



**Before:** Judge Eleanor Donaldson-Honeywell

**Registry:** Geneva

**Registrar:** René M. Vargas M.

HILAIRE-MADSEN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Robbie Leighton, OSLA

**Counsel for Respondent:**

Yun Hwa Ko, UNFPA

Katrina Waiters, UNFPA

## **Introduction**

1. At the time of the application, the Applicant held a fixed-term appointment (“FTA”) at the G-5 level with the United Nations Population Fund (“UNFPA”). She served as a Procurement Assistant within the Procurement Service Branch (“PSB”) and was based in Copenhagen.

2. She was separated from service at UNFPA on 31 January 2019 on grounds of unsatisfactory performance.

## **Procedural history**

3. On 17 April 2019, the Applicant filed an application before this Tribunal to challenge the Respondent’s decision not to renew her appointment beyond 31 January 2019.

4. On 20 May 2019, the Respondent filed his reply to the application. The Respondent contends that the impugned decision was lawful in substance and procedure, and that the Applicant’s claims of bias and other extraneous factors are unsubstantiated.

5. On 2 February 2021, the Tribunal issued Order No. 18 (GVA/2021) setting this matter down for a case management discussion (“CMD”), which took place as scheduled on 12 February 2021.

6. Following the CMD, Order No. 40 (GVA/2021) was issued, in which the issues for adjudication were set out as follows:

a. Was the reason for the initial 8 October 2018 non-renewal decision properly supported by evidence of unsatisfactory performance?

b. After completion of the rebuttal process, was the Respondent required to consider an appraisal for the year 2018 before making the challenged decision on 27 December 2018?

c. Was the assignment of a new Supervisor to the Applicant in August 2018 a remedial measure, the outcome of which should have been taken into account before deciding on non-renewal or was this an alternate arrangement with a limited workplan to allow for finalization of the Applicant's 2017 appraisal?

d. Was there evidence of bias on the part of the Supervisor responsible for the Applicant's 2016 and 2017 appraisal's such that her non-renewal was based on improper motives?

7. The Applicant was also given the opportunity to file further submissions, which she did.

### **Facts**

8. The parties differ in their respective versions of events leading up to the impugned decision. However, as there is supporting documentation on what transpired, undisputable facts can be identified. The timing of the various events is relevant in determining the pertinent periods of work performance that should have been considered in making the decision. The timeline is also key to discerning the motivation of the parties in the performance appraisal and eventual non-renewal decision. Accordingly, the facts are identified and summarised in chronology.

9. The Applicant joined PSB, UNFPA on 1 April 2012 on a FTA which was renewed up to the end of March 2014, and then again up to March 2016.

10. Under the supervision of the Procurement Specialist, Performance Appraisal and Development reports ("PADs") were completed for 2014 and 2015. The Applicant's overall rating was "fully meets outputs" but there were less than satisfactory ratings for two core competencies concerning achieving results and teamwork. She was placed on a Performance Improvement Plan ("PIP") in 2015 and achieved some improvement in the areas of shortfall. However, those two competencies remained with low ratings.

11. Despite there being a few negative indications in her PADs for 2014 and 2015 and the fact that she had to be placed on a PIP, her appointment was renewed from April 2016 through to 31 March 2018. Shortly thereafter, the Applicant's direct supervisor fell ill and was replaced by Ms. L.P.

12. The Applicant was placed on a second PIP by Ms. L.P. for the months of November and December 2016. On 24 April 2017, the Applicant sent an email to the Deputy Chief, PSB. It was expressed as a "cry for help" regarding difficulties with her new supervisor Ms. L.P., which allegedly made her working atmosphere unbearable. The Deputy Chief, PSB arranged a meeting with the Applicant.

13. Ms. L.P. completed her first Performance Appraisal and Development report ("PAD") regarding the Applicant on 1 May 2017, assessing her work for the year 2016. In this PAD shortfalls were recorded, not only regarding the two core competencies that were deficient in 2015 but also four others. Only two core competencies were rated favourably. The overall rating moved down from the previous years and the Applicant was said to have only "partially achieved" her outputs. As Ms L.P. noted that not all areas had improved based on the second PIP, a third PIP was recommended.

14. The third PIP was put in place from June to December 2017. There were recorded concerns of non-cooperation, and the Applicant's performance was seen overall as not having improved.

