UNITED NATIONS DISPUTE TRIBUNAL

Cases Nos.:	UNDT/GVA/2013/039 UNDT/GVA/2013/057
Judgment No.:	UNDT/2018/071
Date:	27 June 2018
Original:	English

Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

BELKHABBAZ (formerly Oummih)

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented (in Case No. UNDT/GVA/2013/039)
Craig Shagin (in Case No. UNDT/GVA/2013/057)

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

Notice: The public version of the Judgment has been redacted pursuant to art. 11.6 of the Dispute Tribunal's Statute.

Introduction

1. Two applications are the subject of this judgment, as they are inextricably linked.

2. By application filed on 22 July 2013 and registered under Case No. UNDT/GVA/2013/039, the Applicant, a former Legal Officer with the Office of Staff Legal Assistance ("OSLA"), Office of Administration of Justice ("OAJ"), contests the decision not to renew her fixed-term appointment pending the outcome of the rebuttal process in respect of her performance appraisal for the period 2012-2013, contained in an email dated 3 June 2013 from the Director, Office of the Chef de Cabinet, Executive Office of the Secretary-General.

3. By another application filed on 14 October 2013 and registered under Case No. UNDT/GVA/2013/057, the Applicant contests the decision not to extend her contract beyond its expiration on 11 June 2013, taken on 9 May 2013 by the former Executive Director, OAJ.

4. These two cases revolve around allegations of harassment, abuse of authority, bias and retaliation on the part of the Applicant's first reporting officer ("FRO"), the former Chief, OSLA, against her in the context of a relationship that deteriorated over time to a point of totally breaking down, as well as allegations of a failure by the Applicant's second reporting officers to protect her from harassment and bias in the decision not to renew her contract. The cases involve a long and complex history of performance appraisal processes and rebuttals, non-renewal and short extensions of the Applicant's fixed-term appointments, oral and written exchanges between the Applicant and her supervisors, investigations into the Applicant's complaint of harassment and abuse of authority against her FRO, numerous legal challenges initiated by the Applicant and a number of previous judicial findings relevant to these cases. The Tribunal will thus start by giving a brief overview of the main steps that led to the contested decisions, and will explore in more detail the whole factual matrix of the cases in its considerations.

Facts

5. Many of the facts were established in previous judgments of this Tribunal and of the Appeals Tribunal concerning the Applicant, including *Applicant* UNDT/2011/187, *Applicant* UNDT/2012/111, *Applicant* UNDT/2012/111, *Oummih* UNDT/2013/045, *Oummih* UNDT/2014/004, *Oummih* 2015-UNAT-518 and *Belkhabbaz* UNDT/2018/016, and are no longer in dispute.

6. On 1 September 2009, the Applicant was granted a two-year fixed-term appointment as a Legal Officer at the P-3 level in OSLA. Assigned initially to Beirut, she was laterally transferred to a position in Geneva in June 2010.

7. During the period as a staff member the Applicant had three second reporting officers ("SRO"). The first SRO was the then Executive Director of OAJ; the second SRO was the officer in charge of OAJ after the first SRO retired; the third SRO was the Executive Director of OAJ from 7 May 2012 until August 2017.

8. On 29 July 2011, the FRO completed the Applicant's first performance appraisal, covering the period from September 2009 until 1 April 2010, giving her an overall rating of "Does not meet performance expectations". He recommended that the Applicant's contract, which was due to expire on 31 August 2011, not be renewed but this recommendation was not followed and it was rather decided on 24 August 2011 to extend the Applicant's contract until completion of her second performance appraisal, for the 2010-2011 cycle. The Applicant successfully rebutted this performance appraisal and her overall rating was upgraded to "Fully successful performance" on 2 April 2012.

9. On 18 November 2011, the Chief, OSLA, completed the Applicant's second performance appraisal, for the 2010-2011 cycle, once again giving her an overall rating of "Does not meet performance expectations". The Applicant successfully rebutted this second performance appraisal, for which her overall rating was upgraded to "Successfully meets performance expectations" on 28 March 2012.

10. From 27 March 2012, the FRO sought to put in place a performance improvement plan ("PIP") but the Applicant refused it. Despite several attempts by the FRO and eventually the Applicant's successive SROs to reach an agreement on a PIP, it was never implemented.

11. From 25 April to 31 July 2012, the Applicant was temporarily assigned to the Office of the United Nations High Commissioner for Human Rights. Her performance for this period was rated as "Fully satisfactory".

12. On 27 April 2012, the Applicant filed a complaint with the Deputy Secretary-General against her FRO and one of her former colleagues at OSLA, under the provisions of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The alleged improper conduct included the following: deprivation of functions, discrimination and abuse of authority, retaliation through performance appraisals, retaliation for having filed an appeal and for having requested mediation, defamation, exerting pressure on staff, delaying the attribution of her post, rejecting travel requests, and preferential treatment of another staff member.

13. The complaint was forwarded to the Applicant's third SRO, who informed the Applicant on 21 September 2012 that no fact-finding investigation would be carried out on the complaint against her colleague at OSLA and that an investigation would be opened regarding her FRO, although solely with respect to some of the facts she had denounced, namely, those concerning the decision to take away from her the cases to which she had previously been assigned as counsel, the fact that certain messages exchanged with the FRO had been copied to other staff members, and finally the question of whether the FRO had created a hostile work environment for the Applicant. The Applicant challenged her third SRO's decision to limit the scope of the investigation but she was ultimately unsuccessful (see *Oummih* UNDT/2014/004 of 15 January 2014 and 2015-UNAT-518 of 17 April 2015).

14. By a written declaration of 7 June 2012, further complemented on 13 June 2012, a former colleague of the Applicant at OSLA reported to the third SRO, through the FRO, that the Applicant had verbally insulted and threatened her on 31 May 2012 during an encounter at the United Nations premises. The FRO noted that he considered that the Applicant's remarks did also constitute a threat to him. On 21 September 2012, the third SRO decided to open an investigation, which she considered had to be dealt with within the framework of ST/AI/371 (Revised disciplinary measures and procedures).

15. On 12 September 2012, the Applicant's third performance appraisal, for the period 2011-2012, was completed and she received an overall rating of "Partially meets performance expectations". The Applicant initiated a rebuttal process on 12 October 2012. She was unsuccessful and her rating was maintained by the rebuttal panel on 31 January 2013.

16. On 26 March 2013, the Applicant was placed on certified sick leave ("CSL"), and, from 22 July 2013, she was on CSL with half pay.

17. On 29 April 2013, the third SRO informed the Applicant that after having reviewed the panel's fact-finding investigation report on her complaint of harassment and abuse of authority against the FRO, she had decided that no further action should be taken on said complaint. The Applicant challenged this decision, which was later found to be unlawful by the Dispute Tribunal and the Appeals Tribunal as the panel was not properly constituted (see *Oummih* UNDT/2014/004 of 15 January 2014 and 2015-UNAT-518 of 17 April 2015). The case was consequently remanded to the third SRO on 17 April 2015 to establish a new fact-finding panel.

18. On the same day (29 April 2013), the third SRO informed the Applicant that based on the fact-finding investigation report on the complaint against the Applicant, she had concluded that there was sufficient evidence indicating that the Applicant had engaged in wrongdoing that could amount to misconduct and had decided to refer the matter to the Assistant Secretary-General for Human Resources

Management ("ASG/OHRM"), in accordance with ST/AI/371/Amend.1, which she did on the same day. This matter was later put on abeyance as the Applicant was on sick leave and the disciplinary proceedings were never concluded.

19. By letter dated 9 May 2013, sent to the Applicant on 10 May 2013, the Applicant was informed that her third SRO had decided not to renew her appointment beyond its expiration date of 11 June 2013.

20. On 10 May 2013, the Applicant received her fourth performance appraisal, namely for the 2012-2013 cycle, with the rating of "Partially meets performance expectations".

21. By email of 15 May 2013, the third SRO, upon the Applicant's request, informed her of the reasons for the non-renewal of her contract, which were as follows:

> You have been unable to maintain professional working relationships with colleagues.
>
> You have required an inordinate amount of supervisory attention.
>
> Your performance has only partially met performance expectations for two consecutive years.
>
> You have lost the confidence of the First Reporting Officer and Second Reporting Officer.
>
> Renewal of your appointment would be inconsistent with the operational requirements of [OSLA] and [OAJ].

22. By email of 30 May 2013, addressed to the Director, Office of the Chef de Cabinet, Executive Office of the Secretary-General, copied, in particular, to the third SRO, the Applicant stated her intention to initiate a rebuttal of her fourth performance appraisal and, on 3 June 2013, she initiated such process. On the same day, by email addressed to the Director, Office of the Chef de Cabinet, Executive Office of the Secretary-General, she requested confirmation that she could expect her appointment to be renewed for the duration necessary to complete the rebuttal

process, pursuant to sec. 4.12 of ST/AI/2013/1 (Administration of fixed-term appointments).

23. By email of 3 June 2013, the Applicant was informed by the Director, Office of the Chef de Cabinet, Executive Office of the Secretary-General, that her contract would not be extended for the duration of the rebuttal procedure as the reasons for non-renewal went beyond performance, and that, thus, sec. 4.12 of ST/AI/2013/1 did not apply in her case. On 4 June 2013, the Applicant requested management evaluation of that decision, followed on 5 June 2013 by an application for suspension of action to the Tribunal, which was granted by Order No. 78 (GVA/2013) of 10 June 2013.

24. Upon the expiration of the Applicant's contract on 11 June 2013, it was extended to 19 July 2013, and then until 22 July 2013 in accordance with Order No. 78 (GVA/2013). From 23 July 2013, the Applicant's contract was extended for "administrative reasons" in order to allow her to avail herself of her right to sick leave.

25. On 10 July 2013, the Applicant requested management evaluation of the decision not to extend her contract beyond 11 June 2013.

26. On 22 July 2013, the Under-Secretary-General for Management addressed a letter to the Applicant, in reply to her requests for management evaluation of 4 June 2013 and 10 July 2013 against the decision not to extend her appointment pending the rebuttal process and the decision not to renew her contract upon its expiry, respectively. In his letter, he indicated the Management Evaluation Unit ("MEU") had considered both requests concerned the same decision, namely the decision not to extend the Applicant's appointment beyond 11 June 2013 and, therefore, they had been examined at the same time. He further informed the Applicant that after a review of the case, the Secretary-General had decided to "endorse the findings and recommendations of the MEU and to uphold the decision not to renew [the Applicant's] fixed-term appointment".

27. On 22 July 2013, the Applicant filed an application contesting the decision not to renew her contract pending the conclusion of the rebuttal of her fourth performance appraisal, which was registered under Case No. UNDT/GVA/2013/039. On the same day, the Applicant filed an application for interim measures seeking to suspend the execution of the contested decision, which was rejected by Order No. 108 (GVA/2013) of 25 July 2013.

28. Also on 22 July 2013, the Director, Office of the Chef de Cabinet, Executive Office of the Secretary-General, reiterated to the Applicant that her contract would be extended solely to allow her to avail herself of her entitlement to sick leave.

29. On 15 August 2013, the Applicant relocated to her home country for medical reasons.

30. On 14 October 2013, the Applicant filed an application challenging the decision not to renew her contract upon its expiry, which was registered under Case No. UNDT/GVA/2013/057.

31. On 27 February 2014, the rebuttal panel issued its report concerning the Applicant's fourth performance appraisal, which upheld the performance rating of "Partially meets performance expectations".

32. The Applicant was separated on 4 April 2014, after exhaustion of her sick leave entitlements.

33. On 19 May 2015, the third SRO, upon the direction of the Appeals Tribunal, appointed a second panel to investigate the following allegations contained in the Applicant's complaint against her FRO:

> a) Whether [the FRO] reassigned [the Applicant]'s cases pursuant to an email communication dated 19 October 2011 and, if so, why, and whether such conduct was retaliatory for seeking recourse in the formal system of justice;

> b) Whether [the FRO] copied others on confidential communications from himself to [the Applicant] and, if so, why, and whether such conduct embarrassed her; and
>
> c) Whether [the FRO] created hostile conditions for [the Applicant] within [OSLA], and cumulatively, through his direct email and verbal communications with her.

34. By letter of 13 July 2015, the third SRO, recused herself as the responsible official under ST/SGB/2008/5 with respect to the fact-finding investigation into the Applicant's complaint against the FRO and advised the panel that the matter had been referred to the Assistant Secretary-General, OHRM.

35. On 6 September 2016, the fact-finding panel submitted its report concerning the Applicant's complaint to the Officer-in-Charge ("OiC"), OHRM.

36. By letter of 25 October 2016, the OiC, OHRM, informed the Applicant that based on the report of the fact-finding panel, he had concluded that no prohibited conduct took place and, therefore, had decided to close the matter.

37. On 23 December 2016, the Applicant requested management evaluation of the decision of the OiC, OHRM, to take no further action in respect of her complaint against her FRO and, on 25 April 2017, she submitted an application to the Tribunal, which was registered under Case No. UNDT/GVA/2017/018.

38. On 5 February 2018, the Tribunal issued its Judgment *Belkhabbaz* UNDT/2018/016 in Case No. No. UNDT/GVA/2017/018 whereby it found that the decision to take no further action into the Applicant's complaint of harassment and abuse of authority against the FRO was unlawful as it was vitiated by several procedural flaws, was based on an erroneous application of the test set out in ST/SGB/2008/5 for determining if the established facts amounted to harassment, and failed to examine if the established facts amounted to abuse of authority. Consequently, the Tribunal rescinded the decision. Given the passage of time and the fact that two invalid investigations had already been conducted, and although the full breath of the Applicant's complaint had not been properly investigated, the Tribunal also found that the evidence collected by the panel, particularly the

documentary evidence, was sufficient to reach a conclusion that the Applicant's FRO:

> a. Deprived the Applicant of her functions and prevented her from performing her work without any legitimate justification but rather, in whole or in part, as a reprisal for seeking recourse in the formal system of administration of justice. As such, the [FRO] unlawfully used his position of authority to influence the Applicant's working conditions;
>
> b. Copied others in personal and confidential communications concerning the Applicant's performance and a reprimand, which might reasonably be expected or be perceived to embarrass the Applicant and, indeed, embarrassed her; and
>
> c. Adopted an aggressive and abrasive tone and made demeaning remarks in his written and oral communications with the Applicant, which created a hostile and offensive work environment.

39. The Tribunal concluded that "[t]aken as a whole, these incidents amount[ed] to harassment and abuse of authority, and, therefore, constitute[d] prohibited conduct under sec. 1.2 and 1.4 of ST/SGB/2008/5".

Procedural background

40. Without setting out all the details of the lengthy procedural history in the present cases, it is worth recalling some of the key procedural milestones.

41. A first hearing on Cases Nos. UNDT/GVA/2013/039 and UNDT/GVA/2013/057 was held before Cousin J on 18 March 2014, to hear oral submissions from the parties. By Order No. 50 (GVA/2014) of 27 March 2014, Cousin J decided to defer judgment in both cases considering that they were linked to a final outcome on the harassment complaint filed by the Applicant against her FRO. The proceedings were further suspended by Order No. 116 (GVA/2017) issued by Laker J on 9 June 2015, after the issuance of the Appeals Tribunal's Judgment *Oummih* 2015-UNAT-518 (see para. 17 above) and the constitution of a new fact-finding panel to investigate the Applicant's complaint (see para. 3333 above).

42. On 1 February 2017, the Respondent filed a letter dated 25 October 2016 from the OiC, OHRM, communicating to the Applicant the outcome of her complaint against the FRO, following which the proceedings in the present cases resumed.

43. The Tribunal held case management discussions on 1 June and 8 August 2017 to discuss procedural matters and to organise hearings on the merits. By Order No. 120 (GVA/2017) of 7 June 2017, the Tribunal decided that the two cases would be heard jointly as they raised a number of common issues and involve, in part, the same witnesses, although they would remain distinct and would be adjudicated separately.

44. The Tribunal held a hearing on the merits from 13 to 17 November 2017 and from 13 to 15 December 2017, where it heard testimonies from:

a. the FRO;

b. the third SRO;

c. the second SRO;

d. the President of the UNOG Staff Coordinating Council;

e. the Applicant's husband; and

f. the Applicant.

45. The parties filed closing written submissions on 18 January, 19 February and 1 March 2018, as directed by the Tribunal.

46. After further consideration and due to the factual matrix and intricate link between the two contested decisions, which both pertain to the non-renewal of the Applicant's appointment, the Tribunal finds it appropriate to reconsider its decision to adjudicate the two cases separately. It will thus address both cases in a single judgment, although each matter will be addressed separately.

Applicant's motion for anonymity

47. The Applicant requested in her application and at the hearing that her name be anonymised in the judgment. The Respondent objected, claiming that the cases did not present any exceptional circumstances warranting a departure from the general rule on the publication of judgments with the name of the applicant mentioned therein.

48. The Tribunal notes that the previous judgments in respect of the Applicant's complaint against the FRO were not anonymised, so a large part of the facts discussed in the present judgment are already in the public domain. However, Judgements *Applicant* UNDT/2011/187 and *Applicant* UNDT/2012/111, which dealt with the decision to deprive the Applicant of her functions, were anonymised.

49. The Tribunal finds that given that previous judgments dealing with the Applicant's complaint where not anonymised and the importance of making a full and comprehensible record of these proceedings accessible to the public, there are no cogent reasons to deviate from the general rule that the name of an applicant should be mentioned in the judgment. The Tribunal, however, finds it appropriate to redact part of the published judgment, to remove confidential medical information.

50. Therefore, the Applicant's motion for anonymity is rejected.

Parties' contentions

Case UNDT/GVA/2013/039

51. The Applicant's main contentions are:

a. The decision not to extend her contract pending conclusion of the performance appraisal rebuttal procedure violates sec. 15.6 of ST/AI/2010/5 (Performance Management and Development System) and sec. 4.12 of ST/AI/2013/1, which provide that a fixed-term appointment should be extended to permit conclusion of a rebuttal procedure where alleged unsatisfactory performance is the basis for a decision of non-renewal;

b. All the five reasons set forth by the third SRO not to renew the Applicant's contract are performance-related as evidenced by the fact that they concern the Applicant's workplan, the competencies subject to evaluation and her performance appraisals. The third SRO merely attempted to create confusion by adding additional elements to her decision not to renew the Applicant's appointment, to avoid that her contract be extended pending completion of the rebuttal process;

c. In any event, since one of these reasons concerns the Applicant's performance appraisal, which she had a right to rebut, her fixed-term appointment had to be renewed until the completion of the rebuttal process. Otherwise, her right to rebuttal would be meaningless;

d. The decision is also in violation of sec. 4.11 of ST/AI/2013/1 as a PIP was presented to the Applicant in February 2013, without any consultation, and not implemented prior to the decision not to renew her contract being made. The process for the introduction of a PIP was characterised by bad faith on the part of the FRO and the third SRO, who never had any real intent to allow the Applicant to improve;

e. The extension of her contract for the sole purpose of allowing her to avail herself of her entitlement to sick leave caused her harm with regard to her entitlement to maternity leave, salary increment, sick leave, annual leave and home leave. She was also forced to relocate to her home country, due to a high risk pregnancy. The contested decision and other related measures adopted by the Administration limited the possibility for the Applicant to be reintegrated in the Organization, thereby damaging her career prospects;

f. She requests the Tribunal to:

i. rescind the contested decision;[1]

ii. order the extension of her contract pending conclusion of the rebuttal process;

iii. award her material damages in the amount of USD59,740 in compensation for the loss of her contractual entitlements and USD10,500 for the loss suffered due to her having to leave Geneva on short notice;

iv. if she is not successful in Case No. UNDT/GVA/2013/057, award her compensation in the equivalent of two years' salary plus the amount of contributions made by the Respondent to the UN Pension Fund for four and a half years for breach of contract and loss of opportunity;

v. award her compensation in the amount of USD70,000 for moral damages; and

vi. award her the reimbursement of USD1,000 for the flight ticket of her husband from Geneva to New York, of one-month salary for having placed her wrongly on sick leave with half-pay for the months of March and April 2013, and of USD6,000 deducted from the Applicant's final pay in compensation for a payment made to the United Nations Staff Mutual Insurance Society against Sickness and Accident ("UNSMIS").

