained a negative comment from the SRO on the Applicant's management and communication skills, and a negative comment from the FRO on her management skills.

33. During the hearing, the SRO stated that he was satisfied with the Applicant's performance except for her management skills which "[w]ere not strong enough." He insisted that he was new to the United Nations when he started his appointment in September 2012 and that he had hired the Applicant, who was also not internal to the system, during his first days of work. He pointed out that he had wanted her to succeed throughout her tenure, that his success depended on her success, and that was why he had put in place several measures to assist her, such as providing her with a private mentor at the USG level and a management coach arranged and paid for by the Organization. He added that he did not provide any such mentorship and/or management coaching to any other Director at the D-2 level in DPA; he also stated that the Applicant was the only Director for whom he had to speak to the heads of SPMs to verify information she had provided to him and the FRO and that managing her proved to be very labor intensive at his level. He also explained that, at the time he took the decision not to renew her appointment, he did not know if his own contract would be extended after 31 December 2016 with the arrival of the new Secretary-General, but that he did not want his successor "to have to deal with a dysfunctional MEWAD Division and with the hiring of a new Director."

34. As for the FRO, at the hearing, he stated that when he started in his Assistant Secretary-General ("ASG") position in May 2015, the previous ASG had informed him about the Applicant's management skills shortcomings and that she had been provided with a mentor, but that he wanted to assess the situation independently. He mentioned that he soon noted these shortcomings and subsequently had a conversation with the SRO in August 2015 where they decided to renew the Applicant's contract for only one year, until September 2016, to see if her performance would improve during that period. When the time for the mid-term performance discussion came in March 2016, after seeing a lack of performance improvement, the SRO and FRO decided to establish a three months PIP focusing on the areas for her to improve and to inform her accordingly. Further, the FRO testified that the exchanges he had had with the Applicant were clear in the sense that he told

her the PIP was being established in order for her to improve her performance during that period, and that the renewal of her contract would depend on whether she would show evidence that her skills had improved.

35. The Tribunal notes that, during the hearing, the FRO declared that several of the staff members under the Applicant's supervision, while wishing to remain anonymous, had complained to him, some of them crying, that they could not continue to work for her because she was allegedly shouting at them, and that "it was heard that [the Applicant] was shouting at people." The Tribunal further notes that the Applicant's e-PAS report of 2014-2015 rated "fully satisfactory" seems to support the FRO's statement regarding the way she addressed some of her subordinates as well as some consistency in behaving in such a way, as one of the SRO's comments in the end-of-cycle reads that "[the SRO] ha[d] encouraged [the Applicant] to relax if a decision was taken that [was] different [from] what she might have done had she been in the office: she [could] always speak quietly with the person who was Officer-in-Charge ("OIC") in her absence to understand the thinking behind the decision and explain what she would have expected to be done […]." The Tribunal observes that the Applicant did not respond to this comment in her final comments of her e-PAS report. In addition, the Tribunal observes that the SRO had already made a similar comment in the end-of-cycle of Applicant's e-PAS report for 2013-2014 by stating that "[the SRO] had spoken with [the Applicant] about [his] impressions that staff members fe[lt] intimidated by her presentations in division meetings and [we]re thus reluctant to present their own views; while not fully agreeing with [his] concern, [the Applicant] had told [him] that she [wa]s now asking staff members to share their perspectives in meetings." This last part of the SRO's comment however shows the Applicant's will to improve the way she addressed the staff working under her supervision, which is positive, and the Applicant did not comment on this remark.

36. ST/AI/2010/5, sec. 10.1, provides that, during the performance cycle, when the FRO identifies a staff member having shortcomings, he/she, in consultation with the SRO, should proactively assist the staff member to overcome them by resorting to

remedial measures. Given the evidence submitted before it, the Tribunal considers that the FRO and the SRO did put in place several measures to assist the Applicant to improve her functions, such as by appointing a mentor for her at the USG level from outside DPA as well as a management coach paid for by DPA for approximately eight months with whom she had thirteen (13) sessions in person and/or by phone.

37. ST/AI/2010/5, sec. 10.1, also provides for other remedial measures such as the institution of a PIP. The Guideline states that the purpose of instituting a PIP is to provide a mechanism that allows a staff member an opportunity to demonstrate improved performance. The Tribunal notes that although the Applicant contends that the PIP was instituted in bad faith and in order to separate her rather than to allow her to improve her performance, the Respondent claims that the FRO and SRO, after trying to assist her in improving her management and communication performance since 2013, decided to establish the PIP to give her a last opportunity to improve. The Tribunal also notes from the evidence adduced that the Applicant obtained two negative e-PAS reports (the second one was rebutted and upheld by the rebuttal panel on 10 October 2016), one satisfactory e-PAS report but containing negative comments on her performance and communication skills and, as noted above, that her FRO and SRO provided her with a mentor and a coach.

38. In light of the above, the Tribunal considers that the FRO and SRO initiated the PIP for the Applicant following negative performance evaluation reports and comments and after taking several steps to assist the Applicant in improving her performance. Therefore, the Tribunal considers that the PIP institution in the present case was justified and that its purpose was to enable the Applicant to improve her performance.

39. Further, the Tribunal finds that a staff member operating at the D-2 level must have been aware of the meaning and purpose of a PIP, namely that such document is put in place when supervisors find recurrent shortcomings in a staff member's performance, and that this document aims at providing an opportunity for the staff

member to focus on the areas where improvement is needed during the PIP implementation period. It is expected that the Applicant, given her high-ranking position within the United Nations system, and given that she was supervising dozens of other staff members within MEWAD, was aware that such a document can be initiated by supervisors during the performance cycle and that one of the unfortunate outcomes, according to ST/AI/2010/5 sec. 10.3, can be the non-renewal of the appointment if the staff member has not managed to demonstrate improvement.