15. On 7 December 2017, the Applicant sent an emailed request, via a colleague, to the Chief of PSB, for her direct supervisor to be changed. The request was refused, with the explanation that it could have an impact on team performance.

16. A few weeks later, in mid-January 2018, the Applicant went on sick leave. In her submissions, she says she was forced to do this following the difficulties she faced with Ms. L.P. The Respondent disputes this and suggests instead that sick leave was approved for scheduled surgery. Nothing in the documents filed by both parties sheds light on this point of dispute. The record does, however, include medical certificates indicating stress related conditions the Applicant experienced

from around August 2018 to October 2018 justifying her delayed return to full time work.

17. The Applicant's PAD for the year 2017 should have been in progress, when on 16 February 2018 she requested a further two weeks of sick leave. She also asked that completion of her 2017 PAD be deferred until after her return from leave, as it was proving to be stressful. This request was granted but the Applicant did not return from leave after two weeks.

18. The Applicant was still on leave when her contract came to expire on 31 March 2018, which contract was then extended through to 28 September 2018 to, the Respondent submits, enable the Applicant to exhaust her sick leave entitlement.

19. The Applicant remained on full sick leave for several months. Then, from 26 August 2018, she resumed duties but was on half pay sick leave. As such, she worked only half days. On her return, the Applicant was assigned to work with a new direct supervisor, Ms. M.L.

20. The Respondent explains that a new line supervisor was assigned to minimize disruption that would have been caused if attempts were made to bring the Applicant back up to speed with her old job, given that other staff members had been assigned to cover those duties. The Respondent further explains that the duties assigned on the Applicant's return were for a limited, nine-week work plan. There is no document on record expressly stating that on the Applicant's return from sick leave, there were limited terms of engagement.

21. The Applicant's new work plan mainly involved work in relation to Haiti, whereas previously work for other countries was included. There is an email dated 11 September 2018<sup>1</sup> from the Deputy Chief, PSB, to Ms. L.P. and Ms. M.L. where the explanation given for the Applicant's re-assignment is that "Haiti needs a lot of

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<sup>1</sup> Disclosed as annex 23 of the Respondent's submissions.

support.” The assignment is expressly stated as to continue from September 2018 to the end of that year.

22. According to the Applicant, the assignment of the new supervisor with a new workplan was a remedial measure, presented to her as an opportunity to prove herself. As evidence that this was the purpose, she relies on annex 18 of her application. It is a short email dated 12 September 2018 from the Deputy Chief, PSB, to the Applicant inviting her for a meeting and indicating “I have some news I hope you will like”.

23. While these duty work assignment changes were taking place, the Applicant’s PAD was in progress. The Applicant’s self-appraisal was what was pending to complete the process. She was dissatisfied with the overall rating and requested an extension of time to 26 September 2018 for her input.

24. It came to the Applicant’s attention, by the inadvertent forwarding of an email stream dated 19 September 2018, that the Deputy Chief, PSB and Ms. L.P. wanted to grant her request, since that might lessen the likelihood that she would seek rebuttal. The Deputy Chief, PSB commented that should there be no rebuttal, the Applicant’s contract would not have to be renewed after 26 October 2018, i.e., 30 days after completion of her PAD.

25. The Applicant’s FTA was renewed to 28 September 2018 and on that date her 2017 PAD was completed. The overall rating was “did not achieve outputs” and the Applicant was further downgraded to “developing proficiency” in all competencies. There was a further renewal of her FTA up to 30 November 2018. The purpose of this renewal was said by the Respondent, in submissions herein, to give ample time to conclude the 2017 PAD. However, the reason for the extension of the Applicant’s FTA at that stage is unclear.

26. As the Applicant’s entitlement to half time sick leave had expired, she resumed full time duties on 1 October 2018. On 8 October 2018, her change of direct supervisor and workplan was entered into the PAD system with amended goals. The Respondent informed the Applicant the next day, on 9 October 2018, that her FTA would not be renewed beyond 30 November 2018. The reason is not

stated in the communication of the decision; but it is not in dispute that it was due to unsatisfactory service based on the 2016 and 2017 PADs. In 2018, her working would have amounted to around four months; her performance during this period had not yet been appraised and was not considered.