52. The Respondent's main contentions are:

a. The decision not to renew the Applicant's contract was not based solely on performance but on five reasons which were cumulatively and individually rational and appropriate not to renew the Applicant's appointment. The principal reasons justifying non-renewal are that her presence in OSLA had a

[1] The Applicant did not pursue this claim.

significant negative impact on the ability of the Office to fulfil its mandate, and that she had lost the confidence of her supervisors, these being matters that cannot be addressed through the Organization's performance management system;

b. In particular, as far back as 2009, the Applicant had been unable to maintain professional working relationships, not only with the FRO and with her second reporting officers, but also with some of her colleagues within OSLA, including those on secondment from the Office of the United Nations High Commissioner for Refugees ("UNHCR"); moreover, that office had expressed its concern with regard to the situation and the Applicant's first and second reporting officers were worried that if the situation were to continue, the funds provided by UNHCR for OSLA operations might have been jeopardized;

c. In addition, the Applicant required special supervisory attention, resulting in an unusually heavy workload for her first and second reporting officers, which had a negative impact on the ability of OSLA/OAJ to fulfil its mandate; one example is the time it took to obtain information from the Applicant with regard to the workload of the OSLA office in Geneva;

d. OSLA has limited resources, and the resources necessary to address the various questions raised by the Applicant's case represent a significant burden for the Office;

e. The mutual loss of confidence between the Applicant and her supervisors, which is uncontested and led to an irreconcilable breakdown of the employment relationship, is sufficient alone not to enter into a new contractual period;

f. The Applicant's performance was rated as "Partially meet[ing] expectations" for two consecutive years, ratings that have been maintained after rebuttal processes and that justify non-renewing her appointment;

g. The Applicant declined to implement the PIP proposed to her for the 2012-2013 performance cycle in accordance with section 10.2 of ST/AI/2010/5, and the Applicant's first and second reporting officers also invested considerable time and effort in attempting to persuade her to complete her workplan for the 2012-2013 cycle, which in the end had to be finalized outside Inspira;

h. The Applicant's performance appraisals do not form the basis of the decision not to renew her contract and there is no causal relationship between the communication of the rating of the Applicant's performance for the 2012-2013 performance cycle and the non-renewal of her contract on 10 May 2013;

i. Sec. 15.6 of ST/AI/2010/5 did not grant the Applicant a right to extension pending rebuttal of her last performance appraisal. Firstly, this provision is not mandatory. Secondly, the non-renewal decision was based on reasons that went beyond performance. Thirdly, the question is academic as the Applicant was not separated from the Organization until after receipt of the rebuttal panel report; and

j. The Tribunal cannot award compensation for the matters identified by the Applicant as they are not related to the contested decision.

Case UNDT/GVA/2013/057

53. The Applicant's principal contentions are:

a. The decisions contested in Case Nos. UNDT/GVA/2013/039 and UNDT/GVA/2013/057 are not the same; the Tribunal itself made such a determination in its Order No. 78 (GVA/2013);

b. The decision not to renew the Applicant's appointment was motivated by bias and taken in retaliation for her having reported prohibited conduct by the FRO and for challenging the handling of her complaint by the third SRO;

c. The Applicant was the subject of harassment and abuse of authority from her direct supervisor, the FRO, and worked in a hostile environment. The Administration failed in its obligation to take all necessary measures to protect her and did not take into account the context of her working environment in its dealings with her. In particular, no action was taken to give effect to her repeated requests to her SROs for reassignment or lateral transfer to another service, the recommendations contained in the report of the rebuttal panel on her performance appraisal for the 2011-2012 performance cycle went unheeded by the Administration, and the second reporting officers took no measure to reprimand the FRO for his conduct towards her. To resolve the issue, the third SRO rather decided to get rid of the Applicant;

d. The five reasons provided to justify the decision not to renew her appointment are not supported by the facts, they are all performance-related and they were contrived to get rid of her without following the mandatory performance appraisal procedure;

e. The first reason, namely that the Applicant's performance only partially met expectations for two consecutive years, is unlawful because it is based on performance appraisals vitiated by procedural irregularities that impaired her due process rights. The Applicant's performance as an attorney was never at issue, and her alleged unsatisfactory performance is rather based on issues related to communication, teamwork and integrity under the broader heading of professionalism. In considering these areas of performance, the Applicant's supervisors did not take into account the hostile working environment in which she was working, nor did they conduct a fair and objective evaluation;

f. There were four consecutive years of highly critical comments from the rebuttal panels about the failure to respect the performance appraisal procedure and the lack of objectivity of the FRO to evaluate the Applicant's performance. No attempt was ever made to remedy the situation and, in light of these comments, the ratings attributed by the FRO to the Applicant's

performance cannot be accorded any credibility. In turn, the third SRO was not in a position to assess the Applicant's performance due to OSLA's structural independence;

g. Finally, her supervisors prepared three successive versions of PIPs, in violation of administrative instruction ST/AI/2010/5, with a view to justify the Applicant's separation and not in order to help her to improve her performance;

h. As to the second reason, namely the Applicant's inability to maintain professional relationship with colleagues, it is not supported by the facts. No consideration was given to the fact that the FRO sought to isolate the Applicant within the team and to discredit her, notably by sharing with colleagues confidential emails about her performance evaluations, the PIP and a reprimand. The third SRO was aware of the situation and took no action to remedy it. Rather, she further isolated the Applicant by directing that any communication with her be made in writing;

i. As to the third reason, namely that the Applicant required an inordinate amount of supervisory attention, it allegedly refers to the Applicant "challeng[ing] feedback from her supervisors and attribut[ing] bad faith and improper motives when none exist", and to her failure to cooperate on her performance appraisal process. Given the history of harassment by the FRO, of which the third SRO was fully aware, it is hard to understand why the third SRO would conclude that the Applicant's suspicion of the FRO's bad faith would not be grounded on reality. In turn, it was the duty of the third SRO to ensure that the FRO fulfilled his duties under the performance appraisal system, which she failed to do;

j. As to the fourth reason, namely that the Applicant had lost the confidence of her first and second reporting officers, it allegedly refers to her having recorded conversations with colleagues without them knowing. No evidence has been provided to support this assertion and no measure has been

taken to sanction the Applicant or even to notify her, in due time, of her allegedly inappropriate conduct;

k. As to the fifth reason, namely that renewal of her appointment would be inconsistent with the operational requirements of OSLA and OAJ, it allegedly refers to concerns that the Applicant was putting at risk OSLA's relationship with UNHCR, who was providing assistance to the Office in the form of non-reimbursable loans. This was merely used as a pretext as UNHCR reassured the third SRO of its continued commitment to OSLA and, in any event, it would be entirely inappropriate for OAJ to take decisions in the management of its human resources based on some comments made by a parent Organization who is not aware of all relevant facts. In addition, in a previous written statement provided by the third SRO to the Dispute Tribunal, she stated that this reason refers to the Applicant contesting numerous measures taken by her hierarchy resulting in OSLA and OAJ spending a lot of time and energy dealing with these issues while their resources were limited;

l. While acknowledging that her relationship with the FRO has broken down irreparably, she emphasizes that it came about in June 2011, when he threatened her and she filed her first complaint of harassment and abuse of authority, in response to which no action has ever been taken. She also acknowledges that her relationship with the third SRO has been harmed subsequent to the formal challenge she made concerning the manner in which the third SRO had handled the second complaint against her FRO. Not renewing the Applicant's contract based on a broken professional relationship would amount to caution the abusive behaviour she was subjected to;

m. On the other hand, the Applicant submits that all of the reasons mentioned by the third SRO are in fact related to her performance, as this Tribunal already stated in its Order No. 78 (GVA/2013), which makes the decision unlawful, as the third SRO did not wait for the report of the rebuttal panel before taking the decision not to renew her contract, and the proper

appraisal procedure was not followed. The fact that her performance appraisal for the 2012-2013 cycle and the decision not to renew her contract were transmitted to her on the same day clearly demonstrates a causal relationship between the two;

n. She requests the Tribunal to:

i. rescind the contested decision;[2]

ii. award her compensation for material damages in an amount equivalent to three years' salary;

iii. award her material damages in the amount of USD10,500 for the loss she suffered due to having to leave Geneva on short notice;

iv. award her compensation in the amount of USD50,000 for moral damages and an additional USD30,000 if the Tribunal finds that she was the subject of harassment and abuse of authority;

v. award her the reimbursement of USD1,000 for the flight ticket of her husband from Geneva to New York, of one-month salary for having placed her wrongly on sick leave with half-pay for the months of March and April 2013, and of USD6,000 deducted from the Applicant's final pay in compensation for a payment made to UNSMIS; and

vi. order the withdrawal of all negative information from her personnel file.

54. The Respondent's principal contentions are:

a. The application is not receivable since in fact it concerns the same decision as in Case No. UNDT/GVA/2013/039. The decision of 3 June 2013 not to extend the Applicant's contract during the rebuttal process is in fact an

[2] This claim was not pursued.

implicit decision confirming the decision of 9 May 2013 not to renew her contract; the application should therefore be rejected; and

b. If the Tribunal were to find the application receivable, it should be considered unfounded for the same reasons stated in Case No. UNDT/GVA/2013/039.

Consideration

Scope of the dispute and receivability of the applications

55. By a first application received on 22 July 2013 and registered under No. UNDT/GVA/2013/039, the Applicant contested the decision expressed in an email of 3 June 2013 by which the Director, Office of the Chef de Cabinet, Executive Office of the Secretary-General, informed her that her contract would not be extended pending the outcome of the rebuttal process concerning her fourth performance appraisal. By a second application received on 14 October 2013 and registered under No. UNDT/GVA/2013/057, the Applicant contested the decision of 9 May 2013 informing her that the third SRO had decided not to extend her contract on its expiration on 11 June 2013.

56. The Respondent claims that the second application, namely the one registered under Case No. UNDT/GVA/2013/057, is not receivable as it is a duplication of the first application filed and thus it challenges the same administrative decision.

57. The two applications were filed by the same Applicant and both concern the non-renewal of her appointment. This bears the question as to whether the email of 3 June 2013 from the Director, Office of the Chef de Cabinet, Executive Office of the Secretary-General, merely confirmed the decision of 9 May 2013 taken by the third SRO or constitutes a separate administrative decision.

58. At the outset, it is noted that the email of 3 June 2013, which forms the basis of the application in Case UNDT/GVA/2013/039, was sent by the Director, Office of the Chef de Cabinet, Executive Office of the Secretary-General, in response to the Applicant's query, directed to him, as to whether her contract would be extended

given the initiation of a rebuttal process against her fourth performance evaluation. However, this email conveyed a decision that was in fact taken by the third SRO who had effectively the sole authority to decide on whether or not to extend the Applicant's appointment. In this respect, the Director, Office of the Chef de Cabinet, Executive Office of the Secretary-General, stated in his email of 3 June 2013: "I have been informed by the Programme Manager that the reasons for the decision not to renew your appointment go beyond performance. Accordingly, section 4.12 of ST/AI/2013/1 does not apply in your case". The Applicant must, therefore, be deemed to challenge this second decision of the third SRO in Case No. UNDT/GVA/2013/039.

59. Between the two contested decisions, namely that of 9 May 2013 and the one of 3 June 2013, a new element came into play, that is the initiation by the Applicant of a rebuttal process against her performance appraisal. This new circumstance would normally have triggered the application of sec. 4.12 of ST/AI/2013/1 and led to the extension of the Applicant's appointment until completion of the rebuttal process. A decision was made that this provision did not apply to the Applicant's case.

60. Since the legal and factual circumstances changed between the two decisions, the Tribunal considers that the second decision is not simply a confirmation of the first. They are two different decisions, and it is incumbent on the Tribunal to assess their lawfulness on the respective dates at which they were taken.

61. The Respondent's objection to the receivability of the application in Case No. UNDT/GVA/2013/057 is thus rejected.

62. Since it is not disputed that both applications were submitted after the filing of requests for management evaluations and within the prescribed time limits, they are both receivable.

63. The Tribunal will thus start by examining the decision of 9 May 2013 not to renew the Applicant's fixed-term appointment, which is the subject of the application in Case UNDT/GVA/2013/057, and then examine the decision of 3 June 2013 not to extend the Applicant's appointment pending completion of the rebuttal process against her last performance appraisal, which is the subject of the application in Case UNDT/GVA/2013/039.

Decision of 9 May 2013 not to renew the Applicant's fixed-term appointment (Case No. UNDT/GVA/2013/057)

Scope and standard of review

64. It is settled law that a fixed-term appointment does not bear any expectancy of renewal (staff regulation 4.5; staff rule 4.13(c); *Syed* 2010-UNAT-061; *Appellee* 2013-UNAT-341). A non-renewal decision can be challenged on the grounds that 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* 2015-UNAT-500; *Assale* 2015-UNAT-534; *Obdeijn* 2012-UNAT-201; *Asaad* 2010-UNAT-021). The Appeals Tribunal held in *He* 2016-UNAT-686 that "[s]uch 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."

65. In turn, when a particular justification is given for an administrative decision it must be supported by the facts (*Islam* 2011-UNAT-115).

66. It is also 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 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).

67. Non-renewal of an appointment on the ground of poor performance must be justified by the evidence and "[i]t is incumbent on the Secretary-General to provide sufficient proof of incompetence, usually on the basis of a procedurally fair assessment or appraisal establishing the staff member's shortcomings and the reasons for them" (*Sarwar* 2017-UNAT-757; see also *Ncube* 2017-UNAT-721). The Appeals Tribunal further held in *Ncube* that "[i]f the Administration can present an e-PAS which is in full accord with the provisions in ST/AI/2010/5, it is then up to the staff member to prove that the content or the findings of the e-PAS are not correct. If, on the other hand, the e-PAS suffers from procedural irregularities, an evaluation can only be upheld if it was not arbitrary and if the Administration proves that it is nonetheless objective, fair and well-based". For an assessment to be "procedurally fair" it must not be tainted by bias, retaliation or prejudice. Objectivity is essential.

68. The Performance Management and Development System itself requires that staff members' performance be evaluated "fairly and consistently" (see, e.g., secs. 5.3(b), 5.4, 11.2, 11.3 of ST/AI/2010/5). Whilst the primary responsibility for conducting performance appraisal falls on the first reporting officers (see, e.g., sec. 5.1), the system also provides for a close monitoring of the first reporting officers' ability to ensure consistency and fairness of the process by the second reporting officers and the head of the offices, and for holding first reporting officers accountable for compliance with the terms of the administrative instruction (see secs. 5.2, 5.4, 5.5, 11.2, 11.3 and 11.4). In the present case, the successive Executive Directors, OAJ, fulfilled the functions of both the second reporting officer and the head of the office.

69. Likewise, supervisors are required to address performance shortcomings in a "fair and equitable manner" (sec. 2.1), including by ensuring an ongoing dialogue with staff members (see, e.g., sec. 2.2) and assisting them to remedy performance shortcomings (sec. 10.1).

70. The Tribunal's role in reviewing decisions not to renew an appointment on the basis of poor performance was recently described by the Appeals Tribunal as follows in *Sarwar*:

> In *Said,* this Tribunal clearly stated that the UNDT must accord deference to the Administration's appraisal of the performance of staff members, and cannot review *de novo* a staff member's appraisal, or place itself in the role of the decision-maker and determine whether it would have renewed the contract, based on the performance appraisal. Performance standards generally fall within the prerogative of the Secretary-General and, unless the standards are manifestly unfair or irrational, the UNDT should not substitute its judgment for that of the Secretary-General. The primary task is to decide whether the preferred and imposed performance standard was not met and to assess whether an adequate evaluation was followed to determine if the staff member failed to meet the required standard. There must be a rational objective connection between the information available and the finding of unsatisfactory work performance.

71. The reference to an "adequate evaluation" must be seen in the context described above (see paras. 67 to 6969 above).

72. Both parties agree that the essence of this case revolves around the broken working relationship between the Applicant and her first and second reporting officers. However, the parties have divergent views as to who is responsible for this situation and whether the resulting decision not to renew the Applicant's fixed-term appointment in the circumstances was taken in a fair, objective and transparent manner, and in accordance with the applicable rules.

73. The crux of the Applicant's case is that the FRO harassed her, abused his authority, created a hostile working environment and isolated her within the OSLA team, which made it impossible for him to assess her performance in an objective manner. She also claims that the third SRO failed to protect her from retaliation, harassment and abuse of authority as was her duty under ST/SGB/2008/5.

74. In turn, the Respondent's case is that the Applicant failed to follow her supervisors' instructions and to fulfil her duties in respect of the performance appraisal, that she could not get along with her colleagues and that she finally lost the confidence of the FRO, and the third SRO. Although the Respondent has some grievances related to the Applicant's work as a legal officer, these do not concern the substance of her work *per se* but rather focus on her alleged lighter case load compared to that of other legal officers, and her failure to adequately report on her work to the FRO. Thus, the decision not to renew the Applicant's contract is essentially based on her alleged inability to work in a team and to follow the instructions of her supervisors. The Respondent argues that the contested decision was justified by the Applicant's unsatisfactory performance as well as four other non-performance-related reasons.

75. In light of the scope of review described above and of the five reasons provided to justify the contested decision, the Tribunal, after having reviewed the voluminous documentary evidence produced by both parties, heard several witnesses, taken judicial notice of numerous previous judgments concerning this matter and carefully considered the parties' submissions, is of the view that the central issues of this case are:

a. Whether the Applicant's performance was evaluated adequately. In particular:

i. whether the FRO was biased in his evaluation of the Applicant's performance and used the performance appraisal system as a means to ensure her separation from service; and

ii. whether the Applicant's SROs took the necessary measures to ensure that her performance would be evaluated adequately and to protect her from retaliation, harassment and abuse of authority;

b. whether any of the four other allegedly non-performance-related reasons is sufficient to justify the non-renewal of the Applicant's appointment; and

c. whether the decision not to renew the Applicant's fixed-term appointment was motivated by bias on the part of the third SRO.

Was the Applicant's performance evaluated adequately?

76. The third reason provided for the contested decision is that the Applicant's performance only partially met expectations for two consecutive years, namely for the performance appraisal cycles of 2011-2012 and 2012-2013, which correspond to the Applicant's third and fourth performance appraisals. The Tribunal must therefore examine if the Applicant's performance was adequately evaluated, particularly during these two cycles.

Origins of the tensions between the Applicant and the FRO

77. According to the Applicant, her relationship with the FRO turned sour when she applied for a position in OSLA's Geneva office during the Autumn of 2009, which led to her selection at the end of 2009 and her move to Geneva in June 2010. The evidence shows that, indeed, the FRO was displeased with the Applicant's request to move to Geneva after only a short stay in Beirut. He tried to convince her to stay in Beirut but he eventually felt constraint to give her the post in Geneva. In this connection, the FRO wrote on 18 November 2011 in the Applicant's second performance appraisal:

> [The Applicant] joined OSLA on 1 September 2009. She was selected for the P-3 OSLA legal officer position in Beirut after a competitive selection process. Soon after joining the Office it became apparent that [the Applicant] was having difficulty managing her caseload. In Fall 2009 the FRO learned that [the Applicant], without advising him, had applied for the vacant OSLA post within the 15-day mark and that [she] was the only 15-day candidate. After consultation it was decided that [the Applicant] would be given the Geneva position although there were concerns that the timing of moving a staff member who had so recently arrived in her current duty station to another, at considerable expense to the Organization, was indeed not in the interest of the OAJ or OSLA, or the Organization as a whole.

> The FRO discussed this matter with [the Applicant] by telephone. During this conversation, she informed the FRO that she was not required to inform her supervisor when she applied for a new position, and that she felt that she had adequately notified him through her expression of interest when they spoke in Beirut. [The Applicant] said if the FRO would not support her transfer she would consider petitioning the Tribunal. This transfer was a particular untimely development during the early days of OSLA's experience, when so much work was still being required to establish basic operations in this new office. [The Applicant] was selected for the Geneva post at the end of 2009.
>
> Given that [the Applicant] was in Beirut and that her transfer would leave the OSLA Beirut office empty, it was decided to delay the transfer until someone had been identified to replace her in Beirut. However, as the Beirut selection process was delayed [the Applicant] was transferred to Geneva in mid-June 2010 without a candidate having been identified for the Beirut Office.

78. The FRO also testified at the hearing that after having tried to convince the Applicant to stay in Beirut, he selected her for the Geneva post out of fear that it would otherwise expose the Office to a legal challenge. He reiterated that he considered that this move was against the interests of the Office.

79. The relationship between the Applicant and the FRO became extremely tense when she moved to Geneva in June 2010, mainly over requests for operational support the Applicant made, which irritated the FRO. An email of 17 June 2010 from the FRO to the Applicant attests of the deteriorating relationship at that point:

> You [the Applicant] further started accusing me of being abusive and said I was threatening you. I told you to put your complaints in writing and you said you have already started to do so. I take that to mean you are building a case against me. If that is the route you plan to take, then please have the courtesy of informing [the first SRO], as Executive Director of the OAJ, and myself in writing.