Was the PIP established in a fair manner and without bias?

40. The Applicant stated orally and in writing that the institution of the PIP was ordered by the FRO and SRO, that she had opposed it and that she therefore did not sign it, and that it was not done seriously and/or in a fair and transparent manner. She also stated before the Tribunal that she had pointed out some inaccuracies in the PIP during its creation, such as the mention of the management coach who had already been assigned to her in 2015, which she had asked to be removed and which remained in the final PIP document. Further, during the FRO's cross-examination, Counsel for the Applicant questioned the integration of a comment in the PIP related to communication, where the PIP reads: "[The Applicant] communicates in a composed manner, clearly and concisely without a raised voice" and questioned whether the FRO would have introduced such a comment if the Applicant had been a man.

41. The Respondent, on the contrary, contends that the decision to undertake a PIP came as a consequence of negative e-PAS reports and comments obtained over three years and that the FRO and SRO informed her about the decision on time, during the mid-term performance review discussion, and that they elaborated on the targets of the PIP carefully, by discussing together, by consulting with OHRM, and by consulting the Applicant in writing and in person on 2 June 2016. The FRO stated that he and the SRO had invited the Applicant to comment on the draft PIP and that they had discussed the draft with her. He also stated that email exchanges between

the FRO and the Applicant to this effect had been submitted in evidence, notably one email from the FRO addressed to the Applicant and copied to the SRO dated 10 November 2016, to which the Applicant did not reply, where the FRO specifically referred to email exchanges confirming that she was consulted in detail on the draft PIP and also at a meeting on 18 May 2016 between the FRO and the Applicant and another meeting on 2 June 2016 between the SRO, the FRO and the Applicant. The FRO also stated that the Applicant provided some comments which they subsequently integrated. For instance, they approved her request to extend the PIP duration to six months and they did so in order to give her the maximum amount of time to implement the PIP and to enable her to take annual leave and undertake mission travel. The FRO also referred to another comment that the Applicant had asked them to remove, namely a reference related to the challenges she faced in her relationship with her Deputy Director (name redacted, Mr. DM). The FRO explained that this relationship was difficult when the Deputy first took up his functions but that since it had improved over time, they had agreed to remove it from the PIP.

42. The Tribunal notes that, under sec. 10.2 of ST/AI/2010/5, the FRO "shall" prepare the PIP in "consultation" with the staff member if "the performance shortcoming was not rectified following the remedial actions" that are enacted under sec. 10.1. As a matter of process, the FRO is therefore only to consult with the staff member regarding the PIP, which is therefore not subject of negotiation between the FRO and the staff member.

43. With regards the Applicant's claim that the establishment of the PIP had been forced on her, the Tribunal notes that she did not provide any evidence, for instance, in the form of an email or a comment on a document, showing any such disapproval. On the contrary, the evidence presented demonstrates that the Applicant not only did not oppose the establishment of the PIP but, instead, participated in its elaboration and provided comments to her supervisors to improve its content and make it fairer to her, as shown in email exchanges between the Applicant and the FRO copied to the SRO dated 2 June and 10 June 2016. Also, a note of the 2 June 2016 meeting that the

Respondent submitted makes a brief mention of the Applicant's disagreement to the establishment of the PIP, but the note also mentions that she agreed to observe the terms of the document. Therefore, the Tribunal considers that this note constitutes evidence that the PIP was not forced upon the Applicant. In addition, the Tribunal notes that the Applicant did not submit a request for management evaluation with the MEU to contest the decision to institute a PIP.

44. Further, as regards the fact that the Applicant refused to sign the PIP, the Tribunal notes that the FRO, in an email dated 1 December 2016 to the Applicant and titled "Mid-point review, PIP", mentioned that "[he] had explained [to the Applicant] that her signature was not necessary for the PIP […] [as] it was signed by the FRO and SRO to enter into force and had to be implemented." The Tribunal also notes that from the evidence adduced, the Applicant did not comment on this remark. Further, ST/AI/2010/5 sec. 10 and the Guideline do not make any reference to an obligation on the parties to sign the PIP document before its implementation. Therefore, the Tribunal rejects the Applicant's claim that the PIP should not have been implemented without her signature on it.

45. With regards to the allegation that the PIP was not established seriously and in a fair and transparent manner, the Tribunal notes that the evidence demonstrates the Administration's efforts to execute the PIP in accordance with the provisions contained in ST/AI/2010/5 and the Guideline. For instance, the FRO and SRO granted the Applicant's request to extend the PIP's duration for three additional months, and this was done in accordance with ST/AI/2010/5, sec. 10.2 and the Guideline, p. 10. Further, the FRO and the SRO discussed the PIP's content between themselves and with OHRM to ensure that they were respecting the applicable rules, with a discussion with the Applicant, as provided for in ST/AI/2010/5, sec. 10.2. In addition, ST/AI/2010/5, sec. 1 provides for remedial measures to be put in place when noticing shortcomings in a staff member's performance, and mentions that one of the measures can be a transfer to more suitable functions. The Tribunal notes that the Applicant and the FRO testified that the FRO had asked her if she would accept a

transfer to another D-2 level position based in New York to work as Senior Advisor on Minorities but that she refused. The Tribunal also notes that the parties jointly submitted email exchanges dated 22 July 2016 related to the proposal made to the Applicant about a new posting in the Secretariat. The Administration has thus acted in conformity with the law by suggesting a transfer for her. Moreover, ST/AI/2010/5, sec. 10.1, and the Guideline p. 10 provide that a PIP "should" include provision for coaching. The Tribunal observes that the PIP makes reference to such provision but, however, agrees with the Applicant's contention that the document in fact refers to the management coach who was provided to the Applicant from December 2014 to July 2015 and that thirteen (13) sessions took place between the coach and the Applicant and the FRO confirmed during the hearing that the management coach referred to in the PIP was the one previously used.