27. The Applicant sought rebuttal of her 2017 PAD, and her FTA was extended to 31 January 2019 to allow for completion of the process. The rebuttal panel upheld the 2017 PAD on 21 December 2018. On 27 December 2018, the contested non-renewal decision was issued to the Applicant indicating that her FTA would end on 31 January 2019.

28. The reason for non-renewal was once more based on unsatisfactory service, reflected in the 2016 and 2017 PADs. No PAD for 2018 had been completed at the end of 2018, and the Respondent did not wait for this appraisal before deciding on non-renewal. The four months of work in 2018 was not considered. The Applicant was separated from service at the end of January 2019.

29. Shortly thereafter, on 17 February 2019, Ms. M.L. completed the Applicant's 2018 PAD. She received overwhelmingly satisfactory ratings and comments regarding the work she had done, which Ms. M.L. repeatedly said was for a period of four months in 2018.

### **Consideration**

30. The issues identified for adjudication in this matter, as set out above, will now be considered.

31. As to the third and fourth issues raised, the Applicant has failed to establish either that her assignment to a new supervisor was a remedial measure or that improper motives minimized the usefulness of the PADs completed by Ms. L.P. in justifying the non-renewal decision.

32. Although it was reasonable for the Applicant to have used the assignment of a new supervisor to prove herself as capable of satisfactory performance, the record of correspondence concerning the reassignment does not support the premise that this was the Respondent's intention.

33. As to the allegations of improper motives made against Ms. L.P., the Tribunal notes that the impugned performance appraisal was upheld by an independent rebuttal panel. There is no basis in the regulatory framework for the Tribunal to question whether the appraiser and/or the appraisal process was tainted so as to vitiate the propriety of the non-renewal decision. Additionally, Ms. L.P. was not the person who decided that the Applicant's appointment should not be renewed. Under sec. 5.7 of the UNFPA Policy on Separation from Service, the authorised decision maker was the Director, DHR, who indeed made the decision.

34. However, having considered the chronology of events, the parties' submissions and the regulatory framework, it is now clear that a consideration of the first two issues together will suffice to determine this application in the Applicant's favour.

35. In conducting its judicial review of the impugned decision, the Tribunal is guided by the Appeals Tribunal in *Kule Kongba* 2018-UNAT-849 at para 27, which provides as follows:

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, as in the case of a non-renewal decision, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The **UNDT can consider whether relevant matters have been ignored** and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Dispute Tribunal to substitute its own decision for that of the Secretary-General. (emphasis added)

36. The critical point made by the Applicant, in contesting the decision not to renew her contract, is that relevant matters were ignored. Specifically, the Applicant contends that before making the non-renewal decision on 27 December 2018, the



Respondent ought to have awaited and considered an appraisal of her performance for the four months she was on duty in 2018. It is my finding that there is merit to this submission by the Applicant. Consideration of the PAD for the most recently applicable year is not only mandated by the regulatory framework but would have been reasonable in the circumstances that unfolded.

37. The apex of the applicable regulatory framework governing non-renewal for unsatisfactory performance is staff regulation 4.5 (c) which provide that “[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service”. Furthermore, staff rule 4.13(c) provides that “[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service ...”.

38. Although there is no expectancy of renewal, the Respondent’s non-renewal decision making is subject to review and as such must be based on valid reasons and supported by the facts.<sup>2</sup> As admitted by the Applicant in her submissions, there is settled jurisprudence that “poor performance ... may be the basis for the non-renewal of (a) fixed-term appointment.”<sup>3</sup>

39. If, as in the instant case, the reason for non-renewal is poor performance, the reason must be explained by the Respondent in a manner which must be factually performance related. The Appeals Tribunal has held that “a staff member whose performance was rated as partially meeting performance expectations had no legitimate expectancy of renewal of his contract.”<sup>4</sup>

40. Thus, if there were only the Applicant’s PADs for 2016 and 2017 that were relevant to be considered before deciding on her non-renewal, then the decision could be upheld as lawful. However, the UNFPA Separation from Service Policy specifically provides for completion and consideration of the most recent PAD, which, in this case, is the 2018 PAD completed for the Applicant’s four

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<sup>2</sup> *Nouinou* 2019-UNAT-902.