80. Most extraordinarily, this email was later reproduced by the FRO in the Applicant's second performance appraisal dated 18 November 2011.

81. The documentary evidence and the witness testimonies show that as time passed, the Applicant complained about a lack of support from the Office and a workload that she considered disproportionate. This caused the FRO to consider that the Applicant lacked autonomy in her work and that she was not as efficient as other colleagues in handling her case load.

First performance appraisal (2009-2010 cycle) and recommendation not to renew the Applicant's appointment

82. As the Applicant joined the Organization in September 2009, her first performance appraisal was due to be completed by the end of March 2010. However, it was significantly delayed. The Applicant's workplan was not finalised until 26 March 2010 and the mid-term review was not completed until 30 November 2010. More importantly, the Applicant completed her self-evaluation on 7 February 2011 and it took until 29 July 2011 for the FRO to finalise the performance appraisal and until 10 August 2011 for the first SRO to sign it. In an email of 16 May 2011 to the Applicant, the FRO acknowledged that he had to finalise her first performance appraisal, but informed her that he would await the outcome of the mediation process they had recently engaged to resolve their difficulties before deciding how to proceed with the Applicant's performance appraisal.

83. The Tribunal finds it inappropriate to assert that the mediation process in mid-2011 could justify delaying the appraisal of a performance for the period between September 2009 and end of March 2010, which was long overdue. This already suggested that the conflict between the Applicant and the FRO impacted on the way the FRO evaluated the Applicant's performance or that the rating to be given was somehow part of some negotiations with the Applicant.

84. On 29 July 2011, after the mediation process had failed and while the Applicant was on home leave, the FRO completed the Applicant's first performance appraisal and gave her an overall rating of "Does not meet performance expectations", finding in particular that her competencies of communication and teamwork were unsatisfactory. On 22 August 2011, he recommended the

non-renewal of the Applicant's contract upon its expiry on 31 August 2011 based on this rating and insisted that "[s]ince that time the performance of the staff member in the core competencies of communication and teamwork has not improved" and that "efforts have been made to find an agreed settlement for the staff member and the Organization through mediation, but to date those efforts have failed".

85. This recommendation was not followed by the Executive Officer in the Executive Office of the Secretary-General who rather decided to renew the Applicant's appointment until 30 September 2011 to allow the completion of her second performance appraisal (2010-2011 cycle), which was also overdue.

86. This prompted the Applicant, on 23 September 2011, to request management evaluation of the decision to renew her contract only until 30 September 2011 and, on 27 September 2011, to request suspension of action of the implicit decision not to renew her appointment beyond 30 September 2011. She also sought rebuttal of her first performance appraisal on 18 October 2011. There began a long legal battle by the Applicant to preserve her employment.

87. The Applicant was partly successful in her challenges as, upon recommendation of the MEU, she was advised on 28 September 2011 that her contract would be extended until 11 November 2011 to allow completion of her second performance appraisal. Her rebuttal was also later found to be successful and her appraisal was upgraded to "Fully successful performance" on 2 April 2012.

Retaliation by the FRO

88. Shortly after the Applicant had launched her first legal challenges before the Dispute Tribunal (see para. 868686 above) and while she was on sick leave from 22 September through 17 October 2011, the FRO reassigned all her cases to other OSLA legal officers and, upon the Applicant's return on 18 October 2011, he refused to return them to her. He also stopped the Applicant's access to OSLA's eRoom, so she could no longer access the OSLA files, and ordered the Applicant not to contact the Dispute Tribunal's Registry or the clients.

89. In an email of 19 October 2011 explaining the reasons for these decisions, the FRO clearly expressed his displeasure about the Applicant's recourse to the formal justice system which in essence aimed at reversing the effects of his recommendation not to renew her appointment. He stated that:

> In light of your extended absence from OSLA and general unprofessional behaviour, I had to reassign your cases to other counsel. You have complained that you should have been informed. Consider yourself so informed. Note that you specifically communicated you did not wish to be disturbed [with] work-related issues while on sick leave. This was respected apart from the matter of your performance evaluation.
>
> Further, what I have seen from our own research (as you have not provided an updated case list) is that you do not have many active files, so the workload can be managed by others.
>
> Given your continued unprofessional and provocative behaviour towards myself as your supervisor as well as other colleagues … you cannot be trusted as fellow counsel in [the Office of Staff Legal Assistance]. Your actions, or lack thereof, have been extremely disruptive to the Office. I have never experienced such a difficult personnel situation in my almost twenty years in the UN system.
>
> I will discuss your situation again [with the Executive Director of the Office of Administration of Justice (first SRO)] and whoever else is required … . In the meantime please refrain from calling or sending unhelpful, angry emails to colleagues, including myself.
>
> The fact you are pursuing a formal complaint against OSLA/OAJ and are intent on litigating against the Organi[z]ation is a further consideration. I cannot imagine how OSLA can have a colleague handling files and accessing confidential office information in that circumstance.

90. By another email of 19 October 2011, the FRO informed the Applicant that he would contact two staff members whom she had previously represented in order to advise them that she was no longer in charge of their cases and that another Counsel would be appointed to represent them. He further mentioned that he would inform the Dispute Tribunal of that fact and "ordered" the Applicant not to contact the Registry of the Tribunal nor the two concerned applicants.

91. On 1 November 2011, the Applicant sought suspension of action of the FRO's decision to effectively deprive her of her functions and to *de facto* evict her from the Office. Importantly, the application was granted on 4 November 2011 in *Applicant* UNDT/2011/187, where the Tribunal found that there was no justification for the FRO not to return the Applicant's files when she came back from sick leave and to stop her access to the eRoom, and that this decision *prima facie* amounted to an unlawful deprivation of functions. The Tribunal reached the same conclusion when it decided on the merits of the matter on 20 July 2012 in *Applicant* UNDT/2012/111 and ordered the Secretary-General to pay the Applicant CHF9,000 as moral damages.

92. This Tribunal later found in *Belkhabbaz* UNDT/2018/016, issued on 5 February 2018, that the FRO acted in whole or in part in retaliation for the Applicant having sought recourse in the formal system of administration of justice and that his conduct amounted to abuse of authority under ST/SGB/2008/5. The Tribunal notes that this finding is also supported by the evidence in the present case, which is recalled above. Thus the Tribunal reaches the same finding in the context of the present case, which no longer concerns the investigation into the FRO's behaviour *per se* but rather focuses on a consideration of the reasons that led to the non-renewal of the Applicant's appointment.

93. The FRO was consequently forced to return her files to the Applicant and to restore her access to the eRoom, which he did on 6 November 2011.

94. During her period of absence, the Applicant was also unjustly blamed for missing a deadline before the Appeals Tribunal, in a motion that discredited her before the Appeals Tribunal. In the *Nyakossi* case, which was reassigned to another OSLA Counsel during the Applicant's absence, a motion for extension of time to file a response was filed to the Appeals Tribunal on 11 October 2011, alleging that "[t]he failure to file Mr. Nyakossi's response within the applicable time limit was caused by the unexpected leave of [the Applicant], assigned counsel for Mr. Nyakossi, until 10 October 2011 when the Chief of OSLA assigned Mr. [A. T.] as counsel". The motion also contained a detailed record of the Applicant's absences

and implied that she failed to follow-up on her cases. The motion stated, *inter alia*, that "[o]n 7 October 2011, an official of the OSLA discovered that within the period of 10 August 2011—26 September 2011, Mr. Nyakossi ha[d] instructed [the Applicant] to oppose the appeal but that no response had been filed on or before 26 September 2011".

95. When the Applicant became aware of the filing upon her return to work on 17 October 2011, she raised the matter with the FRO, who, in an email of 19 October 2011, "ordered" her not to contact the Appeals Tribunal. The Applicant eventually demonstrated that the missed deadline was not attributable to her and that the allegations made to the Tribunal were incorrect. New submissions were made to the Appeals Tribunal to rectify the situation, thereby confirming that the Applicant was wrongly blamed for the missed deadline.

96. There can be no doubt that the motion in the *Nyakossi* case was prepared, at the very least, with the FRO's knowledge and acquiescence. The allegations made therein brought the Applicant's professionalism into question, bringing her into disrepute before one of the two Tribunals before which she was required to appear as an OSLA Counsel. Yet, in his evidence before the Tribunal, the FRO did not provide any explanation to justify the filing made to the Appeals Tribunal. Undermining the professional reputation of a lawyer through misrepresentations is a very serious professional and ethical matter that cannot be seen as a mere mistake and that shows a deliberate intent to harm. It is axiomatic in the legal profession that any such allegations are only made after the most serious consideration and with irrefutable evidence, given the impact that they will have upon the professional standing of the person against who they are directed. As this motion was filed in the context where the Applicant had been removed from her cases, it is reasonable to conclude that it was part of a pattern of retaliatory actions taken by the FRO against the Applicant.

Second performance appraisal (2010-2011 cycle)

97. It is in the context of this heated debate between the Applicant and the FRO over the extension of the Applicant's appointment, her right to continue performing her functions and the filing of a motion to the Appeals Tribunal unjustly blaming her for a missed deadline, that the Applicant's second performance appraisal was conducted. The whole process, including the workplan, the mid-point review and the final appraisal, was conducted between 31 October and 18 November 2011. Again, the FRO rated the Applicant's performance as "Does not meet performance expectations", based on her alleged shortcomings in the competencies of communication and teamwork.

98. The second performance appraisal was rebutted by the Applicant and her rating was revised to "Successfully meet performance expectations" on 28 March 2012.

99. In this second performance appraisal, the FRO discussed at length the conflict he was having with the Applicant (see, e.g., paras. 79-80 above). Of most concern to this Tribunal, the FRO disclosed information about a mediation process conducted under the auspices of the United Nations Office of the Ombudsman, including significant elements related to the substance of the mediation discussions. The disclosure of such discussions in a performance appraisal, which is part of the staff member's official status file and may be accessed by current and future managers, is a very serious breach of the principle of confidentiality of mediation discussions under the auspices of the Office of the Ombudsman (see Mediation principles and guidelines, UN Ombudsman and Mediation Services, dated 7 July 2010).

100. There is absolutely no doubt that the FRO, by virtue of his professional and managerial functions, was well aware of this principle of confidentiality, which is inherent to mediation discussions. The Tribunal is of the view that this disclosure of privileged discussions in the Applicant's performance appraisal constitutes a deliberate, apparently malicious and unprofessional breach of the principle of confidentiality to undermine the Applicant in her performance appraisal, and attests

of the fact that the FRO had lost his objectivity and sense of fairness such as to be unable to provide an adequate evaluation of the Applicant's performance (see *Sarwar*, quoted in para. 70 above). As the Applicant is a member of the legal profession and had a full understanding of the nature of the breach of professional, ethical and legal standards by the FRO in making this disclosure in her performance appraisal, this conduct would also reasonably lead the Applicant to be suspicious of the FRO's motivation.

101. From October 2011, there could be no doubt that the FRO was not in a position to conduct a fair and objective appraisal of the Applicant's performance and in particular to evaluate her interpersonal skills. His retaliatory behaviour through the Applicant's judicially declared unlawful deprivation of functions indicates that he was not prepared to let the Applicant exercise her right to challenge the non-renewal of her appointment through legal channels, and also strongly suggests that he was determined to get rid of her from OSLA one way or another. His vindictive approach even led him to go as far as breaching the sacrosanct principle of confidentiality of mediation discussions to support his negative rating of the Applicant's performance.

102. The Tribunal recalls that it is a fundamental right of every staff member to have access to justice when they believe their terms and conditions of employment have been violated, as provided by art. 10 of the Universal Declaration of Human Rights, adopted by the General Assembly in its Resolution 217(A)(III) of 10 December 1948, and art. 14(1) of the International Covenant on Civil and Political Rights, adopted by the General Assembly in its Resolution 2200A(XXI) of 16 December 1966. This is no different for Counsel working in OSLA. Although the FRO alluded to the contrary in his email of 19 October 2011, he provided no cogent reason to support a view that OSLA Counsel, by virtue of their position, would have their right to access to justice curtailed or in any way restricted. Retaliating or attempting to retaliate against staff members exercising their rights under the Staff Regulations and Rules, including through the justice system, constitutes prohibited conduct under staff rule 1.2(g). These are basic principles underpinning the rule of law in the relationship between the Organization and its staff members. The Tribunal is

highly concerned that the FRO, who was the most senior staff member entrusted with the responsibility to ensure legal representation of staff member's rights, would bluntly disregard these fundamental precepts which are at the core of the work conducted by OSLA.

Persistence of a retaliatory behaviour during the third (2011-2012) and fourth (2012-2013) performance appraisal cycles

103. Between the second performance appraisal, completed in November 2011, and the third one, completed in August 2012, the tensions between the Applicant and the FRO grew even further as the FRO and second reporting officers took a number of decisive actions that had the potential to lead to the Applicant's separation, and the Applicant challenged them in the formal justice system and through rebuttal processes.

104. For instance, the FRO issued a reprimand to the Applicant on 17 April 2012, without giving her the possibility to be heard first, as required by the applicable rules. The Applicant challenged this reprimand through a request for management evaluation and it was withdrawn upon advice from the MEU.

105. This period was also marked by several litigation procedures involving the Applicant's renewal of appointments for limited periods (see *Applicant* UNDT/2012/110, vacated by *Appellee* 2013-UNAT-341, and *Oummih* UNDT/2013/045), the rebuttal of her first and second performance appraisals, and the deprivation of her functions (see *Applicant* UNDT/2012/111).

106. In addition, on 27 April 2012, the Applicant filed her complaint of harassment and abuse of authority against the FRO. The complaint was then considered by the third SRO, who forwarded a detailed summary to the FRO on 9 July 2012 and asked for his comments.

107. At the time of completing the Applicant's third performance appraisal in late August 2012, the FRO was manifestly irritated by the legal challenges brought by the Applicant, which he perceived as attacks against the Office and most certainly

against himself, and he was clearly not prepared to accept that this was merely the exercise of the Applicant's rights.

108. In this connection, the FRO wrote in an email of 15 February 2012 to the Applicant that "[he] ha[d] been prudent to not share details of how [he] spent an inordinate amount of time trying to deal w[ith] [the Applicant], and address [her] many complaints, allegations and applications."

109. The FRO again expressed his resentment towards the Applicant's litigation against the Organization in his comments dated 24 August 2012 in respect of the Applicant's complaint of harassment against him. In her note to the file dated 18 September 2012, the third SRO reports the comments made by the FRO as follows:

> In response to these general assertions [made by the Applicant], the [FRO] states that he and other senior OAJ officials have had to spend an inordinate amount of time addressing her applications and complaints and estimates that over the last two years he has spent 35 per cent of his time dealing with [the Applicant].
>
> …
>
> In closing his comments, [the FRO] asserts that [the Applicant's] complaint flatly misrepresents the excellent relationship among the other OSLA legal officers and him. He asserts that she has attempted through her litigation and numerous complaints to demoralize OSLA and attack the reputation of OSLA, him, the second reporting officer and OAJ.
>
> …
>
> [The FRO] denies that he engaged in unlawful retaliation against [the Applicant] but expresses concern about a staff member litigating against the Organization and indirectly against him in extensive repetitive proceedings and complaints having access to individual case files and the OSLA e-Room and using them to raise complaints against him and other OSLA colleagues who have taken over files during her considerable absence. [The FRO] states that while [the Applicant] is entitled to pursue recourse before the internal justice system, there is a legitimate concern to preserve the professional integrity of OSLA and there is no legitimate or reasonable expectation that OSLA/OAJ should assist her in such

> litigation by providing access to private and professional information.

110. The FRO also wrote on 25 October 2012 in his comments on the Applicant's application for rebuttal of her third performance appraisal:

> It is most regrettable that [the Applicant]'s behaviour has resulted in the FRO and other senior officials, both past and present, having to spend an inordinate amount of time addressing her unsatisfactory performance and numerous complaints. It is stressful, unwelcome and no doubt difficult for all involved including [the Applicant]. Nevertheless, since September 2011 [the Applicant] has brought fourteen requests for management evaluation and several applications filed with the UN Dispute Tribunal in Geneva.
>
> The FRO estimates spending up to 30% of his working time dealing with [the Applicant] over the last two years by responding to her numerous formal applications and complaints.

111. Just after the completion of the Applicant's third performance appraisal, on 18 September 2012, the third SRO decided to open an investigation into some of the Applicant's allegations of prohibited conduct against the FRO. The fourth appraisal cycle was consequently marked by an investigation into the conduct of the FRO, where the latter, the Applicant, the SROs and several other colleagues in OSLA and OAJ were interviewed by an investigation panel. The Applicant also challenged the decision of the third SRO to limit the investigation to a number of allegations contained in her complaint (see *Oummih* UNDT/2014/004 of 15 January 2014 and *Oummih* 2015-UNAT-518 of 17 April 2015). Legal challenges also continued over the Applicant's performance appraisal as she sought rebuttal of her third performance appraisal and also filed an application with the Tribunal contesting her first and second performance appraisal reports, as well as decisions of 28 March 2012 and 3 April 2012 to place these appraisals in her personnel file (see *Oummih* UNDT/2013/044 of 8 March 2013, reversed, in part, by *Oummih* 2014-UNAT-420 of 2 April 2014).

112. It appears from the FRO's testimony at the hearing that his attitude towards the Applicant's exercise of her rights had not changed throughout time, and that the displeasure he previously expressed in this respect remained when he completed the Applicant's fourth performance appraisal on 10 May 2013. In his testimony on 15 November 2017, the FRO reiterated that he spent about 30 per cent of his time dealing with the Applicant's complaints, that he felt threatened as the Applicant had stated that she was going after him personally and that this situation created anxiety and anger. He also stated that although it was not "incorrect" for the Applicant to bring applications, this "put the Office in a professionally awkward position" as in the context of a small office, litigation against one another and against the office itself negatively impacted the team spirit.

113. In addition to the above, there is also evidence of the FRO previously expressing reserves about OSLA staff members seeking recourse to the internal justice system. In September 2010, the FRO considered the fact that a UNHCR staff member had a litigation with the Organization as a predicament to her being deployed to OSLA as part of a loan agreement. In an email of 22 September 2010, the FRO wrote:

> Something we should consider is whether it would be good for OSLA to bring on board a staff member who has and/or had a grievance against a UN entity which has been highly supportive of OSLA. What is the status of her complaint against UNHCR for example?

114. In a further email of 15 July 2011, the FRO wrote to the Applicant that OSLA "took [Ms. X.] on board contingent on her w[ith]drawing any complaint against [UN]HCR, which she did". In the same email, he also admonished the Applicant for seeking recourse to the UNHCR Ombudsman in respect of this colleague with whom she apparently had a conflict:

> It is improper and unethical for you to contact the HCR ombuds as you were [Ms. X.]'s counsel. Moreover the NY ombuds office is engaged in trying to work [with] you and [the concerned staff member], and your most recent action will surely cause confusion. I can imagine you contacted HCR to mess up another colleague which is unacceptable behaviour.

115. The fact, at the time of conducting the third and fourth performance appraisals, that the FRO was engaged in several litigation cases with the Applicant in respect of managerial decisions he had taken and allegations of harassment and abuse of authority, that he consistently held against the Applicant her recourse to the internal justice system and that he had taken in the past direct retaliatory actions in response to legal challenges filed by the Applicant, casts serious and reasonable doubts as to his capacity to evaluate her performance in a fair and objective manner. It appears clear that the FRO's irritation with the Applicant's exercise of her rights constituted a motivation to ensure her separation from service and, thus, an ulterior motive in the appraisal of her performance. At the very least, the FRO did not present the sufficient guarantee of objectivity to evaluate the Applicant's performance adequately and his behaviour gives rise to a reasonable apprehension of bias.

Creation of a hostile working environment

116. The ability of the FRO to appraise the Applicant's performance and to adequately fulfil his supervisory functions was also impaired by the nature of his interactions with the Applicant and his peculiar way of leading the OSLA team, particularly in the period corresponding to the third appraisal cycle.

117. Section 2.1 of ST/SGB/2008/5 sets the fundamental principle that:

> In accordance with the provisions of Article 101, paragraph 3, of the Charter of the United Nations, and the core values set out in staff regulation 1.2 (a) and staff rules 101.2 (d), 201.2 (d) and 301.3 (d), every staff member has the right to be treated with dignity and respect, and to work in an environment free from discrimination, harassment and abuse.

118. To ensure respect of this principle, the Organization committed "to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibited conduct, through preventive measures and the provision of effective remedies when prevention has failed", under sec. 2.2 of ST/SGB/2008/5.