46. As for Counsel for the Applicant's allegation that the FRO would not have included in the PIP the comment related to the Applicant "[c]ommunicat[ing] in a composed manner, clearly and concisely without a raised voice" if she had been a man, the Tribunal notes that the FRO replied at the hearing that "[he] would have asked the same question to a man." As mentioned previously, the Tribunal noted in the Applicant's e-PAS reports of 2013-2014 and 2014-2015, comments that were made by the SRO in each document, where he referred to the way the Applicant was addressing some of the staff under her supervision and noted that the Applicant did not write any comment regarding these remarks in the final comments of her e-PAS reports. In addition, the Tribunal notes that the FRO stated during the hearing that some of the Applicants' subordinates had complained to him, some of them crying, saying that they could not continue to work for her because she was allegedly shouting at them, and he mentioned that "it was heard that [the Applicant] was shouting at people." In light of the above-mentioned evidence, the Tribunal is of the opinion that the comment included in the PIP is credible and reliable and does not constitute gender-bias, as the issue of the Applicant raising her voice to the staff under her supervision has appeared in writing in two of her e-PAS reports, and that

she has not commented on these remarks in either of the documents, which would strongly infer that she did not disagree with those comments. Further, the Tribunal observes that the Applicant did not refer to this alleged bias in her application and in the joint submission and that only her counsel mentioned it during the hearing.

47. In light of the above-mentioned evidence regarding issues related to the establishment of the PIP, the Tribunal considers that the Administration established the process in a serious, fair and transparent manner, as the FRO and SRO complied with the provisions set out in ST/AI/2010/5, sec. 10.1 and 10.2 such as: (a) discussing the PIP content between themselves, with OHRM and with the Applicant and including most of her comments; (b) extending the PIP implementation duration to the maximum time of six months; and (c) discussing the PIP content suggesting to the Applicant a transfer to another D-2 level position based in New York. The Tribunal observes that, while the Administration did not provide management coaching to the Applicant during the PIP, this is not an absolute requirement under ST/AI/2010/5, sec. 10.1, which specifically states that remedial measures "should include […] provision for coaching" and that the Administration had previously arranged and paid for management coaching for the Applicant.

Was the PIP implemented in a reasonable and equitable manner in accordance with applicable law/rules?

Did performance evaluation discussions/meetings take place during the PIP implementation?

48. ST/AI/2010/5, sec. 10.1, provides that the PIP may be instituted "in conjunction with performance discussions, which should be held on a regular basis". According to the Guideline, during the duration of the PIP, "[t]he staff member's performance should be monitored and documented regularly within this period."

49. The Applicant and the Respondent agree that five meetings took place between the Applicant and her FRO during the PIP implementation and shortly after

its implementation, namely on 22 July 2016, 28 or 29 September 2016, 3 November 2016, 14 November 2016 and 1 December 2016. The parties, however, disagree on the content of the four first meetings, specifically on whether they discussed the implementation of the PIP or not.

50. The Applicant claims that she has had discussions about the implementation of the PIP on three (3) occasions during the period of the PIP. In particular, she claims in her application that she had three (3) meetings with her FRO which focused on her PIP on 3 November 2016, 14 November 2016, and 1 December 2016. She also states that the substance of what was discussed during the 22 July 2016 and 29 September 2016 meetings "does not even merit the term review" since no discussions related to the PIP took place. The Applicant states, in the joint submission dated 26 January 2018, that the first time she discussed her PIP with the FRO was during the meeting they had on 28 or 29 September 2016; the second time was on 14 November 2016, and the third time was on 1 December 2016 in which she discussed with her FRO and SRO the overall evaluation of the PIP. She also claims that the meeting held on 22 July 2016 focused only on a proposal for a new post for her within the Secretariat and the one held on 3 November 2016 did not focus on the PIP but instead on her mid-point review and the successes of MEWAD.

51. The Respondent contends, however, that the Applicant and the FRO discussed the PIP implementation on five (5) occasions during the PIP period. He avers that the 22 July 2016 meeting focused on the PIP and the possibility of exploring a new post for the Applicant, and submitted on 7 February 2018 an exchange of emails between the Applicant and his assistant (name redacted, Ms. CH), where the latter, on 21 July 2016, informed the Applicant that "[t]he subject for the [22 July 2016] meeting is to quickly check in on the progress of the PIP and any support [the Applicant] might need". The Applicant replied to this email that "[she] believe[d] [she] [could] discuss this [the progress on the PIP] with [the FRO] only", which shows she did not oppose the subject planned for the discussion, namely the PIP. The Respondent also avers that the 28 or 29 September 2016 meeting focused on the PIP; the 3 November 2016

meeting related to the progress of the PIP; the 14 November 2016 meeting focused on continuing the PIP conversation and the last meeting on 1 December 2016 was to discuss the overall evaluation of the PIP.

52. The Tribunal notes that, in the present case, the duration of the PIP was established for six (6) months, from 2 June 2016 to 30 November 2016. The Tribunal considers that what would reasonably constitute regular meetings and would be fair to a staff member undergoing a PIP would be meetings, more or less, on a monthly basis. The Tribunal notes that the Applicant states that three (3) meetings focusing on the PIP took place and also notes inconsistencies in the Applicant's recalling of the dates and, thus, the content of these meetings. The Tribunal further notes that the Applicant is alleging that the FRO did not discuss the PIP with her until four (4) or five (5) months after the beginning of the implementation of the PIP. The Respondent argues instead that there were five (5) meetings that took place between the FRO and the Applicant during the six (6) months of the implementation of the PIP; that the first one took place on 22 July 2016—one-and-one-half months after the beginning of the implementation of the PIP—and that all of them focused on the PIP. The Tribunal considers that the 21 July 2016 emails regarding the upcoming 22 July 2016 meeting constitute evidence that this meeting took place and that it related to the PIP, especially since the Applicant did not contest the scheduling and/or the purpose of the meeting in her email reply to Ms. CH and since both parties subsequently agreed that a meeting was held on 22 July 2016. Moreover, the Tribunal observes that in an email from the FRO to the Applicant, copied to the SRO and dated 10 November 2016, the FRO referred to the 22 July 2016 and 29 September 2016 meetings, stating as follows:

> [The Applicant] had agreed to actively participate in the PIP monthly reviews of 22 July [2016] and 29 September [2016]. In August the PIP review did not take place because [the Applicant was] on annual leave […]. During the reviews we discussed in detail the points in the PIP and evaluated progress achieved and identified areas where improvement was needed. In addition we met on 3 November [2016] with original intention to conduct both mid-point review of [the

> Applicant's] 2016[-2017] work plan and regular PIP review. However [one] hour and [fifteen] minutes proved not to be enough to fully complete even the mid-point review discussion. […] However, our discussion at our mid-point review was also relevant to the progress on the PIP. […]"

53. The Tribunal further observes from the evidence submitted before it that the Applicant did not reply to this email to contest its content. In light of the above, the Tribunal finds the evidence convincing that the first meeting that took place between the Applicant and her FRO to discuss the implementation of the PIP was on 22 July 2016.

What is the evidentiary weight of the notes of the meetings?

54. On 7 February 2018, the Respondent submitted five (5) notes/minutes, each one of them titled "Record of meeting, [d]iscussion on [p]erformance [i]mprovement [p]lan (PIP), applicable date, [Mr. MJ and the Applicant]". The Respondent states that these notes are contemporaneous records of meetings between the FRO and the Applicant on 2 June 2016, 22 July 2016, 29 September 2016, 3 November 2016, and 14 November 2016. The Respondent indicates that these notes were drafted after each meeting and that he had dictated their content to his assistant, Ms. CH. The FRO also stated during the hearing that he was used to drafting notes for his internal file to have records following one-on-one meetings he had and that he sometimes forwards these notes to the person he met with. He said that in the present case, he offered the Applicant, on 21 July 2016 through an email from Ms. CH to the Applicant, to have a note taker during these meetings to avoid any misunderstanding of what was discussed, but that she (the Applicant) refused.

55. In response to these notes submitted on 7 February 2018, the Applicant contends that the Appeals Tribunal judgment in *Jean* 2017-UNAT-743, in which alleged meeting minutes that were not shared with the Applicant in that case and only became known during the Dispute Tribunal's proceedings, were found to be

incompatible with the good practices of the Organization and that, therefore, the submitted notes in the present case should not be accepted as evidence.

56. The Tribunal notes that with regards to the evidentiary weight to be accorded the notes herein, the Respondent indicated both in his 7 February 2018 submission and during the 14 February 2018 hearing that it was the FRO's habit, as he did in the present case, to draft notes after each of the meetings he had with a counterpart in order for him to have a record of what was said during the encounter. The Tribunal further notes that the Respondent has stated that the contested notes were drafted by the FRO's assistant, Ms. CH, "following each meeting", and that each note contains the date that the meeting occurred. The Tribunal also observes that each note contains the date that they were drafted (between 3 to 9 days following the meetings) and the signature of the drafter, Ms. CH. The Tribunal is of the opinion that, although each note is signed and dated, there is no evidence that these notes were attached to an email and, therefore, a doubt is cast on their evidentiary value. However, the Tribunal also notes that the Applicant did not manage to produce any evidence that the meetings of 22 July 2016, 29 September 2016, 3 November 2016 and 14 November 2016 did not focus on the PIP. In light of the above, the Tribunal deems that the only credible evidence that was submitted before it are the notes that the Respondent dictated to Ms. CH, which she dated and signed, as well as his statement under oath saying that it was his habit, custom and practice, as in the present case, to ask Ms. CH to take notes after each meeting for his own internal files. The Tribunal considers that the overall evidence presented before it weighs towards the credibility of the Respondent and that it has reasonably been shown that the focus of the discussions during these meetings was the PIP implementation.

57. In regard to the fact that the Respondent did not share the notes with the Applicant until the case was brought before the Dispute Tribunal, the Tribunal notes that ST/AI/2010/5, sec. 1, and the Guideline p. 10 provide an obligation on the FRO to organize regular performance discussions during the PIP implementation but does not, however, make any reference to keeping notes of these meetings and/or to having

the obligation to provide such documents to the Applicant. The Tribunal, therefore, sees no reason why the Respondent should or would have transmitted the meeting notes he kept for his own records to the Applicant before the case was brought before the Dispute Tribunal, all the more since she (the Applicant) refused to have a notetaker during the 22 July 2016 meeting which shows that she did not want notes to be taken at this meeting, and *a fortiori* that she did not want them to be shared with her either. The Tribunal observes that had the Applicant wished to have notes taken at the meetings, she could either have requested it from the FRO, which she did not do, and/or drafted her own notes after the meetings and kept them for her own records, which she did not do either. The Tribunal, therefore, concludes that the Applicant was not interested in having notes of these meetings and subsequently cannot blame the FRO for not having shared them with her until it became necessary to produce them for the purpose of the proceedings in front of the Tribunal.

Issues related to the Applicant's performance that occurred during the PIP implementation

Issues related to the first target of the PIP: the staff retreat

58. The FRO stated at the hearing that, according to the PIP, the retreat was the first item to be implemented because he deemed that it was important to hold such retreat especially since it had not been organized for several years, and that the swift recruitment of the facilitator was therefore essential. He stated, however, that his office had provided the Applicant with the facilitator's contact information on 7 June 2016 in order for her to start organizing for the retreat. However, he declared that the Applicant did not respond to his office on this issue until 14 July 2016, saying she had been in contact with the facilitator. The FRO also mentioned that despite the urgency placed on the Applicant to ensure the retreat would take place, it was delayed until 6 October 2016 for several reasons, including the fact that the Applicant went on leave for three weeks in August 2016. Notwithstanding this excused leave, the

Tribunal notes that the Applicant, in essence, has not provided evidence in writing or orally to justify the delay in the conduct of the retreat.