119. The Organization relies upon its managers and supervisors to fulfil this obligation and the latter are imposed strict obligations under the bulletin, as set out in sec. 3.2 whereby:

> Managers and supervisors have the duty to take all appropriate measures to promote a harmonious work environment, free of intimidation, hostility, offence and any form of prohibited conduct. They must act as role models by upholding the highest standards of conduct. Managers and supervisors have the obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner. Failure on the part of managers and supervisors to fulfil their obligations under the present bulletin may be considered a breach of duty, which, if established, shall be reflected in their annual performance appraisal, and they will be subject to administrative or disciplinary action, as appropriate.

120. Section 4.6 also provides that:

> In order to resolve problems which could potentially give rise to instances of prohibited conduct, managers and supervisors shall maintain open channels of communication and ensure that staff members who wish to raise their concerns in good faith can do so freely and without fear of adverse consequences.

121. As this Tribunal already found in *Belkhabbaz* UNDT/2018/016, the FRO created a hostile and offensive work environment for the Applicant from at least November 2011 to April 2012, at which point the Applicant filed her complaint of harassment and abuse of authority. Again, the Tribunal reaches the same finding in the context of the present case.

122. In particular, the FRO used an aggressive and abrasive tone and made demeaning remarks in his oral and written communications with the Applicant, as evidenced by emails of 1 November 2011, 16 November 2011 and 15 February 2012 (cf *Belkhabbaz* UNDT/2018/016), amongst others.

123. The FRO also repeatedly copied colleagues from OSLA and OAJ in personal and confidential communications concerning the Applicant's performance appraisal process, a draft PIP and a reprimand for no apparent reason, *inter alia* in emails sent on 13 February, 14 February, 17 February, 12 April, 13 April and 23 April 2012. As this Tribunal found in *Belkhabbaz* UNDT/2018/016, the inappropriate circulation of these emails might reasonably be expected or be perceived as seeking to embarrass the Applicant and, indeed, embarrassed her. This practice persisted despite several requests made by the Applicant to stop it and the intervention of the second SRO (cf *Belkhabbaz* UNDT/2018/016). This conduct cannot be viewed reasonably as anything other than a further deliberate and aggressive act of retaliation by the FRO. It is reasonable to expect that it would have been entirely unnerving to the Applicant, causing her further stress in her relationship with the FRO.

124. In addition, the FRO decided to cease any oral communication with the Applicant as of 6 March 2012. In an email of that day concerning ways to improve the Applicant's performance, he wrote:

> In order to keep our communications efficient, constructive and professional, and as a result of recent telephone conversations veering off topic and recollection of what was said afterwards being inconsistent, we will communicate in writing. That way there will be a record and this should assist our professional communications and ensure greater accountability.

125. There is no doubt that the FRO was faced with managing a difficult staff member, with a forceful personality, and that the Applicant contributed to create a tense relationship with him, as well as with her succeeding second reporting officers and colleagues within OSLA and OAJ. According to the testimony of the third SRO, the Applicant was at times aggressive and disrespectful in her oral

communications with her, the FRO and her colleagues. For example, in November 2012, the Applicant made demeaning remarks about a colleague working in the Geneva OSLA Office during a conference call with the concerned staff member, the third SRO and the FRO, saying that he was "lazy", "working in his pyjamas and not doing anything". The documentary evidence and the testimonies of the FRO and the third SRO also show that the Applicant often refused to follow the instructions of her supervisors. The difficulties of the Applicant to work collaboratively with two colleagues successively on loan from UNHCR to assist OSLA in Geneva and some other colleagues from OSLA and OAJ in New York are also not contested and well documented. The Applicant's communication style was often said to be rude and disrespectful by colleagues.

126. Notwithstanding this, as a supervisor, the FRO was expected to address the situation in a professional manner and to deal with any issue he may have had with the Applicant's behaviour through the appropriate means, formal or informal. It is noted that aggressive and demeaning communications and displaying an unwillingness to restore a courteous relationship with the Applicant after she had lodged complaints in the formal justice system were not appropriate ways for the FRO to act to redress the situation. Such behaviour was in breach of the FRO's obligation to promote a harmonious work environment under sec. 3.2 of ST/SGB/2008/5.

127. Also, this confrontational behaviour by the FRO seriously puts into question his ability to evaluate the Applicant's communication skills in an objective and fair manner. Most certainly, the FRO's inability to communicate properly with the Applicant and the cessation of any oral communication as of 6 March 2012 impaired his ability to proactively assist her in remedying any shortcoming he had identified in respect of her communications skills in the first and second performance appraisals, as was his duty under sec. 10.1 of ST/AI/2010/5 and sec. 4.6 of ST/SGB/2008/5.

128. The sharing of confidential communications about the Applicant's performance also had the potential to negatively influence the perception of her colleagues about her work and to further isolate her in the team, if not bringing her into ridicule. Without saying that the FRO was responsible for the Applicant's difficult relationship with her colleagues and of her alleged shortcoming with respect to the competency of "teamwork", the FRO's behaviour certainly did not help to nurture a harmonious working environment and to foster respect amongst colleagues. It rather suggests that the FRO sought to use the team in his power struggle with the Applicant and antagonise it against her, while at the same time causing significant pressure upon the Applicant, as she could well see that her colleagues had been copied in on confidential emails.

129. The FRO adopted a divisive approach in his leading of the OSLA team, rather than seeking to ease tensions. When colleagues in Geneva experienced difficulties with the Applicant, the FRO asked them to take note of their interactions with her, without asking the Applicant to do the same. Instead of assisting in resolving the difficulties there was an exercise being undertaken to obtain evidence against the Applicant, effectively pitting the colleagues in Geneva against her and creating a situation where staff who would have regarded themselves as part of an "in group" with the FRO, against the Applicant. This is an abhorrent managerial style which rather than supporting the Applicant to resolve any issues with the FRO, added to the conflict situations to which she was exposed.

130. In this connection, the FRO wrote in the Applicant's second performance appraisal on 18 November 2011:

> On 1 February 2011, in an effort to get more support for the OSLA Geneva Office and the staff member, the FRO arranged a loan of a second UNHCR staff member to OSLA Geneva. [The Applicant] personally promoted engaging this UNHCR staff member with OSLA Geneva. However, serious problems between [the Applicant] and the UNHCR colleague began soon afterwards.

> After only a few weeks in the position, the UNHCR staff member contacted the FRO to complain about how she was being treated by [the Applicant], and in turn [the Applicant] complained about her fellow colleague. Given the difficult antecedents and history with [the Applicant], the FRO asked the UNHCR colleague to keep contemporaneous notes of her interactions with [the Applicant].

131. This situation apparently reoccurred later with another colleague on loan from UNHCR to the Geneva OSLA office, as evidenced by two notes to the file dated 24-25 October 2012 and 31 October 2012, sent to the FRO on 31 October 2012, in respect of interactions with the Applicant. One of these even contained a clearly verbatim record of a conversation with the Applicant.

132. Another indication of the divisive leadership exercised by the FRO stems from an email he wrote on 22 September 2010 where he talked negatively about a potential team member. He wrote to the Applicant about a prospect loan of a UNHCR colleague to OSLA, which eventually led the concerned staff member to be deployed to OSLA:

> I rec[eived] reports from UNHCR colleagues that I know well and trust that [Ms. X] was a disaster to work with. We don't need someone like that in our office. And certainly we do not want to pay for a potential liability.

133. Again, this type of communication about a prospect colleague was not prone to promote teamwork.

Third performance appraisal (2011-2012 cycle)

134. Despite his retaliatory behaviour and his attitude towards the Applicant, as described above, the FRO remained fully in charge of conducting her third performance appraisal.

135. The Applicant entered her 2011-2012 workplan in Inspira on 22 February 2012 following a series of exchanges with the FRO to reach an agreement on its exact content. The workplan was approved by the FRO on 6 March 2012. The Applicant refused to sign the mid-term review in the system as none had effectively taken place. On 24 August 2012, the FRO proceeded to

evaluate the Applicant's performance outside the electronic system, as permitted under sec. 4.2 of ST/AI/2010/5.

136. The FRO rated the Applicant's overall performance as "Partially meet expectations". The FRO found that the Applicant did not meet all of the success criteria for any of the three "major goals" set out in the OSLA workplan. It is noted that the FRO did not evaluate the fourth goal contained in the Applicant's workplan. Essentially, the FRO's grievances were that:

a. The number of cases the Applicant handled fell short of the number expected "due to a variety of circumstances including frequent and protracted absences from the Office". Also, several cases assigned to the Applicant had been returned to the FRO without proper explanation;

b. The Applicant failed to share her draft submissions with her FRO for his clearance, to provide updates on her cases and to prepare handover notes to ensure follow-up during her absences;

c. The Applicant failed to accept constructive feedback from her FRO and "to follow his instructions in handling individual cases";

d. The Applicant submitted two articles for publication in the UN Special without seeking advance approval from the FRO. "As her work was of poor quality, it failed to properly represent the high standards of the OSLA Office";

e. "[The Applicant]'s requests for administrative support far outweighed that of her other OSLA colleagues in the field" and displayed a lack of capacity to work independently and manage her work within the resource constraints of the Office;

f. The Applicant failed to participate in OSLA weekly team meetings on three successive occasions in the Spring of 2012, without informing the FRO; and

g. The Applicant had difficulty to maintain professional working relationships with the FRO and OSLA colleagues, and to work collaboratively. "Since joining OSLA there have been numerous aggressive and inappropriate emails, telephone conversations and exchanges instigated by [the Applicant] towards her FRO and fellow colleagues". The Applicant's behaviour towards the NY General Service staff was "often unprofessional", resulting in animosity that was disruptive to the work of the office.

137. The FRO also rated the Applicant's performance as "Unsatisfactory" in respect of the core competencies of "Teamwork", "Planning and Organizing" and "Professionalism". These ratings were essentially based on the shortcoming identified above.

138. No comment or rating was made on the quality of the Applicant's legal work. The conclusion reached by the FRO is that the Applicant "Did not meet all of the successful criteria" for each goal, which suggests that some criteria must have been met. However, the evaluation reports only shortcomings, without any positive indicator.

139. The third performance appraisal was endorsed by the first SRO and the second SRO on 24 August 2012, without any comment. It is noted that due to the structural independence of OSLA, the SROs had not worked directly with the Applicant and were thus not in a position to assess her actual performance.

140. The Tribunal notes that the performance shortcomings identified by the FRO essentially relate to the Applicant's interpersonal skills, her willingness or ability to follow the FRO's instructions and to report on her work and the impact of her absences on the work of the Office. Given the FRO's broken relationship with the Applicant and his behaviour towards her, the FRO was not in a position to adequately and objectively evaluate these aspects of her work, as discussed above.

141. The Applicant sought rebuttal of this performance appraisal. In a report dated 31 January 2013, the rebuttal panel maintained the rating but raised serious concerns about the capacity of the FRO to objectively evaluate the Applicant's performance. In this connection, the panel stated that "[its] report should be viewed in the context of … a relationship between the Staff Member and FRO that had already deteriorated dramatically before the start of the relevant performance period". The panel implicitly recognised that the FRO was part of the problem and thus made the following recommendations:

> *Strongly recommends* that the Staff Member or FRO be urgently transferred to different responsibilities or arrangements urgently made to ensure supervision of the SM by a different FRO.
>
> *Suggests also* that the Staff Member or relevant managers could consider seeking medical advice on the capacity of the Staff Member to continue working under the supervision of the FRO.
>
> *Draws attention to* the inability of multiple SROs and many other administrative services involved in the situation, most notably OAJ, EOSG and OHRM, to suggest and find solutions and alternatives to change the supervisory relationship, as it would be very difficult for the performance of the SM to be adequately appraised by the FRO in the context of their extremely difficult relationship.

Institution of a PIP

142. In March 2012, the FRO forwarded a draft PIP to the Applicant for her review and comments. The Applicant did not respond.

143. Following the Applicant's third performance appraisal, the FRO, in September 2012, proposed again to the Applicant to implement a PIP. This was discussed during a telephone conversation on 24 October 2012 between the Applicant, the FRO, and the third SRO. No agreement was reached. The Applicant did not agree with the content of the proposed PIP nor that a PIP should be implemented at all since she had initiated a rebuttal process of her third performance appraisal. She still maintains today that a PIP was not required given that her third performance appraisal was not final at the time.

144. Upon issuance of the report of the rebuttal panel on 31 January 2012, which upheld the "Partially meet performance expectations" rating, the FRO and third SRO proposed an updated version of the PIP.

145. Although the content of the PIP varied slightly over time, its essence was that the Applicant was to provide a weekly written report on her active case/workload, to send all her draft written submissions in advance of their filing to the FRO for his clearance, to handle in an appropriate manner all cases assigned to her by the FRO, including to meet all deadlines, and to communicate with the FRO and other legal officers of OSLA on case-related matters in writing. The last version of the proposed PIP provided that the FRO would discuss regularly with the Applicant by telephone about her case load and performance-related issues.

146. A number of attempts were made by the FRO and the third SRO to discuss the PIP with the Applicant and a discussion commenced on 13 March 2013, during a telephone conversation in which a representative of the Staff Council participated. The conversation was not concluded and no agreement was reached on a PIP.

147. The representative of the Staff Council wrote about this meeting of 13 March 2013 in an email of 18 March 2013 to the third SRO that:

> [T]hat meeting was unlike any [he] ha[d] ever witnessed in this organization and if [he] had been at the receiving end of it, [he] think[s] [he] would also be in a pretty bad state by now.
>
> The crux of the issue is the relationship between [the FRO] and [the Applicant].
>
> …
>
> It's the real elephant in the room and my suggestion is that instead of plodding through yet more interminable discussions on who said and did what, that we find a third way out of this.

148. He further clarified at the hearing that during this meeting, which lasted for several hours, the FRO raised his voice and did not make any effort to listen to the Applicant's concerns. He stated that the outcome had already been decided, that the third SRO was backing the FRO and not doing anything to find a solution to the

difficult work relationship between the FRO and the Applicant. He stated that the Applicant was upset and uncomfortable, and that he would also have been if he had been in a similar situation. He considered that the proposed PIP was "unrealistic" and that it was not the solution to remedy the real problem at issue, which was the dysfunctional relationship between the Applicant and the FRO.

149. The Applicant refused to resume the discussions after the meeting of 13 March 2013. Instead, she expressed her disagreement with certain aspects of the proposed PIP and suggested some amendments through an email of 22 March 2013. The main point of contention was that the Applicant considered that it was unrealistic for her to report on her cases every week. However, she proposed to report on a bi-monthly basis. She stated that there was no support for the requirement that she handles her cases in an appropriate manner and meet all deadlines as no shortcoming on her work as an advocate had been identified in her third performance appraisal. She also disagreed with the requirement that she communicates only in writing with her colleagues and the FRO on case-related matters as she was of the view that this would not assist her in remedying any alleged shortcoming in her communication skills. She rather proposed to go on mission to New York in order to meet with her colleagues, most of whom she had never met before. She did not object to submitting her draft written submissions in advance, although she stressed that the FRO did not in the past assist her in the review of her submissions and that no issue as to the quality of her submissions had been identified.

150. By email of 26 March 2013, the FRO communicated to the Applicant that her proposed amendments to the PIP rendered the exercise "meaningless", and that he and the third SRO considered that the Applicant had refused the PIP. No further discussion ensued on this matter.

151. The Tribunal does not agree with the Applicant's submission that a PIP could not be implemented as she had lodged a rebuttal process against her third performance appraisal and her rating of "Partially meet expectations" had not been confirmed. Pursuant to sec. 10.1 of ST/AI/2010/5, a PIP is one of several remedial

measures that may be taken to assist a staff member to remedy a performance shortcoming identified during a performance cycle. Furthermore, sec. 10.2 provides that "where at the end of the performance cycle performance is appraised overall as 'partially meets expectations', a written performance improvement plan shall be prepared by the first reporting officer … in consultation with the staff member and the second reporting officer". There is no indication that the process has to be suspended if the staff member initiates a rebuttal process, and rightfully so as the purpose of a PIP is to "proactively assist" the staff member to remedy shortcomings at the first opportunity. It is not a punishment nor a way to ensure the separation of staff members, as it appears to be conceived by the Applicant.

152. As to the process for the establishment of a PIP, the Tribunal notes that while staff members shall be consulted on its content, it remains within the purview of supervisors to give instructions as to the conduct of work, including on reporting obligations. As long as the requirements set forth by the supervisors are reasonable and legitimate, and they are not based on ulterior motives, the Tribunal will not intervene in the managerial discretion. Similarly, a staff member cannot block the implementation of a PIP by simply disagreeing with its terms.

153. Institution of a PIP necessarily requires the cooperation of the staff member, as well as good faith on the part of the first and second reporting officers so it is fit for purpose. In the instant case, none of these two elements appear to have been present.

154. The evidence demonstrates that the Applicant did not show much willingness to engage in a PIP. She was several times unresponsive to proposed PIPs or to take part in discussions in this respect, and maintained the view that it was not required, which, as stated above, was legally incorrect. She, however, showed some level of cooperation in March 2013 when she raised specific concerns on some aspects of the PIP and made counter-proposals, which remained unconsidered.

155. The Tribunal is mindful that discussions with the Applicant on the proposed PIP had been time and energy consuming for the FRO and the third SRO. However, it is unfortunate that the Applicant's questions as to the grounds for requiring her to improve her performance in the handling of her cases were not addressed, since no shortcoming in this respect had been clearly identified in her third performance appraisal. In this connection, the Tribunal notes that the third performance appraisal refers to the missing of a deadline with the Appeals Tribunal, which the Applicant explained was mispresented by the FRO in her performance appraisal. Also, the Applicant's proposal to report on a bi-weekly basis and her expressed willingness to restore communications with her colleagues deserved some consideration. The Tribunal thus does not agree with the conclusion of the FRO and the third SRO that the Applicant had simply rejected the PIP discussed in March 2013.

156. Most importantly, the Tribunal is concerned that in the case at hand, the proposed PIP intended to submit the Applicant to a tighter control by the FRO and to ensure that all their interactions be in a written form, while no consideration appears to have been given to the FRO's difficulties to act as an adequate supervisor for the Applicant and his treatment of her. As further discussed in the following section, no measure was taken to remedy these shortcomings on the part of the FRO. Given that it is undisputed that a large part of the Applicant's alleged performance shortcomings was triggered by her difficult relationship with the FRO, and considering that the FRO also bore responsibility for this difficult relationship, the Applicant's reluctance to submit herself to such control without any appropriate checks and balances to ensure that the FRO would behave adequately is comprehensible.

157. In other words, the proposed PIP, absent any corresponding measure to monitor the behaviour of the FRO, appears to put all the blame on the Applicant for the difficult environment in which she was working. It did not adequately address the root of the problem and it is dubious, in the circumstances, that it could have assisted her in improving her performance and that the FRO actually intended to

give her a chance to improve her performance through the PIP. The limit imposed on oral communication was certainly not prone to assist her in this respect and is certainly not in line with the spirit of ST/AI/2010/5, as discussed above (see para. 124 above). The Applicant had good cause to be suspicious of the motivation of the FRO in light of his past conduct towards her as she expressed in her testimony, which reasonably explains her reluctance to agree to the proposed PIP.

158. Hence, under the circumstances, the Tribunal finds that the Applicant's failure to agree and implement the terms of the PIP as suggested by her FRO and third SRO was reasonable and cannot be held against her; it is thus not a legitimate cause to justify the non-renewal of her appointment.

Fourth performance appraisal (2012-2013 cycle)

159. Despite the recommendations made by the rebuttal panel and the persistent retaliatory behaviour of the FRO towards the Applicant, the FRO also remained in charge of the Applicant's fourth performance appraisal.

160. This fourth performance appraisal, which was also completed outside the electronic system on 8 May 2013, is very similar to the previous one. The FRO found again that the Applicant did not meet all of the success criteria for any of the three "major goals" set out in the OSLA workplan. The FRO's grievances were essentially the same as those identified in the third performance appraisal, namely that:

a. The Applicant handled a lesser case load than that of her colleagues, which the FRO attributed to a difficulty from the Applicant to manage her case load while in the Office, and to her frequent absences leading her to be away from the Office "approximately 40% of the time during the period from 1 August 2012 to 31 March 2013";

b. The Applicant failed to share submissions with her FRO, to provide updates on her cases and to prepare hand-over notes to ensure follow-up during her absences;

c. "Although some clients indicated that they were satisfied with [the Applicant]'s work on their cases, the FRO received several complaints from [the Applicant]'s clients that she was unresponsive";

d. The Applicant failed to accept constructive feedback from her FRO;

e. "[The Applicant]'s need for administrative support outweighed that of her other OSLA colleagues in the field" and displayed a lack of capacity to manage her work within the resource constraints of the Office;

f. She regularly failed to participate in OSLA weekly team meetings; and

g. She had difficulty maintaining professional working relations with the FRO and OSLA colleagues and working collaboratively. She raised her voice on several occasions and "accused fellow legal officers of being lazy, dishonest or incompetent".