59. An issue which arose during the conduct of the retreat, and on which the parties disagree, is related to the Applicant's alleged lack of leadership and strategic guidance and communication. The FRO stated that he participated in the retreat and that when he opened the floor for questions, he was surprised to hear staff members under the Applicant's supervision ask him "what should we do?" He stated that this question revealed "a clear sign there was a problem in leading the Division because staff members [did] not clearly know the priorities." He also declared that it showed him that the Applicant was facing communication issues with her staff as regards making it clear to them what the objectives and goals were and how they should be attained. The Applicant responded to this remark at the 1 December 2016 meeting she had with her FRO and SRO, as referred to in the meeting minutes, during which she replied to her FRO that "[…] the reason for the staff needing strategic direction at the retreat was because it was the way that [the FRO] had approached his discussion at the retreat". The FRO responded to her that her characterization was incorrect and that he had shown appreciation of the staff members' work at the retreat. The Applicant further responded to the FRO's comment by referring to the facilitator that the Division had hired to facilitate the retreat who, in her final report, commented in favor of the Applicant's performance at the retreat. When confronted with this comment during the hearing, the FRO agreed that the facilitator had made it but specified that she was a facilitator, therefore suggesting that she was not someone who was there to evaluate the Applicant's performance. On this issue, the Tribunal is of the opinion that the facilitator's comment is not relevant to the case since she was hired solely to facilitate the retreat and thus she had no authority nor was she in a position to conduct an evaluation of the Applicant's performance at the retreat.

Leadership and guidance issues

60. In response to the allegations of her lack of leadership and strategic guidance, the Applicant referred to a note she had drafted titled "Note to [Mr. JF, SRO] (through [Mr. MJ, FRO]) […]: Letter from [non-governmental organizations, ("NGOs")] regarding Geneva talks", which was sent to the SRO and copied to a United Nations Special Envoy on 11 July 2016, which contains one hand-written comment from the SRO dated 14 July 2016 addressed to the Applicant (and Mr. DM and, name redacted, Mr. R) reading: "MEWAD/[the Applicant, Mr. DM, Mr. R] Good suggestions! Let's pursue your ideas." The FRO stated during the cross-examination that in this note, the Applicant had been successful in communicating ways on how to respond to the letter in question, confirmed that the SRO provided positive feedback to the Applicant, and agreed with Counsel for the Applicant that this note constituted "strategic guidance at its best." The Tribunal notes that the SRO's comment is very positive towards the Applicant's performance regarding this note and, not to minimize the Applicant's role in this, observes that his comment was also addressed to two other colleagues in the Division. The Tribunal further notes that the PIP in the "core competencies" concerning professionalism, mentions that one of the Applicant's targets is to "ensure the quality of all generics (talking points and briefing notes) and that information is accurate, length is appropriate, exercises judgment that messages are politically well positioned, exercises judgment and provides recommendations on the strategic direction on MEWAD countries by ensuring draft notes […] include recommendations for DPA […]." After reading the note the Applicant drafted, after reading the SRO's comment and hearing the FRO's confirmation that this note constituted strategic guidance, the Tribunal finds that the evidence is convincing that in this particular instance, the Applicant produced work of good quality and in line with the PIP's expectations.

Management issues with SPMs faced by the Applicant

61. The FRO and SRO stated at the hearing, which is also submitted by the Respondent, that the Applicant faced management issues with SPMs. In particular, the FRO and the SRO stated that the DPA had inherited a SPM in 2014 and that the Applicant never went there on mission despite several requests. The SRO stated at the hearing that it was a very important SPM and it was carefully followed. He also stated that any Director at the D-2 level should have known that she needed to go there on mission to assess the situation and to meet the staff in the SPM, and that he and the FRO should never have had to insist that she needed to go there. The Tribunal notes that the FRO, in an email dated 1 December 2016 and addressed to the Applicant titled "Mid-point review, PIP", referred to the fact that the Applicant had not undertaken a mission to this SPM during the past two years and that he had assessed this as a failure on her part and as a result of poor planning of duty trips across the Division. The Applicant submitted in evidence an email dated 18 October 2016 that she sent to her FRO in which she explained that she had planned her trip to that SPM to take place that month but that she had had to subsequently cancel the trip and decided to stay in New York instead to monitor the developments in another urgent dossier covered by the Division. In light of the evidence presented before it, the Tribunal notes that, although the Applicant had planned to undertake a mission to the SPM in question, she never actually went there during the two (2) years that SPM had been placed under DPA's responsibility. The Tribunal, therefore, considers that a manager at the D-2 level responsible for the management of this SPM should have made it a priority to visit in order to see the reality on the ground, especially given the size and strategic importance of this SPM and that this shows a lack of good management and planning on her part.

Planning and organizational issues

62. Another issue which arose during the PIP implementation, and on which the parties disagree, is related to the Applicant's alleged lack of planning and

organizational skills. The FRO and SRO testified that an incident occurred during the development of a dossier DPA handled during the PIP implementation. The FRO stated that the issue in this instance was that he was not informed in a clear and timely manner of the activities in relation to the developments in the dossier and that the communication had led to confusion. The SRO declared specifically in his 20 December 2017 written statement that "[…] [a]s an illustration of [the Applicant's] lack of oversight of travel in the Division, she had agreed that her Deputy [Mr. DM] and for the team leader of the concerned SPM to be away from the office while new developments occurred in the dossier" and that "[the Applicant] had notice of these developments and despite this, failed to ensure appropriate coverage within the Division."

63. The Applicant during her hearing referred to an email dated 18 October 2016 that she sent to the FRO copying the SRO, in which she informed him that she had decided to cancel her mission to the SPM and to stay in New York to handle the dossier instead in the absence of her Deputy and Team Leader during that time. She explained to him that she had approved her Deputy's official travel two weeks before and that she had made sure [name redacted, Ms. I] would be OIC; as for the Team Leader, she told him that her Deputy had approved his leave two-and-a-half months earlier.

64. The Tribunal notes that, according to the Applicant's email, her Deputy, Team Leader and herself were to be absent from New York while the new developments where happening in the dossier and that the Applicant decided to remain in New York when she saw that all of them would be away at the same time. The Tribunal also notes that the SRO submitted that the Applicant had notice of the new developments. In light of this information, the Tribunal considers that the Applicant could have cancelled her mission to the SPM earlier to ensure that she would be present in New York to follow the developments in the dossier. The Tribunal observes that the PIP mentions as one of the Applicant's targets in the "Core competencies – Planning and organization" that "[e]ach request for travel include[s] a justification for how the

event/travel would benefit DPA and what specific concrete outcomes DPA would gain from the travel. Justification should also justify why the Director's participation is required and not another more junior staff member". The Applicant clearly failed in this instance.

65. Another issue related to planning and organization and travel as per the PIP relates to an incident that occurred when the Applicant requested, on 28 October 2016, the authorization from her FRO to travel to two countries covered by the Division from 28 November 2016 to 8 December 2016 and that this request was denied by both the FRO and SRO. The reason they gave to the Applicant was that this trip coincided with the ending of the PIP implementation on 30 November 2016; that they needed to meet after 30 November 2016 and that someone else in the Division could undertake this mission instead of her. The FRO, in an email dated 10 November 2016 sent to the Applicant and copied to the SRO, told the Applicant that her request had been rejected based on poor planning on her part.

66. The Applicant claims in contrast in her application of 9 January 2017 that "[…] this failure to grant the request reinforced the perception that the Administration had already predetermined the outcome of her PIP […]" and had thus already decided not to renew her contract at the end of the PIP.

67. The Tribunal notes that the PIP ending date was 30 November 2016 and that the Applicant's contract had been extended until the end of the PIP, on 30 November 2016, in accordance with ST/AI/2010/5, sec. 10.5. The Tribunal also notes that the Applicant did not receive any indication in writing or orally from her supervisors that her contract would be extended beyond 30 November 2016. The Tribunal further notes that the travel the Applicant requested was from 28 November 2016 to 8 December 2016, the majority of this time being after the expiration of the PIP and consequently of her contract. In addition, the Tribunal notes that according to the PIP, one of her targets, as mentioned earlier, was to ensure that all travel was justified and that her participation was also justified, and that the

present request, as pointed out by the FRO in his 10 November 2016 email to the Applicant, showed a serious shortcoming on her part in planning duty trips. In light of the above, the Tribunal considers that the travel request does not appear to have been reasonably thought through by the Applicant, as she was not promised any contract extension at that time and the PIP implementation period would have ended during her mission. The Tribunal is of the opinion that a D-2 level manager should have been able to understand the weight such a request was carrying and that the Applicant should have been more conscious and concerned that the future of her contract depended on the outcome of the PIP which was due to expire during the requested mission. The Tribunal therefore considers that the FRO and the SRO acted with fairness and reason towards the Applicant by not granting her request and that such rejection does not reflect that the Administration had already pre-determined the outcome of the PIP.

Communication issues

68. An issue arose during the PIP implementation relating to the Applicant's alleged lack of communication skills. The Respondent states that, on 16 June 2016, he had received an email from a Special Envoy complaining that the Division had provided him with talking points for a meeting with high-ranking United Nations officials which contained information that did not reflect the situation in the country concerned accurately and that he had felt obliged to re-write them shortly before the meeting. The FRO stated during the hearing that the content of these talking points was incorrect because MEWAD had failed in its obligation to consult the Special Representative of the Secretary-General ("SRSG") of the concerned SPM. He also stated that he had immediately written to the Applicant and the SRO to inform them about the situation and that they would try to fix it on the ground. The Applicant responded in her defense in the 1 December 2016 meeting that the Special Envoy in question was in fact satisfied with the quality of the support she had been providing to him as he recently wrote to her commending her work. The Tribunal has reviewed the evidence submitted before it and observes that the Special Envoy in question

effectively sent emails to the Applicant commending her work but that they are dated from 15 November 2015 and 4 May 2016, thereby being before the occurrence of the June 2016 incident. Further, the Tribunal notes that one of the Applicant's PIP targets is to ensure the quality of talking points and that the information and messages are politically well positioned and finds that the Applicant has failed in reaching this target in this particular instance. In addition, the Tribunal considers that the Applicant did not present evidence to counter the Respondent's allegation that the Applicant failed to communicate with the Special Envoy and the SPM on the talking points prepared for the meeting.

Issues that happened during the evaluation of the PIP

69. The parties agree that during the meeting that took place on 1 December 2016, the FRO and SRO assessed the PIP and told the Applicant that her contract would not be renewed and this is confirmed in the meeting note dated 6 December 2016 relating the encounter.

70. An issue arose regarding the Applicant's assessment with her alleging that the grades given in the PIP did not match some of the FRO and/or SRO's comments contained in emails, written documents and in the Respondent's meeting notes. In particular, the Applicant states that the finalized PIP does not contain any comment from the FRO or SRO other than mentions of "yes" or "no" corresponding to specific targets.

71. The FRO confirmed during his cross-examination that the email exchanges and the PIP meeting notes that were submitted, as mentioned in the PIP in the fifth column, constituted the feedback given to the Applicant on her performance during the PIP implementation and agreed that no explicit comments were provided inside the PIP itself.