161. The FRO also rated the Applicant's performance as "Unsatisfactory" in respect of the core value of "Integrity and Professionalism" and the core competencies of "Teamwork", "Communication", "Planning and Organizing" and "Client Orientation". These ratings were essentially based on the shortcomings identified above, except for the core value of "Integrity and Professionalism", in respect of which the FRO wrote that "[o]n 13 March 2013 [the Applicant] advised the FRO and SRO that she ha[d] been tape recording all her conversations with colleagues in [New York], without their knowledge or consent" and "[the Applicant] was not always forthright in her representations to the FRO".

162. Again, no comment was made as to the quality of the Applicant's legal work and the evaluation reports only shortcomings despite the fact that she partially met the performance expectations.

163. An appraisal from the Applicant's supervisors during her temporary assignment with OHCHR for the period from 25 April to 31 July 2012 was attached to her fourth performance appraisal. The Applicant's performance was rated as "Fully satisfactory". It stated, *inter alia*, that the Applicant "delivered well", had

"excellent drafting skills and drafted a variety of correspondence in Geneva and Tunis", "had good knowledge of the political and human rights situation in North Africa" and "demonstrated the required competencies of integrity and professionalism". There is no indication, however, that this appraisal report was taken into account in any manner for the Applicant's formal rating for this cycle by the FRO or the SROs.

164. The fourth performance appraisal was endorsed by the third SRO, with a mention "I agree with the comments of the FRO", on 8 May 2013. It was also signed, with the same mention, by the second SRO, who acted as the Applicant's SRO for a period of five weeks at the beginning of the cycle, between 1 April and 7 May 2012, and who had then retired.

165. The Applicant takes issue with the fact that the second SRO signed her fourth performance appraisal although she only acted as such for a short period at the beginning of the cycle, whilst her supervisor during her assignment at the OHCHR for a period of more than three months was not added as an additional supervisor.

166. The Tribunal notes that the signature of the fourth performance appraisal by the second SRO, whilst it does not constitute a procedural irregularity, is surprising in the circumstances given her limited role in this performance appraisal process and the fact that she had retired at the moment of completing the final evaluation. The Applicant took her assignment with OHCHR three weeks after the start of the appraisal cycle, where she was no longer under the supervision of the FRO or the SRO. The second SRO was not in any way involved in the initiation of the workplan either, as it was only completed upon the Applicant's return from her temporary assignment and, by the time, the second SRO had retired. Given that the role of the SROs is not *per se* to evaluate the performance of staff members but rather to ensure that the FROs follow the proper procedure and ultimately endorse the whole appraisal process, the Tribunal fails to understand why the second SRO would sign the Applicant's fourth performance appraisal.

167. In turn, it is equally surprising that the Applicant's supervisor during her assignment at OHCHR was not made part of the formal appraisal process or that his comments on the Applicant's performance were in no way reflected in her formal appraisal, especially in the circumstances of this case where the capacity of the FRO to objectively evaluate the Applicant's performance had been seriously put in question, including by the rebuttal panel for the third performance evaluation. In this connection, it is noted that the Applicant's supervisor at OHCHR was not designated as an additional supervisor or as a FRO for the period covering the Applicant's temporary assignment, as could have been done under secs. 3.3 and 5.2 of ST/AI/2010/5. This does not constitute *per se* a procedural irregularity as the rules allow for some flexibility and are not entirely clear as to the need to change the supervisory line during temporary assignments of less than six months (see, e.g., secs 3.2, 3.3, 5.2 and 8.4 of ST/AI/2010/5). However, it is certainly a missed opportunity to get an objective appraisal of the Applicant's performance, while working outside the hostile environment in which she was operating in OSLA.

168. Overall, the Tribunal is of the view that the fact that the Applicant's performance appraisal during her three-month temporary assignment was not taken into account in her formal performance appraisal and overall rating, whilst the endorsement of the appraisal process by a SRO who did not effectively participate in the said process was sought and formally recorded, shows an unfair attempt by management to legitimise the appraisal conducted by the FRO, who was not objective, while ignoring contradicting views that would favour the Applicant.

169. The Applicant sought rebuttal of her fourth performance appraisal. In its report of 27 February 2014, the rebuttal panel, composed of members different from those who reviewed the Applicant's third performance appraisal, upheld the rating, but in an entirely contradictory manner, this differently constituted panel again independently raised serious concerns as to the ability of the FRO to adequately fulfil his supervisory role. In this connection, the panel wrote that "it [was] clear that tensions between the FRO and the plaintiff, which escalated to involve the SRO and other actors, seriously affected their ability to maintain a productive

professional relationship which is a pre-condition for the successful delivery of goals 2 and 3".

170. The panel was also highly critical of the appraisal process, finding that:

> [T]here are serious procedural issues with the way the [Applicant]'s performance and evaluation were managed.
>
> Indeed, the performance evaluation is tainted by exactly the same sorts of procedural irregularity as those invoked by the UNDT in two recent judgments to invalidate entirely the evaluations covering 2009-2010 and 2010-2011: the workplan was left undefined until almost the end of the cycle, the mid-term review was a travesty and there appears to have been nothing resembling a staff/supervisor discussion before the end-of-cycle sign-off. The FRO seeks to lay the blame for this entirely at [the Applicant]'s door, but the evidence submitted to the panel does not support such a tendentious reading.

Monitoring of the situation by the Applicant's SROs

171. As recalled above, the Applicant's SROs had a duty to ensure that her performance was evaluated adequately and that the FRO properly fulfilled his obligations under ST/AI/2010/5, as provided by secs. 5.2, 5.4, 5.5. 11.2, 11.3 and 11.4 of said administrative instruction (see para. 68 above).

172. They also had a duty to ensure that the Applicant was working in a harmonious environment and that she was not subject to harassment and abuse of authority, as provided in sec. 3.2 of ST/SGB/2008/5 (quoted above at para. 119119) and in sec. 5.3, which further provides that:

> Managers and supervisors have the duty to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to take action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings.

173. As Heads of Office, the SROs were also responsible to hold the FRO accountable for his compliance with the terms of the bulletin (see sec. 3.3) and for monitoring the situation once the Applicant had filed her complaint for harassment and abuse of authority against the FRO. In this connection, sec. 6.4 provides that:

> Where a fact-finding investigation is initiated following receipt of a formal complaint of prohibited conduct, appropriate measures shall be taken by the head of department, office or mission to monitor the status of the aggrieved party, the alleged offender and the work unit(s) concerned until such time as the fact-finding investigation report has been submitted. The purpose of such monitoring shall be to ensure that all parties comply with their duty to cooperate with the fact-finding investigation and that no party is subjected to retaliation as a result of the complaint or the fact-finding investigation. Where retaliation is detected, the Ethics Office shall be promptly notified and the matter shall be handled in accordance with the provisions of ST/SGB/2005/21. The Office of Human Resources Management may request information from the head of department or office, as necessary.

174. The actions of each of the Applicant's successive SROs are examined in turn below.

First SRO

175. The Applicant's first SRO, who covered the period from her appointment until 31 January 2012, had received a first complaint by the Applicant on 1 July 2011, exposing difficulties she was having with her FRO. He considered that this complaint did not require his intervention and took no action on it.

176. Yet, the first SRO had reasons to suspect that the Applicant was possibly working in a difficult environment and notably subject to aggressive language from the FRO. In this connection, the first SRO told the panel who investigated the Applicant's complaint of harassment against the FRO on 4 June 2015 that:

> [The FRO] is human and sometimes he could be "hot-blooded". There were even occasions when he communicated in strong language to USGs, for which I had to make amends. He used unacceptable language and I had to speak to him about this. I don't see a particular problem in his considering a particular act of [the Applicant] as "unethical" if he had his good reasons for doing so, even if the tone is strong.

177. The Tribunal notes that this statement is part of a separate case, namely Case No. UNDT/GVA/2017/018, and that it was collected by a fact-finding panel that was found to have been unlawfully constituted. These two factors, however, do not

preclude the use of this statement as evidence in the present case. Firstly, the Respondent is well aware of this statement as it was part of a connected case concerning the Applicant in which he was also involved, and this statement was, in part, referred to in *Belkhabbaz* UNDT/2018/016 (at para. 174). There can thus be no prejudice for the Respondent to refer to this statement in the course of the present Judgment. Secondly, the Tribunal previously held in *Belkhabbaz* that although this statement, as well as other similar ones, was collected by an unlawfully constituted panel, it is sufficiently reliable to be used as evidence as several witnesses testified about the FRO's aggressive and abrasive tone in his oral communications with the Applicant, and it is further corroborated by written communications of the same nature sent by the FRO to the Applicant. Therefore, the Tribunal will, *proprio motu*, include this statement in the present case file, to ensure its completeness.

178. Most importantly, the first SRO was the Applicant's SRO at the time the FRO unlawfully deprived the Applicant of her functions in October 2011, just after she initiated challenges in respect of the renewal of her contract (see paras. 88-90 above). He was even copied on the FRO's email of 19 October 2011, where he clearly expressed that the Applicant's legal challenges against "OAJ/OSLA" was a consideration for this decision (see para. 89 above). The first SRO must have been aware of the Tribunal's findings in Judgment *Applicant* UNDT/2011/187 issued on 1 November 2011, and indeed this knowledge would be imputed to him, that this decision was unlawful as not justified by operational requirements.

179. The first SRO was also aware that the Applicant was improperly blamed for the missed deadline to file the appeal in the *Nyakossi* case (see para. 94 above). The Applicant specifically asked him to investigate the matter, alleging that her name was included in that motion by her FRO and possibly one other legal officer "maliciously and with a discriminatory intent". The first SRO concluded that the Applicant's name had been "erroneously" included in the motion and that she had not adduced any evidence of malicious intent. He considered the matter closed, given that the situation had been rectified before the Appeals Tribunal, as appears

from an email of the second SRO to the Applicant dated 21 March 2012. The Tribunal is concerned that blaming the Applicant for a missed deadline in a motion to the Appeals Tribunal, which could seriously impair her credibility and professionalism as an attorney, could be considered as a mere error, especially in the context where the FRO had attempted to deprive the Applicant of her functions.

180. Although these disturbing events happened at the time that the FRO was conducting the Applicant's second performance appraisal, the first SRO took no action to ensure that the Applicant would be evaluated objectively. Rather, he signed the appraisal on 21 November 2011, saying that "[he] agree[d] with the FRO overall rating and comments". This is particularly worrying in the context where, by that time, the Applicant's employment with the Organization was at stake.

181. Later on, towards the end of 2011, the first SRO suggested that the Applicant be supervised by the then Principal Registrar, OAJ. However, the Principal Registrar said that it was not possible as this would create a conflict of interest, and rightfully so. Other options to change the supervisory lines were explored but since there was no P-4 post within OSLA and the FRO was the highest ranked staff member in OSLA, no other option to supervise the Applicant was deemed appropriate.

182. These efforts made by the first SRO to remove the Applicant from the supervision of the FRO show that he had concerns about the latter's capacity to fulfil the FRO role. The Tribunal accepts that it may not have been possible to change the Applicant's reporting line in the context of OSLA. However, it is highly concerned that absent any viable solution in this respect, no specific action was taken by the first SRO to remedy the situation in another way, notably by closely monitoring the FRO's behaviour, by giving clear directions in writing or through the performance appraisal process, by recommending the FRO to undertake managerial training or even by reprimanding him if necessary.

Second SRO

183. Once the first SRO retired at the end of January 2012, the then Principal Registrar, OAJ, was appointed to act as OiC, OAJ, and thus became the Applicant's second SRO. She testified that upon taking the functions, she was already aware of the difficult relationship between the FRO and the Applicant, which she characterised as "a personality problem". She was notably informed of the Applicant's claim that the FRO had created a hostile working environment in July 2011.

184. During the short time she was in office, the second SRO had to deal with the FRO's sending of confidential emails to OSLA and OAJ colleagues, amongst other things. She expressed the view that these communications of confidential emails by the FRO were "inappropriate" and could contribute to isolate the Applicant in the team. She said that she felt it was important to ask the FRO to refrain from doing this, which she did. She acknowledged in her testimony that it was unclear whether the FRO had listened to her and she believed he did not as the Applicant informed her afterwards that the situation had reoccurred. However, for entirely unexplained reasons, she took no further action in respect of such a serious breach of confidentiality amounting to a retaliatory act which could reasonably be expected to bring the Applicant into ridicule from her colleagues and to damage her professionally.

185. The second SRO was also made aware of the incident related to the *Nykaossi* appeal by the Applicant (see para. 94 above) and was requested to investigate the matter. She summarily endorsed the first SRO's conclusion that the Applicant's name was "erroneously" included in the motion and considered the matter closed. This incident should, at the very least, have alerted the second SRO to the fact that the FRO may not have been fair with the Applicant and to keep him under close scrutiny.

186. As to her relationship with the Applicant, the second SRO said that she talked with her a few times over the phone, during what she qualified as "long and unpleasant conversations". She then decided to communicate with the Applicant

only in writing, as appears from an email dated 23 March 2012, and instructed the Applicant to do the same. This disengagement with the Applicant was certainly not prone to ensuring that the FRO would not abuse his supervisory role.

187. The second SRO was also involved in the issuance of a reprimand initiated by the FRO against the Applicant, in April 2012 (see para. 104 above). She stated that this reprimand had to be withdrawn after the Applicant challenged it because there had been an error. Effectively, the evidence showed that the Applicant had not been heard. The second SRO endorsed this process, which was not in accordance with the rules. This attitude by the second SRO displays again a lack of engagement with the Applicant, to the point of even ignoring the applicable procedures, as well as a lack of oversight over the FRO's actions towards the Applicant.

188. The second FRO also appears to have been reluctant about the Applicant exercising her rights in the informal or formal internal justice system, such that she refrained from implementing processes foreseen in the rules out of fear that her actions would lead to further legal challenges by the Applicant. In her statement to the second panel investigating the Applicant's complaint against the FRO, the second SRO told the investigators in respect of the Applicant's attitude towards the PIP proposed in March 2012 that:

> She objected. She refused to cooperate. She said this was a gesture of bad faith, etc. In the end, she never agreed to the PIP. We could not force this on her if she refused to cooperate. She would have turned this into yet another appeal to the Administrative Tribunal. I think she already had a half dozen or more cases against the administration, before the Tribunal. So we gave up on this course of action. This was unfortunate, because if we had been allowed to guide her performance, we might have been able to help her to remain in the system.

189. She further stated in respect of an email where the FRO admonished the Applicant for her having recourse to the UNHCR Ombudsman (quoted at para. 114 above):

> Q: Could you comment on the tone and language of some of [the FRO]'s email communications with [the Applicant]? In particular, please comment on the exchange with [the Applicant] in connection with her going to visit the UNHCR Ombudsman concerning her tense relations with [Ms. X].
>
> A: I believe that I was not O-i-C at the time of those exchanges about Ms. X and the discussions of [the Applicant] with the UNHCR Ombudsman. However, I find it difficult to accept that a staff member will disregard her boss's instructions, which is what I understand happened in this case. This might explain why [the FRO] became so upset at [the Applicant].

190. This statement was taken in Case No. UNDT/GVA/2017/018, and will be added to this case file, for the reasons set out in para. 177 above.

191. The evidence shows that the second SRO made no effective effort to protect the Applicant against potential retaliatory actions by the FRO or to put an end to his illegitimate or unlawful actions towards the Applicant.

Third SRO

192. The third SRO, who took office on 1 May 2012, was immediately made aware of the situation between the Applicant and the FRO. She was briefed by her predecessors and the FRO and said that she immediately witnessed the tense relationship between the FRO and the Applicant. She also received the Applicant's complaint of harassment and abuse of authority against the FRO a few days after her taking office, on 9 May 2012, on which she was requested to take action. In this process, she was notably provided with documents related to the conduct of the FRO prior to her arrival.

193. In her note to the file dated 18 September 2012 in respect of the Applicant's complaint against the FRO, the third SRO expressed three areas of concerns in respect of the FRO's behaviour towards the Applicant, for which she indeed triggered a fact-finding investigation.

194. Firstly, the third SRO wrote that she was "troubled by the tone and content of some of [the FRO]'s direct e-mail and verbal communications with [the Applicant], which could be reasonably construed as creating hostile working conditions for [the Applicant] within OSLA".

195. Secondly, the third SRO wrote in respect of the sharing of confidential emails by the FRO, which happened just before she took office, that "[t]hese e-mails are troubling, given that the PIP and reprimand were confidential and personal matters and the e-mails appear to have been sent to individuals who were not strictly on a 'need to know' basis".

196. Thirdly, the third SRO expressed concerns that the FRO may have retaliated against the Applicant when he removed her from her cases in October 2011, writing that:

> In my view, the Organization as employer has a duty to assure staff members that they will not be retaliated against for participating in the internal justice system. I am troubled by [the FRO]'s 19 October 2011 e-mail, which appears to suggest that the fact that [the Applicant] had recourse to the internal system of justice was a consideration in his reassignment of her cases.

197. These concerns persisted over time and prompted the third SRO to take some remedial actions.

198. As to the first and second issues mentioned above, the third SRO testified at the hearing that "[she] did discuss with the FRO the importance of not sending communications such as the ones identified in her complaint, that those communications in her view were not appropriate and he had to be very mindful of the need to maintain appropriate confidentiality as well as of the need not to do anything that could worsen his relationship with the Applicant or put other OSLA colleagues in [the] middle of [the] relationship". She also stated that she "had conversations with the FRO about management style and the need to be very mindful of how he interacted with the Applicant, in a professional and respectful manner, including in conveying messages in a professional manner". She said that

she provided support to the FRO to improve his management skills. In particular, she held weekly meetings with him where she insisted on the importance of being more aware of his tone and demeanour with his staff, enrolled him in a development program offered by OHRM and in an executive coaching to increase his self-awareness as to how he came across to others.

199. The third SRO took no decisive action against the FRO in the form of a reprimand or reflected his managerial shortcomings in his performance appraisal. In her testimony, the third SRO was reluctant to recognise that the FRO had issues with his communication skills, and even stated that from what she witnessed he was always professional in his communications with the Applicant, which was not the same for the Applicant. In the Tribunal's view, this statement was characteristic of an approach whereby the third SRO attempted to demonstrate that she took proactive actions to ensure that the FRO properly exercised his supervisory duties towards the Applicant, while at the same time trying to avoid any formal recognition of an existing problem.

200. As to the third issue mentioned above, the third SRO acknowledged in her testimony that she was notably made aware of the comments the FRO made on 25 October 2012 to the rebuttal panel expressing his resentment with the Applicant seeking recourse in the formal justice system (see para. 110 above). She reiterated her concerns over possible retaliatory behaviour by the FRO, stating that "the FRO was not happy with the Applicant's recourse to the internal justice system". She further stated that she "had a number of conversations to recall him that it was her right, and to get over it and get on with it. This is her right and it can't be held against her in any matter." Being asked if she was concerned about the fact that it could be held against the Applicant on a personal level, she responded that "[she] was always aware that the FRO was not happy with the Applicant having brought proceedings in the internal justice system. So it was on [her] mind. On a number of occasions, on an ongoing basis, [she] would remind the FRO that it was her right and could not be a factor on his treatment of her or his evaluation of her". Nothing was put in writing to record the reminders given.

201. The third SRO also stated that she had to remind the FRO of his duty not to retaliate against the Applicant following her filing of the complaint of harassment in April 2012, although she claimed that this advice was not prompted by any particular action by the FRO. She acknowledged in her testimony that it was very important to ensure that the Applicant was not retaliated against following the filing of her complaint of harassment. She explained that she envisaged to transfer the Applicant but this was not possible as her authority was limited to OAJ, in which there was no vacant post at the time.

202. The third SRO's solution was to try to monitor the situation. However, she explained that this was difficult as she was not involved in OSLA's daily activities and received contradictory information that the Applicant was the problem, not the FRO. She said she had to rely on talking with the FRO and intervened when she felt it was appropriate. She stated that she discussed the Applicant's situation "almost daily, certainly weekly" with the FRO, to ensure that he was not creating a hostile work environment in light of the Applicant's allegations. She stressed the need for the FRO to be mindful of his tone and demeanour, and in terms of substance to ensure that he treated the Applicant fairly and responded to reasonable requests she may make. These interactions with the FRO were all done verbally and nothing was put in writing.