72. The Tribunal notes that with regards the managerial competency of leadership mentioned in the PIP, the FRO told the Applicant in an email dated 19 November

2016 that although she had improved in certain aspects of her work, some shortcomings related to communicating and providing strategic guidance to her staff remained, mentioning as an example illustrating this remark that "[…] at the MEWAD retreat, it was apparent that the Division was seeking such strategic guidance from [the Applicant] and were not receiving it." The Tribunal also notes that in the evidence provided before it, the Applicant did not reply to this email. During the 1 December 2016 meeting, as noted previously, when the FRO and SRO referred to this example, the Applicant did not in essence provide evidence in response to this comment.

73. The Tribunal further notes that in relation to the managerial competency of planning and organizing mentioned in the PIP, the FRO, in his email of 19 November 2016, reminded the Applicant about the travel authorization request she had made to him and the SRO on 28 October 2016 for a mission that would have taken place from 28 November 2016 to 8 December 2016, whereas her PIP was coming to an end on 30 November 2016. In the email, he referred to this request as "another example of poor planning of travel" and he also referred to this example during the 1 December 2016 meeting. The Applicant argued that through their refusal to grant the request to her, her FRO and SRO had already decided not to renew her contract. The Tribunal finds that the FRO and SRO's decision was fair and justified. The Tribunal therefore deems that it was fair for the FRO and SRO to mention this incident in email exchanges with the Applicant and during the PIP evaluation meeting, and that the refusal to grant the request does not show that they had already decided to end the Applicant's appointment.

74. Another example related to planning and organizing relates to the fact that the Applicant did not undertake a mission to a specific SPM between 2014 and 2016, which the Tribunal considers as a lack of good management and planning on her part. This example was mentioned during the 1 December 2016 PIP evaluation meeting and during the hearing and, as such, the Tribunal considers it was fair for the FRO and SRO to refer to it.

75. The Tribunal notes that with regards to the managerial competency of communicating, the FRO and SRO raised the incident related to the talking points for the Special Envoy that contained incorrect information. The Tribunal considers that this incident was rightfully mentioned during the PIP evaluation meeting on 1 December 2016.

76. ST/AI/2010/5 sec. 10.3 provides that "[i]f the performance shortcoming was not rectified following the remedial actions indicated in sec[.] 10.1, a number of administrative actions may ensue, including […] the non-renewal of an appointment."

77. In light of the evidence adduced before the Tribunal, including email exchanges, written documents, meeting notes, the finalized PIP document, the Tribunal considers that the FRO and SRO have evaluated the performance of the Applicant during the PIP implementation in a serious, fair and transparent manner.

78. In light of the above-mentioned evidence and in accordance with the applicable law, the Tribunal considers that the PIP was implemented in a reasonable and equitable manner.

Was the decision to separate the Applicant from service lawful?

79. The Applicant alleges that the separation process instituted against her was conducted in an unfair manner and was tainted with flaws. She claims specifically that on 1 December 2016, the FRO sent her an email titled "[m]id-point review: PIP" which "[sought] to lambast [the Applicant] concluding that she had not demonstrated performance at the level of a D[-]2 in the area of managerial competencies, such as the provision of strategic guidance." She then states that, after receiving this email, she had a meeting with her SRO and FRO during which they had a discussion on the final evaluation of her PIP during which they informed her that her contract would not be renewed based on unsatisfactory performance. She further states that the 1 December 2017 discussion did not cover the targets of the PIP and that her FRO and

SRO only provided her with a copy of the finalized PIP on 7 December 2016, one day after she lodged a management evaluation request with the MEU.

80. The Applicant also alleged during the 1 December 2016 meeting that, in relation to the rebuttal panel's decision of 10 October 2016 to uphold the grading of "partially meets expectations" of her 2015-2016 performance evaluation report, she disagreed and told the SRO and FRO that she was not given a good opportunity to present her position to the rebuttal panel, that the panel did not review the documents she had submitted to them and that she had only been given 40 minutes to speak to them and plead her case.

81. The Applicant further alleges that numerous stakeholders have provided the FRO and SRO with letters and emails of recommendation. She claims that her work was appreciated and recognized by these stakeholders, both internal and external to the United Nations–such as United Nations Ambassadors, a United Nations Executive Director, a United Nations Resident Coordinator, and an internal staff member under her supervision–and that despite these documents, the Administration/FRO and SRO acted in an unfair and non-transparent manner in separating her from the Organization.

82. The Respondent argues, on the contrary, that the separation process was lawful, that it was conducted in a fair manner and, in accordance with ST/AI/2010/5, secs. 10.3 and 10.4 which provides that if a staff member's performance shortcomings still remain after the implementation of a PIP, the Administration may take the decision not to renew his/her appointment.

83. According to the Appeals Tribunal in *Said* 2015-UNAT-500, it is not the role of the Dispute Tribunal to examine whether it would have made the same decision as the Administration not to renew the Applicant's contract based on the performance appraised. The Appeals Tribunal also ruled in *Obdeijn* 2012-UNAT-201 that the role of the Tribunal is to look at whether the Administration followed the applicable procedure leading to the Applicant's separation from service for unsatisfactory

services. Further, in *Hepworth* 2015-UNAT-503, the Appeals Tribunal ruled that any decision to separate a staff member must be supported by the facts and not be vitiated by bias or improper motive.

84. Regarding the Applicant's claim that the separation was done in an unfair manner and was tainted with flaws, the Tribunal notes that the FRO and SRO convened a formal final meeting with the Applicant on 1 December 2016 to discuss her overall performance evaluation during the six month PIP implementation period. During that meeting, the FRO, SRO and Applicant, according to the content of the meeting minutes, discussed the targets of the PIP, namely the leadership/strategic guidance, planning and organization, and communication and professionalism. The FRO and SRO mentioned that the Applicant had improved in some areas, without mentioning them specifically, and by adding that "[…] they were not significant to bring the performance [of the Applicant] to the level of a Director at the D[-]2 level", but that unfortunately shortcomings remained in the three above-mentioned areas and they provided her with concrete examples of incidents that occurred during the PIP implementation.