203. The third SRO also had communications with the Applicant, mainly at the latter's request, but these were conducted over the phone only and much more limited given the distance. The Applicant asked to meet with her in person to discuss the situation but the third SRO declined. There is no evidence, that the third SRO proactively contacted the Applicant to monitor the situation.

204. The Tribunal is highly concerned by the fact that measures taken by the third SRO to ensure protection of the Applicant against retaliation, particularly in the context of her complaint of harassment, were limited to oral communications with the FRO. This limited scope of action is particularly worrying given the history of retaliation displayed by the FRO, ongoing concerns that the FRO continued to be upset with the Applicant seeking recourse in the formal justice system, the

likelihood that a complaint filed personally against the FRO could possibly prompt further retaliation and the recognition of the third SRO that she had a limited possibility to closely monitor the situation given OSLA's structural independence from OAJ.

205. The Tribunal is further concerned that despite these circumstances, the third SRO considered that the FRO was nevertheless in a position to make a fair and objective assessment of the Applicant's performance, as she testified. She acknowledged however that when the Applicant "put her mind to it", she could perform well and that it was difficult for her to evaluate whether the Applicant's performance was affected by her working environment, because of the distance between them. The third SRO was also specifically warned by the rebuttal panel in its report of 31 January 2013 that, in its view, the FRO was not in a position to evaluate the Applicant's performance (see para. 141 above), but she considered that the panel had exceeded its mandate and that the advice was not warranted.

206. Notwithstanding the foregoing, the third SRO decided to get closely involved in the completion of the Applicant's performance appraisal and the implementation of a PIP. She said that having been informed that two previous performance appraisals had been rebutted, she wanted to ensure that both the Applicant and the FRO would fulfil their duties under the applicable procedure. Unfortunately, this caused her to get overly involved in OSLA's operations and led to a breach of the client-attorney privilege, which also raises serious concerns to this Tribunal.

207. In particular, the third SRO asked the Applicant to provide her with case reports to assess her claim that she had been assigned a "disproportionate" case load, and a complaint the Applicant made on 9 August 2012 that she "had not been assigned a single case in litigation phase" since her return to OSLA on 1 August 2012. From August 2012, she demanded and received a number of case reports from the Applicant, as well as from her colleague in Geneva. Names of staff members were redacted but the reports contained detailed information about the cases and strategic advice. The third SRO even annotated them to assess the cases' status and to identify priorities.

208. This disclosure of information concerning ongoing cases handled by the Applicant constituted a breach of the client-attorney privilege, which OSLA Counsel are bound to respect pursuant to secs. 12 and 15 of the Guiding Principles of Conduct for Office of Staff Legal Assistance (OSLA) Affiliated Counsel in the United Nations ("Guiding Principles of OSLA"), in force since March 2010. These provisions state, respectively, that "Counsel shall preserve the confidence of the client even after the counsel/client relationship has ended" and that "Counsel shall preserve the confidentiality of proceedings in which he or she is acting".

209. Pursuant to sec. 7.1 of ST/SGB/2010/3 (Organization and terms of reference of the Office of Administration of Justice), OSLA is responsible "to provide legal assistance to staff members in an independent and impartial manner". Consequently, the third SRO, as Executive Director of OAJ, was not entitled to receive any substantive information regarding ongoing cases. This, placed limitations on the rights of the SRO to have access to information which may normally be available to a SRO. It is evident that the structure of OAJ and OSLA is such that a legal officer would find it exceptionally difficult to resist a demand from a SRO to produce case summaries, notwithstanding that they were confidential. Such a refusal would certainly have resulted in further formal criticism of the Applicant by her managers.

210. The FRO was aware of this practice and even endorsed it, without raising any issue of breach of client-attorney relationship. Rather, it appears that the FRO was ready to breach himself the attorney-client privilege to support his claim that the Applicant was underperforming.

211. In this connection, on 18 January 2013, the FRO copied the third SRO on a confidential email to the Applicant where he admonished her for not having settled a case as he had instructed her to do. In an email of the same day, the Applicant raised concerns to the FRO that he was sharing confidential clients' matters with the third SRO and explained that the client did not want to settle and she had to follow his instructions. By an email of the same day, the FRO responded that "as it

concerns specific performance issues [the third SRO] need[ded] to be informed" and added that "[he] trust[ed] she [would] maintain the confidence".

212. The third SRO said in her testimony that she did not feel comfortable being copied on these emails and that it was not appropriate for her to get too much involved in OSLA's operations. However, she took no action to cease this practice or to reprimand the FRO for his breach of the client-attorney privilege and unprofessional behaviour. Similarly, she acknowledged that it was inappropriate for the FRO to force a settlement but she took no action. In this respect, the Tribunal notes that the responsibility to advise the client on a possible settlement laid with the Applicant, as her Counsel, and it was against sec. 8 of the Guiding Principles of OSLA for the FRO to intervene in this matter. In this connection, sec. 8 provides that (emphasis added):

> In regard to the conduct of his or her duties, counsel shall not seek or accept any material reward or benefit (other than UN salary, in the case of OSLA Legal Officers), nor any career advantage. Nor shall counsel be inhibited from advising or taking any course of action which he or she considers proper by any fear of adverse consequences for himself or herself. Counsel shall neither seek nor accept directions from any quarter whatever in the discharge of his or her duties to a client, save those arising from the counsel/client relationship.

213. The Tribunal is highly concerned that for the sake of dealing with the Applicant's performance, the FRO and the third SRO breached the attorney-client privilege, which they both well knew by virtue of their functions is a fundamental professional obligation for OSLA Counsel and the Chief of OSLA. They also compromised OSLA's independence, which is a cardinal principle of the internal justice system. Such a fundamental mistake suggests that they may have both lost their objectivity in dealing with the Applicant.

Conclusion

214. It is apparent that the FRO lost his ability to objectively evaluate the Applicant's performance as his relationship with her deteriorated in May 2010 or, at the very least, from the time that the Applicant started to challenge his decisions

in the internal justice system and through the rebuttal process in September 2011. The FRO clearly retaliated against the Applicant for seeking recourse in the internal justice system and abused his authority in October 2011 by unlawfully depriving her of functions and seeking to evict her from the office. This was a turning point in the relationship between the Applicant and the FRO, which required an immediate intervention from the first SRO to avoid further degeneration. Nothing was done, causing the relationship to deteriorate beyond repair and allowing the FRO to persist in his retaliatory behaviour.

215. The FRO's persistent irritation with the Applicant's recourse to the internal justice system to challenge his managerial decisions created a clear motive to evaluate her performance negatively to ensure her departure from OSLA and is evidence of bias. The FRO's creation of a hostile working environment through aggressive and abrasive communications with the Applicant, and the repeated circulation of confidential emails discrediting her within the team further impaired his ability to objectively assess the Applicant's performance, particularly in the areas of communication and teamwork. The creation of such an environment may have also affected the Applicant's ability to perform well in the team, knowing that she had been significantly demeaned by the FRO in the eyes of her colleagues.

216. Also, the FRO significantly breached very basic legal professional conduct obligations, which if they had occurred in a domestic setting would have been clearly cause for a referral to an ethics committee or the like to consider if he was a fit and proper person to hold a practising certificate as a lawyer. The conduct was such as to bring into question the FRO's compliance with the UN Charter requirements for international civil servants in respect of professionalism and ethical conduct.

217. The SROs failed in their responsibility to ensure that the Applicant was working in a harmonious environment, free from harassment and abuse of authority, and that her performance would be evaluated adequately. They were all well aware of the difficult situation the Applicant was facing but took no decisive action to put an end to it, as was their duty to do so. They were undoubtedly faced with a difficult

situation to resolve, as it is clear that the Applicant also had her faults and contributed to the tense relationship she had with the FRO and some members of the OSLA team and in OAJ. They admittedly had limited possibilities to move the Applicant or change her supervisory line.

218. However, they were the direct supervisors of the FRO and, as such, had to control or sanction his inappropriate or even unlawful behaviour. Oral communications with the FRO were apparently not enough to achieve this goal in the circumstances. It is apparent that the managers of the FRO, whilst recognising that the conduct of the FRO was unacceptable, did nothing to actually sanction or stop his behaviour. All three SROs, during the relevant time period, failed to take appropriate control of the FRO's comportment. There was a loss of objectivity and perspective.

219. The Applicant, in turn, was regarded as being professionally capable, while being criticised for not being a team member and cooperative. She was said not to accept managerial direction and refused to finally agree on a PIP. It is recognised by the Tribunal that the Applicant may have had difficulty with some interpersonal relationships. However, the reaction of the Applicant to the poor management by her FRO and the failed management of the successive SROs, provided for an environment where the Applicant had no effective stance other than to challenge managerial decisions and to become highly suspicious of the motivation of her managers. Actions taken by the FRO to demean and undermine the Applicant before her colleagues were such as to ensure that the ability of the Applicant to work within a team was effectively challenged. The evidence discloses that the Applicant developed a defensive reaction to her managers.

220. The Tribunal is not in a position to assess the Applicant's performance. It cannot determine if an adequate evaluation would have led to conclude that she only partially met performance expectations and to eventually justify a decision not to renew her appointment. It cannot determine, either, how the Applicant would have performed if she had been working in a harmonious environment, as she was entitled to. However, the Organization's failure to uphold the standards of fairness

and objectivity in the evaluation of the Applicant's performance and to protect her against harassment and abuse of authority cannot be held against her. It had to be factored in when deciding whether her performance was adequately evaluated, which was not done by the SROs when they signed the performance appraisals or by the third SRO in taking the decision not to renew the Applicant's appointment.

221. The Tribunal acknowledges that the Organization was, to some extent, facing an impasse in fulfilling its duty to ensure that the Applicant's performance would be evaluated adequately, that she would receive proper supervision and that the broken relationship between the Applicant and the FRO would be properly addressed, especially given the structure of OSLA. Ensuring that the FRO would not retaliate against the Applicant or be biased in his appraisal of her performance at that stage of their long litigation history was most certainly a real challenge. It is not certain in the circumstances that this could have been achieved through proactive managerial actions such as disciplinary actions, notes to the file or performance appraisals. It does not appear either that changing the Applicant's supervisory line or reassigning her within OAJ were options immediately available. A real and viable solution most likely required addressing the roots of the problem and, as such, restoring a harmonious work environment in OSLA and in particular between the Applicant and the FRO. It is not certain that this was possible by that time or that the Organization had the means to create the necessary conditions to resolve the conflict between the Applicant and the FRO, notably by getting their full and genuine cooperation.

222. That being noted, the Tribunal finds that the impasse in which the Organization possibly found itself was not a legitimate justification for not renewing the Applicant's appointment based on performance appraisals that lacked objectivity. The Organization was bound to ensure that the Applicant was not the subject of retaliation, particularly following the filing of her complaint of harassment and abuse of authority, to closely monitor the situation and to provide the Applicant effective remedies, as directed by secs 2.2, 5.9, 5.18(b), 6.4 and 6.5 of ST/SGB/2008/5.

223. If concrete actions to remedy the FRO's managerial shortcomings eventually prove to be unsuccessful, the unique situation of this case may have called for extraordinary measures to avoid having a situation of harassment, abuse of authority and retaliation leading the aggrieved party, in this case the Applicant, to lose her employment. Team building exercises, counselling and additional efforts to move the Applicant or the FRO to other positions in the specific context of ST/SGB/2008/5 could, for example, have been envisaged. The one-sided approach that was taken to put the Applicant under tighter control of the FRO, without proper safeguards and without addressing the root of their difficulties, was entirely unsatisfactory and not in compliance with the Organization's obligation and commitment to ensure a harmonious work environment for its staff members.

224. In view of the foregoing, the Tribunal finds that the Applicant's performance was not fairly evaluated, notably during the third and fourth evaluation cycles. Thus, these performance appraisals cannot be relied upon to justify a decision not to renew the Applicant's fixed-term appointment. As a consequence, the Tribunal finds that the third reason for not renewing the Applicant's fixed-term appointment, namely that she only partially met expectations for two consecutive years, is not adequately supported by the evidence and cannot stand.

Is the decision not to renew the Applicant's appointment supported by any of the four other allegedly non-performance-related reasons?

225. The contested decision was based on four other reasons, as recalled above at para. 2121. Each of these will be examined in turn to determine whether they could, independently from the first reason examined above, justify the non-renewal of the Applicant's appointment. In examining them, the Tribunal will also determine if they were performance-related, which is more directly relevant to Case No. UNDT/GVA/2013/039, to avoid unnecessary repetitions.

Inability to maintain professional working relationships with colleagues

226. According to a witness statement signed by the third SRO on 7 June 2013, which she reconfirmed at the hearing, "the working relationship between [the Applicant] and the [FRO] ha[d] irrevocably broken down, and her relationship with

her three successive [SROs] ha[d] been seriously strained. Her presence in OSLA [was] divisive; a number of OSLA colleagues [had] indicated that they prefer to avoid dealing with her." She further stated that "[the Applicant] ha[d] been unable to maintain professional working relationships with two successive Legal Officers loaned to OSLA in Geneva by UNHCR", which caused her to be concerned that "if this situation were allowed to continue, it could put the non-reimbursable loan relationship with UNHCR in jeopardy".

227. In the view of the third SRO, this problem "goes beyond performance" as "it … disrupted the functioning of OSLA and the ability of [its] supervisors to provide managerial supervision and oversight". She also stated that "it ha[d] been difficult for them to fulfil their obligations to provide a harmonious work environment for staff due to [the Applicant's] presence".

228. The Tribunal finds that these grievances go to the heart of the Applicant's performance appraisals and the shortcomings identified thereto. For instance, goal 3 of the Applicant's workplan for the third and fourth evaluation cycles included as a successful criterion "good working relations maintained with other colleagues". Her performance is described as follows in her fourth appraisal:

> [The Applicant] had difficulty in maintaining professional working relationships with the FRO and OSLA colleagues. On several occasions, she accused fellow legal officers of being lazy, dishonest or incompetent. She raised her voice to the FRO and other colleagues on several occasions. This led some OSLA colleagues to raise concerns about her conduct, avoid her or express reluctance to work with her.

229. She was also specifically evaluated on the competency of teamwork, where her fourth performance appraisal reports exactly the same grievances as those set forth above by the third SRO:

> During the reporting period, [the Applicant's] inability to maintain professional working relationships with the FRO and her colleagues and her reluctance to work collaboratively with others caused serious difficulties and was detrimental to the teamwork that is essential to the smooth operation of OSLA.

230. This issue had to be properly addressed in the context of the performance management system or, if it was deemed to reach such level as to amount to misconduct, under the framework provided for disciplinary proceedings.

231. Most importantly, it is apparent from the statement of the third SRO that she did not consider the impact that the actions of the FRO and the working environment that he contributed to create could have on the Applicant's ability to entertain harmonious relationship with her colleagues and supervisors. The third SRO puts the entire blame on the Applicant for the breakdown of her relationship with the FRO, without taking into account any of the facts discussed above. This amounts to a failure to take into account all relevant facts.

232. In this connection, it is noted that at the time of taking the contested decision, the Applicant's complaint of harassment and abuse of authority against the FRO had not reach finality. The third SRO had received a report from a first investigation panel on 9 April 2013, and she decided to close the matter on 26 April 2013, a few weeks before taking the contested decision (see *Oummih* UNDT/2014/004). However, this investigation was later found to be unlawful and a second one was eventually carried out after the Applicant had been separated from the Organization. The second investigation was also found to be unlawful, but the Tribunal, based on the evidence on record, found that the Applicant had been the subject of harassment and abuse of authority from the FRO (see *Belkhabbaz* UNDT-2018-016). Although these findings were formally reached after the contested decision, they relate to facts that existed at the time of said decision and were established through documentary evidence already available at the time. These facts were available to the third SRO, and their belated establishment through formal proceedings, which is due to the Organization's failure to timely and properly investigate the Applicant's complaint, is not an excuse for the third SRO's failure to take them into account when issuing the contested decision. The sequence of events indicates that the third SRO worked under the incorrect assumption that the Applicant's complaint of harassment and abuse of authority had no merit.

233. The Respondent insisted that the breakdown of the relationship of the Applicant with her supervisors, which the Respondent also qualifies as a breakdown of her relationship with the Organization, and claims that this is not disputed by the Applicant, is a sufficient reason to justify the non-renewal of her appointment according to the jurisprudence of the Appeals and the Dispute Tribunals. He refers, in particular, to *Sarwar* 2017-UNAT-757 (at para. 80), *Lauritzen* UNT/2010/172 (upheld on appeal in *Lauritzen* 2013-UNAT-282) and *Wait* (former UN Administrative Tribunal Judgment No. 1430).

234. The Tribunal acknowledges that the breakdown of an employment relationship may be a legitimate cause not to renew the appointment of a staff member. However, each case must be examined on its own merits and the cause of this breakdown cannot be ignored. A breakdown of a relationship that is, at least in part, caused by a supervisor who abuses his authority, creates a hostile working environment and retaliates against a staff member for exercising her legal rights, is not a legitimate justification for the non-renewal of that staff member's appointment. In the instant case, the fatal problem with the argument raised by the Respondent is his failure to adopt a balanced approach in assessing the roots of the breakdown of the relationship between the FRO and the Applicant, and to properly consider the whole set of circumstances. Rather, he attributed all the blame to the Applicant.

235. As to the alleged risk to the UNHCR loan arrangement, this appears to be a pretext used to support the assertion that the Applicant's difficulties to work with colleagues could not be addressed through the performance appraisal system rather than a real threat that could lead to UNHCR withdrawing its cooperation, as asserted by the third SRO in her witness statement.

236. On 3 December 2012, the Director, Division of Human Resources Management, UNHCR, wrote to the third SRO:

> I want to assure you that UNHCR remains committed to supporting the work of OSLA within the limits of available resources but it is nevertheless preoccupying that successive complaints have come to my attention from both [Ms. X] and [Mr. Y] concerning the behavior of the OSLA Geneva Legal Officer.
>
> Thank you for giving this situation necessary attention.

237. The third SRO acknowledged that she understood from this letter that UNHCR remained committed to support OSLA as it was also in UNHCR's interest to provide work to its staff members who were in-between assignments. She also stated that she did not feel the need to ask what the complaints were about or try to investigate further as she knew about "the Applicant's conduct towards [Mr. Y]" as she witnessed first-hand the Applicant being rude with him during a conference call in November 2012. The third SRO stated that she did not receive any further similar communication nor discussed the matter further with UNHCR. Hence, there is no evidence that the situation evolved from December 2012 to May 2013, when the contested decision was made, in such a way as to put at jeopardy the UNHCR loan arrangement.

Inordinate amount of supervisory attention

238. The second reason for not renewing the Applicant's appointment is that she required substantial supervisory attention, which allegedly put an inordinate and unsustainable burden on the FRO and on the SROs. The third SRO stated in her witness statement that:

> [The Applicant] disregards or challenges operational instructions from her FRO and also has ignored queries and requests from [the third SRO]. She challenges feedback from her supervisors and attributes bad faith and improper motives to them when none exist.
>
> As a result, her supervisors and in particular the FRO have had to spend an unsustainable amount of time attempting to engage with [the Applicant] on work-related matters and find out what is going on in the Geneva office of OSLA. The FRO's time has been expended at the expense of his responsibilities to ensure that OSLA discharges its mandate. [The third SRO] ha[s] also had to devote a significant amount of time to dealing with [the Applicant], to the detriment of the management of OAJ.

> The inordinate expenditure of managerial resources on [the Applicant] negatively impacts the ability of OSLA/OAJ to deliver its mandate effectively and efficiently. It goes beyond performance and, accordingly, cannot be addressed within the context of the performance appraisal system.

239. In her testimony, the third SRO clarified that she referred more specifically to the attention devoted by herself and the FRO in order to get the Applicant to agree to the OSLA workplan and to implement a PIP, despite numerous requests being made in this respect.

240. The Tribunal notes that the Applicant's fourth performance appraisal refers extensively to the Applicant's refusal to include some items from the OSLA workplan that were missing from her draft workplan, and her refusal to agree to a PIP. It is also replete with comments about the Applicant's difficulties to follow the instructions of her supervisors, particularly the FRO, and to receive feedback on her performance.

241. For example, the fourth appraisal states under goal 1 that the Applicant needs to:

> - share her written submissions in advance of filing for review by her supervisor. With one exception near the end of the reporting period, the staff member did not comply with this instruction.
>
> …
>
> - Accept constructive feedback from her FRO. [The Applicant] has demonstrated an unwillingness or inability to be supervised or managed.

242. It also states under goal 2 that the Applicant "did not manage to provide updated and adequate case lists and update her files in e-room, despite being instructed to do so".