85. In addition, the Tribunal observes that the Applicant's three successive FROs and the SRO all referred to her lack of leadership and strategic guidance and communication in her three e-PAS reports and that the rebuttal panel, in its decision, also referred to this issue.

86. With regards the Applicant's claim that the FRO and SRO provided her with a copy of the finalized PIP on 7 December 2016, one day after she contacted the MEU, instead of on 1 December 2016 during the meeting, the FRO and SRO confirmed that the copy was handed over to the Applicant on 7 December 2016. They also stated that the decision not to renew her contract was taken on 1 December 2016, after the PIP implementation, and that they had graded the PIP with "yes" and "nos" and added a comment that they had provided feedback to the Applicant in email exchanges, other communications and during the meetings of 22 July 2016, 29 September 2016,

3 November 2016, 14 November 2016 and 1 December 2016. The Tribunal has reviewed the above-mentioned evidence and considers that the FRO and SRO provided sufficient feedback to the Applicant on her performance in the e-PAS reports and during the PIP implementation.

87. With regards the letters and emails of recommendation addressed to the Applicant, the Tribunal indeed observes that many stakeholders commended her work. However, the Tribunal notes that there are mechanisms in place aimed at assessing a staff member's performance, such as the e-PAS reports, rebuttal process, and PIP process. The Tribunal also notes that the Applicant and the FRO and SRO have made use of these available channels and that following negative reviews of her performance, they made the decision not to renew her appointment. The Tribunal also observes that the FRO, in one of his comments contained in Section 7 of the Applicant's e-PAS report for 2015-2016, wrote that "[the Applicant] has […] received positive feedback on occasion for her interaction with senior management and partners", and that he thus made reference to these recognitions given by external stakeholders. The Tribunal, however, considers that these letters of recommendation do not constitute official records, namely performance evaluation records, but that they are rather documents external to the United Nations evaluation process. In light of the above, the Tribunal considers that these documents cannot be viewed as evidence of the Applicant's performance but positively notes that they have been taken in consideration by the FRO in his 2015-2016 assessment of the Applicant's performance.

88. In relation to the Applicant's disapproval of the rebuttal panel's decision, the Tribunal notes that the Applicant received her 2015-2016 e-PAS report with the grading of "partially meets expectations" on 17 May 2016 and that she lodged a rebuttal within the 14 days required by ST/AI/2010/5, sec. 15.1. In her rebuttal, she was also given the opportunity to select the three (3) panel members, in conformity with ST/AI/2010/5, sec. 15.2. The rebuttal panel subsequently interviewed the Applicant on 15 September 2016 and issued its report on 10 October 2016 upholding

the grading of "partially meets expectations" on the basis that "[…][the [p]anel found evidence of shortcomings in [the Applicant's] managerial performance, contributing to failure to fully achieve some of the goals of her work plan." The Tribunal observes that the Applicant used her right to rebut a negative performance assessment in accordance with ST/AI/2010/5, sec. 15, that the Applicant lodged her rebuttal in accordance with the applicable text and that the rebuttal panel subsequently issued a decision confirming the unfavorable evaluation, pointing out her managerial deficiencies. The Tribunal notes that the SRO took the decision not to renew her appointment based on poor managerial performance, and that the rebuttal panel identified similar managerial performance deficiencies in its decision. The Tribunal further notes that ST/AI/2010/5, sec. 15.7 sets out that a rebuttal panel's decision is final and may not be appealed, and that the Applicant did not actually raise in her application and/or in the joint submission the fact that she disapproved of the rebuttal panel's decision. The Tribunal, however, sees in the rebuttal panel's decision, which points out managerial deficiencies on the part of the Applicant, evidence that the SRO and FRO did not act in a biased manner by giving her the grade of "partially meets expectations" for the 2015-2016 performance cycle, especially since the panel composed of three (3) members chosen by the Applicant identified the same issue of managerial deficiency on her part.

Conclusion

89. Accordingly, the Tribunal concludes that, with reference to *He* 2016-UNAT-686, the Applicant has not sustained her burden of proving that the decision not to renew her appointment due to poor performance was improper and that the non-renewal decision was therefore unlawful. The Tribunal notes several minor flaws in the conduct of the separation process, such as the fact that (a) the Applicant received the finalized PIP version on 7 December 2016 instead of on 1 December 2016; (b) the FRO and SRO recognized some improvements of the Applicant's performance in the FRO's email of 19 November 2016 and during the 1 December 2016 meeting, but

without mentioning them, and by adding that "[…] they were not significant to bring the performance [of the Applicant] to the level of a Director at the D[-]2 level"; (c) the FRO and SRO did not provide the Applicant with examples of areas of improvement during the PIP evaluation meeting on 1 December 2016. As ruled by the Appeals Tribunal in *Luvai* 2010-UNAT-014, minor errors in the process in question prejudiced no one's rights and therefore there was no violation. In the present case, the Tribunal considers similarly that the procedural flaws observed were insignificant to the outcome of the PIP process and therefore did not render the subsequent non-renewal decision unlawful. Therefore, the Tribunal considers that the decision not to renew the Applicant's appointment on the ground of unsatisfactory performance and service is lawful.

Decision

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

The application is rejected in its entirety.

(*Signed*)
Judge Alexander W. Hunter, Jr.

Dated this 22nd day of March 2018

Entered in the Register on this 22nd day of March 2018

(*Signed*)

Morten Albert Michelsen, Officer-in-Charge, New York