243. Under the competency of "Planning and Organizing", it states that the Applicant "had difficulty working independently and within the resource constraints of the Office".

244. Again, the Tribunal finds that these grievances mirror those contained in her fourth performance appraisals and must thus be considered as being performance-related.

245. The Tribunal also finds that this reason is directly linked to the broken relationship between the Applicant and the FRO, which not only the third SRO failed to manage properly but that she also failed to consider in elaborating this reason for the contested decision. In light of the FRO's previous behaviour and the failure of the Applicant's SROs to constrain it, it was not unreasonable for the Applicant not to perceive feedback from the FRO on a positive manner or to be suspicious about the process for evaluating her performance.

246. As to the Applicant's failure to adapt her workplan to mirror the one prepared for OSLA legal officers, the rebuttal panel found no fault on the part of the Applicant. In its report dated 27 February 2014, the panel found that on 17 October 2012, the Applicant and the FRO had agreed on a workplan and that the FRO stated in an email that he was "ready to sign-off on [her] 2012-2013 Epas as the workplan is fine". However, after a videoconference on 24 October 2012, "the FRO demanded further additions to the previously 'fine' workplan". This caused the Applicant to encounter technical difficulties to enter the revised workplan in Inspira. The panel concluded that it "[saw] no want of cooperation with [the Applicant's] repeated attempts [to establish her workplan in Inspira]".

247. As to the Applicant's failure to agree on a PIP, the Tribunal recalls its finding above that in the circumstances of this case, it, alone, could not justify the non-renewal of the Applicant's appointment (see para. 158 above).

Loss of confidence by the FRO and the third SRO

248. In her witness statement dated 7 June 2013, the third SRO merely stated that:

> The fourth reason for the non-renewal of [the Applicant]'s appointment set out in the 15 May 2013 e-mail is that both the [FRO] and I have lost confidence in her. This is not a performance-based problem that can be addressed within the context of the performance appraisal system. This loss of confidence cannot be remedied by way of a performance improvement plan.

249. No specific reason for that loss of confidence was given until the hearing of the case. The third SRO testified that the reason for her loss of confidence in the Applicant is that she told her in the conference call on 13 March 2013 that she had recorded her phone conversations with colleagues without their knowledge. The third SRO also stated that this reason was related to the Applicant's failure to respond to requests from her supervisors to complete her workplan, her denial that the workplan had been discussed in October 2012 and her failure to provide a list of her cases.

250. The Tribunal notes that the incidents about the recording of phone conversations was reported in the Applicant's fourth performance appraisal, as recalled above (see para. 161 above). These were specifically used to give her a rating of "Unsatisfactory" for the competencies of "Integrity" and "Professionalism". As to the Applicant's alleged failure to complete her workplan, this is a duplication of her fourth performance appraisal.

251. This reason must thus also be considered as performance-related. The Tribunal notes that the issues underlying this reason for the non-renewal may not be easily remedied in the context of the performance appraisal system but this does not mean that they are not performance-related insofar as they concern the way the Applicant delivered her services to the Organization, and touched upon the competencies of Professionalism and Integrity. It is noted, in particular, that the alleged recording of conversations occurred in the context of the Applicant's interactions with her colleagues for work-related matters. Arguably, this issue could also have been dealt with in the context of a disciplinary procedure, but this was not

done and the FRO elected to address it through the performance appraisal mechanism.

252. The Tribunal finds that the evidence is contradictory as to whether the Applicant recorded conversations with colleagues or not. The Applicant claims that she never recorded phone conversations with colleagues nor told the third SRO that she had done so. None of the colleagues whose conversation was allegedly recorded testified or otherwise provided evidence. The third SRO said that she only advised the Applicant over the phone that this practice was not acceptable, but did not admonish her in writing or placed a note in her file.

253. Most importantly, the third SRO insisted in her testimony that recording conversations with colleagues was a serious matter and would normally lead to a reprimand. Yet, she took no action against the Applicant as she said that this "would just have launched a new battle and [she] did not consider to do that". The lack of contemporaneous action by the third SRO suggests that there was not enough evidence to support this assertion or that it was decided not to pursue the matter. In any event, the Tribunal finds it unfair towards the Applicant, and possibly in violation of her due process rights, to use an alleged incident that may amount to misconduct to justify the non-renewal of her appointment without taking appropriate action right after the event and giving her an appropriate opportunity to provide her account of events.

254. As to the loss of confidence of the FRO towards the Applicant, the Tribunal is, once again, concerned that this reason fails to take into account the FRO's own behaviour towards the Applicant. The FRO's retaliatory statements for the Applicant's exercise of her rights, in particular, cast serious doubts as to the basis for his loss of confidence in the Applicant.

Renewal being inconsistent with the operational requirements of OSLA and OAJ

255. According to the third SRO's witness statement dated 7 June 2013:

> The last reason for the non-renewal of [the Applicant]'s contract would be [that the renewal of her contract was] inconsistent with the operational requirement of OSLA and OAJ. As detailed above, OSLA has limited resources. It is not sustainable for OSLA to continue to absorb the impact that [the Applicant] is having on the office and [the effective delivery of] its mandate.

256. The Tribunal notes that the underlying justification for this vague reason, provided by the third SRO not to renew the Applicant's appointment, varied over time.

257. In his reply to the Applicant's application to suspend, pending management evaluation, the implementation of the decision not to extend her contract until completion of the rebuttal process, the Respondent explained that the behaviour of the Applicant, who challenged several decisions taken by the Administration, resulted in a waste of time and energy for OSLA and OAJ, who had limited resources (see *Oummih* Order No. 78 (GVA/2013)).

258. This appears also to have been the position taken by the Respondent at the stage of the management evaluation, although reference was also made to the fact that the Applicant's behaviour put at jeopardy the loan agreement with UNHCR. Most surprisingly, this position was endorsed by the MEU, which considered it as evidence that the Applicant's relationship with the Organization had broken down and that the renewal of her appointment would be inconsistent with the operational requirements of OAJ. The Under-Secretary-General for Management stated in his response of 22 July 2013 to the Applicant's requests for management evaluation:

> The MEU also noted that since you joined the United Nations, you submitted 20 MERs, 13 appeals to the UNDT (including requests for Suspension of Action), 4 appeals to the UNAT, 3 complaints of misconduct (against several individuals) and one complaint of retaliation.

> The MEU was mindful that it is clearly a right of a staff member to seek redress from the Organization in cases when the staff member thinks that his or her rights were violated by a decision. Such right cannot be compromised as such. However, the MEU took the view that even though based on the record of your cases not every action of the Administration withstood your legal challenge in full, in the context of the entire relationship between you and the Organization, the multiplicity of appeals and complaints in which you are involved reflects that there is a break down in relationship between you and the Organization.
>
> …
>
> The MEU took the position that the facts suggest that OAJ is a relatively small office with significant responsibilities for the Organization as a whole. The handling by the OAJ office of the numerous appeals and complaints submitted by you or by other staff members against you, has had a significant effect on the ability of OAJ to discharge its mandate. Under these circumstances, the MEU opined, it is legitimate for the Organization not to renew your contract.

259. This underlying justification was also supported by the FRO who, upon being questioned at the hearing about this reason for the non-renewal of the Applicant's appointment, responded that he was often being asked by the Respondent and the MEU to comment on the Applicant's applications. He further stated that "dealing with [the Applicant's] complaints took him away from OSLA" and agreed that it would be fair to say that "[he] would have preferred otherwise".

260. By contrast, the third SRO insisted at the hearing that the sole basis of this reason for the non-renewal of the Applicant's contract was that her difficult relationship with UNHCR staff members jeopardized the loan agreement between OSLA and UNHCR, which provided additional resources for OSLA free of charge.

261. The underlying justification for this reason provided by the third SRO during the hearing departs, at least in part, from what was said before by the Respondent to support the contested decision. This casts serious doubts as to the credibility of this justification. In any event, it is duplicative of the first reason and, as such, it is performance-related and not adequately supported by the evidence, as discussed above (see paras. 235-237235above).

262. It thus appears that the real motivation behind this reason for not renewing the Applicant's appointment was the time spent by OSLA and OAJ to deal with the Applicant's legal challenges. The Respondent merely refers to the number of challenges brought by the Applicant without any indication that she had abused her rights or otherwise acted with an intent to cause harm or disrupt the work of OSLA or OAJ.

263. The Tribunal stresses that none of the Applicant's challenges to the Dispute Tribunal or the Appeals Tribunal was deemed to be frivolous or to otherwise amount to an abuse of procedure. Rather, most of the challenges brought by the Applicant were aimed at preserving her employment and to get her complaint of harassment against the FRO properly investigated. She was successful, at least in part, in several of her challenges. Notably, she was, after almost six years of legal proceedings, successful in her complaint of harassment against the FRO, which explains to a large extent the roots of the problems that led to the intensive litigation undertaken by the Applicant.

264. As recalled above, staff members have a fundamental right to exercise their rights under the rules, notably by challenging administrative decisions that affect their terms or conditions of employment, in the Organization's internal justice system (see para. 102 above). The legitimate exercise of these rights, absent any evidence of bad faith, intent to harm or any other form of abuse of procedure, cannot be held against staff members in any way and certainly not when considering whether or not to renew their appointments. Legal actions brought by staff members, by nature, are likely to cause the Organization to spend some time addressing them. This is inherent to the process and the internal justice system would be seriously undermined if the time spent by the Organization to deal with legitimate actions brought by staff members could entail negative consequences for them. By legitimate actions, the Tribunal does not exclusively refer to those that are found successful by the Tribunals, but also to all those actions that do not amount to an abuse of procedure. This entails a judicial determination and the threshold is high (see art. 10.6 of the Dispute Tribunal's Statute), again to ensure that staff

members effectively have access to justice, without fear of any negative consequence.

265. In this case, it is clear that the Applicant was prejudiced for her recourse to the internal justice system, under the cover that handling her legal challenges was time consuming for the Organization. This reason for the contested decision is not only illegitimate but it is also in clear violation of the principle of the rule of law in the Organization. Absent any indication of an abuse of procedure by the Applicant, the Tribunal could not be more concerned and shocked that senior officials of OSLA, OAJ and the MEU, the three offices at the heart of the UN internal justice system and for which the principal *raison d'être* is to ensure that staff members have access to justice, all took the view that the Applicant's legitimate exercise of her legal rights could justify her separation from service.

266. Insofar as Case No. UNDT/GVA/2013/039 is concerned, the Tribunal finds that the fifth reason for the non-renewal constitutes a totally extraneous and irrelevant factor for the contested decision which is not performance-related.

267. In view of the foregoing, the Tribunal finds that none of the four additional reasons set out in the letter of 15 May 2013 examined above independently supports the decision not to renew the Applicant's fixed-term appointment. With the exception of the last one, these reasons were all reflected in the Applicant's performance appraisals and shall thus be considered as performance-related.

Alleged bias by the third SRO

268. The Applicant claims that the third SRO demonstrated bias in not holding the FRO accountable while punishing the Applicant for asserting her rights in the formal justice system. She asserts that the third SRO retaliated against her, although subtly, for the challenges she brought in respect of the handling of her complaint against the FRO.

269. The Tribunal finds that the Applicant did not adduce any evidence that the actions taken by the third SRO, including the contested decision, were linked with the legal challenges brought by the Applicant in respect of the handling of her complaint of harassment against the FRO. There is no indication that the third SRO was in any way irritated by the challenges brought against her own decisions, or that her behaviour towards the Applicant changed as a consequence of these legal challenges. The Tribunal finds no evidence of malicious intent on the part of the third SRO.

270. Rather, and as is discussed above, the Tribunal finds that the issue is that the third SRO failed to adopt a balanced approach in handling the problematic relationship between the Applicant and the FRO which she knew had broken down. On the one hand, she took no decisive measure to address the managerial shortcomings of the FRO, notably to ensure that he would not retaliate against the Applicant, that he was treating her in an appropriate manner and that he would not antagonise the team against her. The third SRO was in constant communication with the FRO, so she was fully appraised of his versions of events. On the other hand, the third SRO supported and even pushed for the implementation of a PIP for the Applicant which would have tightened the control of the FRO over her work, blankly endorsed the evaluation of her performance by the FRO despite his lack of objectivity and had herself only limited contacts with the Applicant. There is no indication either that the third SRO took any measure to restore a harmonious work environment at the team level.

271. The third SRO testified that the Applicant could perform well "when she puts her mind to it" and that she could not assess how she would perform in a different working environment. She had indeed in possession an evaluation from OHCHR appraising the Applicant's performance positively. Most importantly, the third SRO testified that she considered the possibility to transfer the Applicant within OAJ but that this was not possible due to the lack of openings at the time. She further contacted OHRM to examine the possibility that the Applicant be transferred elsewhere but this was not possible in the current recruitment system. This shows

that, somehow, the third SRO considered that the Applicant had the potential to perform well, but there is no indication that this was properly considered in taking a decision in respect of the renewal of the Applicant's appointment.

272. The Tribunal acknowledges that this was a very difficult situation to handle and that, ultimately, the Applicant's inability to work collaboratively with her supervisor and to follow his instructions could justify her separation from service. However, a decision to separate the Applicant in the present circumstances could not be taken without first adequately addressing the FRO's improper behaviour or establishing a separate cause for the Applicant's separation, none of which had been done in the present case. The contested decision, as it stands, ignores a retaliatory and abusive behaviour by a supervisor at the expense of the employment of a staff member. This constitutes a failure to take into account the Applicant's rights and thus an error in the exercise of managerial discretion, but it does not amount to bias.

273. The Tribunal is concerned however that being well aware that the Applicant was likely to challenge the decision not to renew her appointment, the third SRO contrived to present it in such a way as to prevent the suspension of its implementation pending the rebuttal of the Applicant's last performance appraisal. In addition to relying on the Applicant's performance appraisals, the third SRO elaborated four other reasons which she claimed justified the immediate implementation of the non-renewal decision, without waiting for the rebuttal process to be completed. As the Tribunal found above, three of these four reasons were directly related to the Applicant's performance and the last one was totally irrelevant. This aspect of the contested decision, which relates more closely to Case No. UNDT/GVA/2013/039, appears to be motivated by a desire to ensure that the Applicant's separation would be immediate so as to avoid further delays caused by the rebuttal process and thus constitutes an ulterior motive.

Conclusion on the legality of the contested decision

274. In view of the foregoing, the Tribunal finds that the Applicant's performance was not adequately and properly evaluated during her third and fourth performance appraisal cycles as the FRO was biased against her and the SROs did not take

sufficient measures to ensure an objective assessment of her performance. Furthermore, no consideration was given to the impact that the environment created by the FRO and his behaviour towards the Applicant could impact on her performance. Thus, the third reason for the contested decision, namely that the Applicant only partially met performance expectations for two consecutive years, cannot stand.

275. None of the other four reasons provided to support the contested decision can independently justify it. Three are duplication of elements contained in the Applicant's fourth performance appraisal and are affected with the same problem of not taking into account the impact of the inappropriate behaviour of the FRO. They appear to have been construed to avoid the extension of the Applicant's appointment pending rebuttal of her fourth performance appraisal.

276. Therefore, the Tribunal finds that the decision not to renew the Applicant's appointment upon its expiry on 11 June 2013 was unlawful.

Remedies

277. The Tribunal shall examine the Applicant's claim for remedies (see para. 53.n above) in light of art. 10.5 of its Statute, which delineates its powers in this respect. This article provides that:

> 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, and shall provide the reasons for that decision.

278. The Applicant initially requested rescission of the contested decision but, in her closing submissions dated 15 March 2018, she did not reiterate that request and solely claimed financial compensation. The Tribunal notes that rescission of the contested decision would in principle entail reintegration of the Applicant unless the Respondent was to decide to pay the alternative compensation that the Tribunal would be mandated to order pursuant to art. 10.5(a) of its Statute. In the instant case, where the contested decision was taken more than five years ago and the Applicant has moved to another career and shown no interest in being reintegrated in her former position, the Tribunal does not find it appropriate to rescind the contested decision.

279. Having found that the decision was unlawful, the most appropriate and pragmatic course of action is to compensate the Applicant for the harm she suffered under art. 10.5(b) of the Tribunal's Statute.

Pecuniary damages

280. Firstly, the Applicant claims compensation for pecuniary damages equivalent to three years' salary for her loss of income, damage to her professional reputation and career prospects, and loss of pension benefits, due to the exceptional circumstances of this case, especially the inaction of the third SRO in the face of retaliatory actions being taken by the FRO.

281. The Applicant stated that she had been unable to secure another appointment with the United Nations after the non-renewal of her appointment with OSLA despite having applied for several positions. The non-renewal of her appointment based on poor performance and the difficulties to get references from OSLA made her job search particularly difficult. The situation was dire as she was pregnant at the time she was informed of the non-renewal of her appointment and also was the main breadwinner for her family. She remained unemployed for one year after her separation and "was only partly employed the second year" as she started her own legal practice once she realised that her efforts to find another appointment with the United Nations would be unsuccessful. This provided her only with an irregular income since she had to build her practice while at the same time taking care of her

sick mother. She received a first short-term contract in May 2015 and resumed her practice in November or December 2016 when she got a physical office. She stated that she "handled cases here and there". The Applicant was also separated from the Organization before having reached the five-year threshold to be entitled to a pension from the United Nations Joint Staff Pension Fund.

282. The Tribunal finds that there is sufficient evidence to conclude that the Applicant suffered a loss of income as a result of the contested decision from her separation on 5 April 2014 until the end of 2016. She is thus entitled to compensation equivalent to 21 months' net base salary. She also suffered a loss of income for the period during which she was on certified sick leave with half pay, namely from 22 July 2013 until April 2014, for which she is entitled to compensation. During that period, the Applicant had not formally relocated to the United States for administrative purposes and she was paid half of her net base salary plus post adjustment. She is thus entitled to compensation equivalent to half her net base salary, plus post adjustment, for eight months and 13 days.

283. The Applicant also requests material damages in the amount of USD10,500 for the loss she suffered due to having to leave Geneva on short notice, namely to have to sell her car and home furniture in a hurry and thus at a reduced price.

284. The Tribunal finds that the Applicant did not adduce sufficient evidence to conclude that the alleged reduced price for which she sold her second hand car and home furniture was due to her precipitated departure. In any event, it is noted that the Applicant received USD15,000 as relocation grant upon her departure from Geneva, which is meant to cover the costs associated with relocation into another country, including the potential loss resulting from the selling of personal items if the staff member chooses not to move them.

285. The Applicant also requests "reimbursement" of USD1,000 for the flight ticket of her husband from Geneva to New York, of one-month salary for having placed her wrongly on sick leave with half-pay for the months of March and April 2013, and of USD6,000 deducted from the Applicant's final pay in compensation for a payment made to UNSMIS.

286. The Tribunal finds that these claims are not receivable as they are not directly related to the contested decision. Any issue as to the settling of these alleged entitlements had to be challenged separately.

Non-pecuniary damages

287. The Applicant requests the Tribunal to award her compensation in the amount of USD50,000 for moral damages and an additional USD30,000 if the Tribunal finds that she was the subject of harassment and abuse of authority. She claims that the present circumstances may lead to a presumption of moral injury *res ipsa loquitur* and, in the alternative, that she established her claim for moral damages through her testimony and medical evidence.

288. At the outset, the Tribunal recalls that non-pecuniary damages, similar to pecuniary ones, need to be established by evidence pursuant to art. 10.5(b) of the Tribunal's Statute. The Tribunal notes that the recent judgment by the Appeals Tribunal in *Kallon* 2017-UNAT-742 (full bench) may have created some confusion as to whether the Dispute Tribunal may infer from the circumstances of a case that a staff member had suffered a moral injury, thereby applying a presumption known as *res ipsa loquitur*, according to which the circumstances of a case may speak for themselves.

289. An opinion issued in *Kallon* by Murphy JA "for the Majority" and signed by four judges suggests that this is possible. However, Knierim JA, who signed this "majority" opinion, clearly stated in her concurring opinion that, on the one hand, her joining the "majority" was exclusively because she agreed with the *outcome* of the case reached by her colleagues.

290. On the other hand, she explicitly disagreed with the opinion that the Dispute Tribunal may award compensation for moral injury based on presumption in the absence of any direct evidence having been adduced by the Applicant. At para. 2 of her concurring opinion in *Kallon*, Knierim JA stated that:

> Like [her] colleagues Judge Thomas-Felix, Judge Lussick and Judge Chapman, [she thinks] that the harm for which compensation is requested must be supported by evidence and that a staff member's testimony alone is not sufficient to present evidence supporting harm under Articles 9(1)(b) of the Appeals Tribunal Statute and 10(5)(b) of the UNDT Statute.

291. Thus, Knierim JA joined the "Joint Partial Dissent" issued by the three other judges, namely Thomas-Felix, Lussick and Chapman JJA. It follows that the majority opinion of the Appeals Tribunal is that moral injury must be supported by evidence and cannot be inferred from the circumstances. This Tribunal considers itself bound by this opinion expressed by four of the seven judges of the Appeals Tribunal.

292. The *Kallon* judgment also suggests that "[w]hile there may be some exceptions, generally speaking, the testimony of an applicant alone is not satisfactory proof to support an award of damages". Again, the Appeals Tribunal was divided on that point but the three partially dissenting judges expressed this opinion (see para. 12 of Joint Partial Dissent by Thomas-Felix, Lussick, and Chapman JJA). Knierim JA went even further in totally excluding the possibility of relying on the sole testimony of an applicant (see Concurring Opinion by Knierim JA, para. 2). This position was later reaffirmed in *Auda* 2017-UNAT-787 (para. 64).

293. On third point, this Tribunal notes that the Appeals Tribunal does not reject outright the possibility of relying exclusively on the testimony of an applicant to establish non-pecuniary harm but calls for the exercise of caution and explicit justifications for so doing.

294. The Tribunal concurs with the judgment issued in *Harrison* UNDT-2018-963, that moral injury may be established by the testimony of the Applicant under oath if the Tribunal considers that "the testimony provided is credible, reliable and satisfactory to sufficiently discharge the burden of proof" (para. 59). In this assessment, the Tribunal may take into account the contextual circumstances of the case (see, e.g., *Al Hallaj* 2018-UNAT-810). The Tribunal also notes that in the present case it has other direct corroborative evidence upon which it may rely.

295. The Tribunal recalls that the Applicant was already compensated for having been the subject of harassment and abuse of authority through its judgment *Belkhabbaz* UNDT/2018/016, which was rendered after she filed her closing submissions in the present case. Thus, any award of compensation on that ground would be duplicative. The Tribunal will thus only examine the Applicant's claim insofar as it relates to the non-renewal of her appointment *stricto sensu*.

296. The Applicant testified that she was pregnant, at home on sick leave, when she received the email informing her of the non-renewal of her appointment and of her fourth performance appraisal rating. She was at the end of her first trimester of pregnancy, with vomiting. She stated that she was "shocked" as this was unexpected. Nobody had mentioned that to her, not even the third SRO. When she received the letter, she did not know the grounds for her non-renewal. She further explained that the non-renewal decision devastated her, as she had hoped that the third SRO would respect the rules. She stated that "emotionally she was a mess". Being pregnant with twins and having a high-risk pregnancy, she did not know where to go. Her doctor was concerned with her condition and she was not sure whether to stay in Geneva to give birth. She could not get clearance to travel after six months, so she finally decided that she had to leave Geneva and return to the United States to give birth. Her husband had to quit his employment in Morocco to be with her in Geneva and was thus unemployed. She described this situation as "difficult, emotionally and physically". Given the restrictions on her travel, the

Applicant organised her move from Geneva to New York in a couple of weeks, a situation that she described as particularly stressful and unsettling.

297. The Applicant also described the stressful situation she faced when she arrived in New York. She explained that her house in New York was rented out at the time so she had to settle in a small studio. Her husband did not have any visa to work in the United States. It was difficult to find a doctor due to her high-risk pregnancy. Once the Applicant was formally separated in April 2014, she lost her medical insurance with the United Nations and thereafter remained without health insurance for a while, which caused her additional stress.

298. The Applicant testified that before the issuance of the non-renewal decision, she was already seeing a doctor to deal with the stress caused by her relationship with the FRO and her work environment. She testified that her stress and anxiety increased when she received the non-renewal decision that led her to consult a psychiatrist.

299. The Applicant further testified that "she is now back up" and "psychologically fine". However, she stated that the resumption of the proceedings in the present case brought back the stress so she resumed her consultations with the psychiatrist during the time of proceedings. She further stated that the delays in bringing her cases to a close caused her stress.

300. The Applicant's testimony is corroborated by that of her husband, who stated that the Applicant was "devastated" when she received the contested decision. He confirmed that he had to leave Morocco to support her and then go to the United States shortly thereafter because of the restrictions on her travel due to her difficult pregnancy. He further confirmed the difficult financial and emotional situation that they both faced when they arrived in New York. He said that they were "lost". They had to live in a studio, which was difficult once the twins were born. He confirmed that the Applicant's loss of her employment affected her "physically and financially". [redacted]

[redacted] Dealing with the bills caused both of them a high level of stress.

301. The stress and anxiety expressed by the Applicant is also supported by medical reports. [redacted]

302. The Applicant consulted again in September 2017 [redacted]

303. The Tribunal finds that there is sufficient evidence in this case to support the Applicant's claim that the non-renewal of her appointment in the circumstances described above, which effectively put an end to her career with the United Nations, harmed her professional reputation and caused her emotional distress so as to constitute an infringement of her *dignitas*. The Applicant also established that she suffered stress and anxiety over a prolonged period of time due to the contested

decision, which ultimately led her to relocate to the United States while pregnant with twins and with an unemployed husband.

304. Whilst the determination of the quantum to compensate a non-pecuniary damage involves a certain degree of empiricism, and taking into account the jurisprudence of the Appeals Tribunal, the Tribunal considers that the present case displays exceptional circumstances in terms of the egregious nature of the violations of the Applicant's rights and the consequences that the decision to put an end to her employment had on her professional and personal life so as to justify awarding her compensation at the high end of the spectrum. Taking into account the moral damages awarded to the Applicant in related matters (see *Belkhabbaz* UNDT/2018/016 and the present judgment in respect of Case No. UNDT/GVA/2013/039), the Tribunal sets the amount of compensation for non-pecuniary damages in the instant case at USD40,000.

Removal of prejudicial material

305. In her application, the Applicant requested that prejudicial material be removed for her personnel file, but she did not specifically identify the material in question. Absent any further indication from the Applicant and in order to address her claim, the Tribunal finds it sufficient to order that the present judgment be placed in her official status file.

Decision of 3 June 2013 not to extend the Applicant's fixed-term appointment pending completion of the rebuttal process (Case No. UNDT/GVA/2013/039)

Legality of the contested decision

306. The Respondent claims that the application in this case is moot as the Applicant's appointment was extended until 4 April 2014, whilst the rebuttal of her fourth performance appraisal was already completed since 27 February 2014.

307. The Tribunal finds that this argument is without merit as the Applicant's appointment was extended solely for the purpose of exhausting her sick leave entitlements. This entails a different characterisation and a different legal status

within the Organization (see secs. 3.9 and 3.10 of ST/AI/2005/3 (Sick leave)). It also affects the staff member's entitlements, as pursuant to sec. 3.10 of said administrative instruction, "such extension shall not give rise to any further entitlement to salary increment, annual leave, sick leave, maternity leave, paternity leave or home leave, although credit towards repatriation grant may continue to accrue if the staff member has not returned to his or her home country".

308. Therefore, the Tribunal finds that the application in Case No. UNDT/GVA/2013/039 is not moot and shall be fully considered. The impact related to the extension of the Applicant's appointment is only relevant to the examination of the Applicant's claim for remedies and will thus be addressed in this context.

309. Secs. 4.12 of ST/AI/2013/1 and 15.6 of ST/AI/2010/5 both provide that:

> Should unsatisfactory performance be the basis for a decision of non-renewal of an appointment and should the appointment expire before the end of the rebuttal process, the appointment should be renewed for the duration necessary to the completion of the rebuttal process.

310. In the instant case, it is undisputed that the third reason set out in the contested decision for not renewing the Applicant's appointment, namely that her performance only partially met performance expectations for two consecutive years, is performance-related. In addition, the Tribunal found that the first, second and fourth additional reasons for the non-renewal—namely that the Applicant was unable to maintain professional working relationships with colleagues, that she required an inordinate amount of supervisory attention and that she lost the confidence of the FRO and the third SRO—were also related to the Applicant's alleged unsatisfactory performance (see paras. 228-230, 240-244 and 250-251 above). As to the fifth additional reason, namely that the renewal of the Applicant's appointment would have been inconsistent with the operational requirements of OSLA and OAJ, the Tribunal found that this was an extraneous and irrelevant factor in the making of the contested decision (see paras. 262-266 above). Thus, it does

not provide a legitimate justification to depart from the above-mentioned rules, which require extension of appointment pending completion of a rebuttal process.

311. The Respondent argued, in the alternative, that even if the reasons for the non-renewal were deemed to be performance-related, the Administration still retained discretion as to whether or not to renew the Applicant's appointment as the provision uses the auxiliary "should".

312. The Tribunal notes that the use of the auxiliary verb "should" in the above-mentioned provisions is unfortunate and may create confusion, as it can be interpreted either as enacting an obligation or providing an advice or suggestion, unlike the verb "shall" that clearly enacts an obligation or the auxiliary verb "may" that clearly expresses a possible course of action. However, taken as a whole, these provisions clearly indicate that the appointment must be extended pending rebuttal when unsatisfactory performance is the basis of a decision of non-renewal. The rebuttal process would be meaningless if it were to be otherwise and a staff member could be separated before its completion.

313. This interpretation is confirmed by the French version of sec. 15.6 of ST/AI/2010/5, which clearly expresses a mandatory requirement:

> S'il est décidé de ne pas renouveler l'engagement de tout fonctionnaire dont la performance ne donne pas satisfaction et si cet engagement vient à expiration avant la fin de la procédure de contestation, il doit être prorogé jusqu'à l'achèvement de cette procédure.

314. The Tribunal acknowledges that the French version of sec. 4.12 of ST/AI/2013/1, which is identical to sec. 15.6 of ST/AI/2010/5 in English, is slightly more nuanced but it still establishes the principle of renewal pending completion of rebuttal:

> L'engagement à durée déterminée qu'il est décidé de ne pas renouveler au motif que les services du fonctionnaire n'ont pas donné satisfaction et qui expire avant la fin d'une procédure d'objection lancée par l'intéressé est en principe renouvelé jusqu'à l'achèvement de la procédure.

315. At minima, there would need to be very good reasons to depart from the principle of renewal pending completion of a rebuttal process. None have been provided here. The assertion by the third SRO that the non-renewal of the Applicant's appointment would still be warranted even if her fourth performance appraisal had been successfully rebutted and her performance upgraded to satisfactory is without merit given the intrinsic link between the alleged performance shortcomings in the fourth performance appraisal and the reasons for the non-renewal.

316. The Tribunal further notes that pursuant to secs. 10.2 and 10.3 of ST/AI/2010/5, the Organization is entitled not to renew a fixed-term appointment when the staff member's performance was evaluated as "Partially meet performance expectations" for one year and after having instituted a PIP. Thus the rules did not *per se* require two performance appraisals of "Partially meet performance expectations" for a decision not to renew the Applicant's appointment to be taken.

317. That being said, in this case it is clear that the decision not to renew the Applicant's contract was not based solely on her third performance appraisal and the subsequent attempt to implement a PIP, but also on her fourth performance appraisal. Since the Applicant's fourth performance appraisal was, at least in part, the basis of the Organization's finding that her performance was unsatisfactory, secs. 4.12 of ST/AI/2013/1 and 15.6 of ST/AI/2010/5 mandated that her appointment be extended pending the rebuttal of such appraisal.

318. Therefore, the Tribunal finds that the decision of 3 June 2013 not to renew or extend the Applicant's fixed-term appointment pending the conclusion of the rebuttal process concerning her fourth performance appraisal was in violation of secs. 4.12 of ST/AI/2013/1 and 15.6 of ST/AI/2010/5, and was thus unlawful.

Remedies

319. Having found that the contested decision was unlawful, the Tribunal must now examine the Applicant's claim for remedies, as stated above (see para. 51.f above) and in line with art. 10.5 of the Dispute Tribunal Statute.

320. The Tribunal notes that whilst the Applicant initially requested rescission of the contested decision and extension of her appointment until completion of the rebuttal process, she did not reiterate that request in her closing submissions where she detailed her claim for remedies. Since rescission of the contested decision would entail renewal of the Applicant's appointment for a very specific period—pending rebuttal that has now elapsed—, it is practically impossible to order it. The Tribunal should thus focus on the Applicant's claim for compensation under art. 10.5(b) of its Statute.

Pecuniary damages

321. The evidence shows that the Applicant received her full salary until 21 July 2013 and then half of her salary until the issuance of the rebuttal report on 27 February 2014. She is thus entitled to compensation for her financial loss, which amounts to the equivalent of half of her net base salary, plus post adjustment, for 7 months and 5 days.

322. The Tribunal stresses however that it already awarded compensation for these pecuniary damages in the context of Case No. UNDT/GVA/2013/057. Although the same damage was caused by two distinct causes of action, it cannot be compensated twice. Thus, the award of compensation in the above paragraph is offset by that previously awarded and shall not be paid twice by the Respondent.

323. As to the Applicant's claim for material damages in the amount of USD10,500 for the loss she suffered due to having to leave Geneva on short notice, namely to have to sell her car and home furniture in a hurry and thus at a reduced price, the Tribunal reiterates its finding in Case No. UNDT/GVA/2013/057 that these were not sufficiently substantiated (see para. 284 above).

324. Similarly, the Tribunal reiterates its finding that the Applicant's request for "reimbursement" of USD1,000 for the flight ticket of her husband from Geneva to New York, of one-month salary for having placed her wrongly on sick leave with half-pay for the months of March and April 2013, and of USD6,000 deducted from the Applicant's final pay in compensation for a payment made to UNSMIS are not receivable as they are not directly related to the contested decision (see paras. 285-286 above).

Non-pecuniary damages

325. As recalled above, the Applicant claims USD70,000 for non-pecuniary damages.

326. The Tribunal notes that distinguishing the non-pecuniary damages that the Applicant suffered as a result of the decision of 9 May 2013 not to renew her contract from those she may have incurred as a result of the decision not to extend her appointment pending rebuttal, for which the period overlaps, poses some challenges.

327. The Tribunal is of the view that most of the emotional distress, stress and anxiety that the Applicant suffered as a consequence of losing her employment are a consequence of the decision of 9 May 2013 not to renew her appointment upon its expiry on 11 June 2013. That being said, this does not exclude the possibility that the Applicant suffered additional harm as a direct consequence of the decision not to extend her appointment pending rebuttal.

328. In this connection, the Applicant testified that when she filed her rebuttal, she was surprised to learn on 3 June 2013 that the right to have her appointment extended pending rebuttal was not applied to her. She contacted UNOG and received confirmation that their position was that it was the standard to extend appointments pending rebuttal. She found it "difficult to be treated differently".

329. After she filed an application for suspension of action, the FRO submitted an affidavit saying that the rebuttal result would not make any difference to the decision to separate her. At that point, the Applicant understood that her separation from the Organization was irreversible and her anxiety grew as her contract was expiring in eight days. She then stated that this forced her to leave Geneva in a hurry. This statement is corroborated by the testimony of the Applicant's husband who confirmed the emotional distress she suffered when she learned on 3 June 2013 that her contract would not be extended pending rebuttal and her anxiety for having to rapidly decide whether to leave Geneva and then actually relocate hastily.

330. The Tribunal finds that the evidence is insufficient to conclude that the decision not to extend the Applicant's appointment pending rebuttal was actually the trigger for her decision to hastily relocate to the United States. The duration of a rebuttal process varies and the Applicant was most certainly well aware of that. In the circumstances, where she testified that she had only a small time window to decide whether to relocate to the United States for giving birth, it would be speculative to conclude that the Applicant would have stayed in Geneva had her appointment been extended pending rebuttal. The most apparent cause of the Applicant's decision to relocate and the stress that this caused her appears to be the decision not to renew her appointment beyond 11 June 2013.

331. However, the Tribunal finds that the Applicant submitted sufficient evidence to conclude that she suffered infringement of *dignitas* as a result of being treated differently from other staff members whose appointments are normally extended pending the completion of a rebuttal process, which she perceived as an unfair treatment. The decision not to extend her appointment pending rebuttal also caused her additional stress and anxiety from that caused by the decision not to extend her appointment beyond 11 June 2013 as she saw any hope that this latter decision could be reversed, if she was successful in her rebuttal, disappear. Although there is no evidence that the Applicant sought psychological support during the specific period between 3 June 2013 and the time she received her rebuttal report in February 2014, the report of her psychiatrist dated 3 April 2014 corroborates the

fact that she was experiencing a high level of stress, anxiety and emotional distress during the period that followed the non-renewal of her appointment, part of which may be attributed to the decision not to extend her appointment pending rebuttal. In view of the foregoing, the Tribunal finds it appropriate to award the Applicant an amount of USD10,000 for non-pecuniary harm as a direct result of the decision not to extend her appointment pending completion of the rebuttal process.

Referral for accountability

332. The FRO is referred for accountability to the Secretary-General pursuant to art. 10.8 of the Dispute Tribunal's Statute in respect of the breaches of confidentiality (see paras. 99-100 and 207-212 above) and the directions given to the Applicant in respect of the conduct of her cases (see paras. 211above), which constitute a failure to meet or maintain the requisite level of professionalism. The FRO is no longer with OSLA but continues to work within the United Nations system. During the course of the hearing and of the consideration of this case, the Tribunal found that the conduct of the FRO was such that it is bound to refer him to the Secretary-General for consideration in respect of such conduct. There were significant breaches of very basic precepts of legal professional conduct and ethics by the FRO, which if such had occurred in a domestic setting would have been clearly a cause for a referral to an appropriate professional body to consider if he was a fit and proper person to hold a practising certificate as a lawyer. The conduct was such as to bring into question the compliance by the FRO with the United Nations Charter requirements for international civil servants in respect of professionalism and ethical conduct, and more specifically, the code by which he was then bound as set out in the Guiding Principles of Conduct for Office of Staff Legal Assistance (OSLA) Affiliated Counsel in the United Nations of 2010.

333. The Tribunal is further concerned that the FRO took retaliatory actions against the Applicant who was exercising her rights under the Staff Regulations and Rules, which may constitute prohibited conduct under staff rule 1.2(g) as discussed above at para. 102102. The Tribunal found that this conduct related not only to the Applicant, but also to another staff member. In an email of 15 July 2011, the FRO

wrote to the Applicant that OSLA "took [a UNHCR staff member] on board contingent on her w[ith]drawing any complaint against [UN]HCR, which she did". The identity of the staff member involved will be disclosed to the Secretary-General.

A final note

334. The Tribunal wishes to record its thanks to the retired staff members who appeared before it to give evidence. The third SRO, who made herself available notwithstanding she had only just taken up a new position outside the Organization, was the subject of a particularly long period of cross-examination. The Tribunal relies upon the continuing professionalism of retired staff members in order to be able to resolve many of the matters coming before it, as many delegated decisions are necessarily made by senior managers who are approaching retirement and have often retired at the time cases are considered by the Tribunal. As the Tribunal has no way to compel the attendance of those who retire, or who are not within the Organization, it relies on both the professionalism and public spirit of many of those asked to give evidence.

Conclusion

335. In view of the foregoing, the Tribunal DECIDES in Case No. UNDT/GVA/2013/057 that:

a. The Respondent shall pay the Applicant compensation equivalent to 21 months' net base salary, as pecuniary damages resulting from the decision not to renew her appointment beyond 11 June 2013;

b. The Respondent shall also pay the Applicant compensation equivalent to half her net base salary, plus post adjustment, for eight months and 13 days, as pecuniary damages;

c. The Respondent shall pay the Applicant compensation in the amount of USD40,000 as non-pecuniary damages;

d. The award of 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 award. An additional five per cent shall be applied to the United States of America prime rate 60 days from the date this Judgment becomes executable;

e. The Respondent shall place a copy of the present judgment in the Applicant's official status file; and

f. All other claims are rejected.

336. In Case No. UNDT/GVA/2013/039, the Tribunal DECIDES that:

a. The Respondent shall pay the Applicant compensation equivalent to half her net base salary, plus post adjustment, for 7 months and 5 days, as pecuniary damages resulting from the decision not to extend her appointment pending rebuttal, unless payment is made in accordance with para. 335a above;

b. The Respondent shall pay the Applicant compensation in the amount of USD10,000 as non-pecuniary damages;

c. The award of 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 award. An additional five per cent shall be applied to the United States of America prime rate 60 days from the date this Judgment becomes executable; and

d. All other claims are rejected.

(*Signed*)

Judge Rowan Downing
Dated this 27th day of June 2018

Entered in the Register on this 27th day of June 2018
(*Signed*)
René M. Vargas M., Registrar, Geneva