<sup>3</sup> *Said* 2015-UNAT-500, para. 34, referring to *Morsy* 2013-UNAT-298, para. 18; *Ahmed* 2011-UNAT-153, para. 49.

<sup>4</sup> *Dzintars* 2011-UNAT-176, paras. 30-31.

months' work in 2018 under the supervision of Ms. M.L. The relevant provisions are as follows:

*Reason for decision not to renew appointment:*

- 5.12 There may be various reasons for a decision not to renew an appointment, including, for example:

*Reason of unsatisfactory performance:*

- 5.13 Where reasons of unsatisfactory performance account for the decision not to renew the fixed term appointment, the departures from the required standards of performance should be reflected in "Performance Appraisal and Development" (PAD), UNFPA's performance management system. However, while the PAD is aligned with the calendar year, the expiration dates of fixed term appointments are mostly not so aligned. (For example, a fixed term appointment might expire in the month of August, whereas the regular year-end appraisal in PAD for the year in question may be due only on 31 December.) Therefore:

- (a) If a fixed term appointment expires between 1 January and 30 June of any given year, it is not necessary to issue a year-end appraisal. In this case, the organization may rely on (a) previous year-end appraisal(s);
- (b) **If a fixed term appointment expires between 1 July and 31 December of any given year, the year-end appraisal in PAD should be completed.** The appraisal concerned may be performed prior to the Fund-wide year-end appraisal phase in PAD. Line Managers should contact LCMB/DHR to obtain access to the year-end appraisal section in the PAD internet application earlier in the year if the year-end appraisal section is not already accessible. The staff member may be assigned deadlines to complete his or her part in the PAD. Should the staff member fail to do his or her part, the appraisal shall nevertheless proceed. (emphasis added)

- 5.14 In the event that a staff member has submitted a statement of rebuttal **in respect of the year-end appraisal relied upon by the organization for the administrative decision not to renew** the fixed term appointment, the rebuttal should be reviewed by the UNFPA Rebuttal Panel prior to implementation of separation from service.[ ...]

**Any extension of the fixed term appointment to give effect to the staff member's right to rebuttal review will not be counted for purposes of paragraph 5.13, above.** (emphasis added)

41. It is clear, as pointed out by Counsel for the Respondent in his submissions, that the provision for taking into account the most recent PAD is directive and not mandatory. The words "should be completed" in relation to the year-end PAD can be construed as meaning that this can be done as a matter of discretion.

42. From 30 November 2018 to the end of 2018, the Applicant's FTA was only renewed for purposes of completing a rebuttal of her 2017 PAD. Although on a literal reading of 5.14 of the UNFPA Policy set out above, the rebuttal of a PAD for a prior year is not contemplated, this forms part of the circumstances to be considered in deciding whether it was reasonable not to take into account an appraisal for the year ending 2018.

43. It is for this reason that the timing and circumstances of the Applicant's appraisals, sick leave taken, the nature of the four-month assignment in 2018 and the reasons for it, are relevant. These factors have been considered in coming to a determination that a proper exercise of the Respondent's discretion would have been to consider an appraisal of the Applicant's work for the four-month period in 2018.

44. The first time that the Applicant was informed of a non-renewal decision was on 9 October 2018. By then, the Applicant had been actively on duty for almost six weeks and had been assigned to a new supervisor with a new work-plan. It is not at all clear, as contended by the Respondent, that the Applicant's FTA renewals beyond 31 March 2018 were solely for purposes of completing her 2017 PAD.

45. The correspondence to the Applicant clearly encouraged her to treat her new assignment from early September 2018 as good news and subject to appraisal. This must be viewed in context. Immediately before this new assignment, i.e., just before the Applicant went on sick leave, she had requested re-assignment to a different supervisor.

46. Furthermore, there were indications that her service was needed in the new assignment because of a heavy workload in Haiti. The re-assigned supervisor and workplan were inputted to the PAD system. The Applicant then made significant strides in proving her abilities. It is evident that both the Applicant and her new supervisor intended that the new opportunity, under different supervision, would be appraised to see whether there was improvement.

47. It is the Tribunal's finding that it would have been reasonable for the Organization to have followed through on this constructive approach, before making the second non-renewal decision at the end of December 2018. The Applicant's performance from September to December 2018 was in fact assessed after her separation and found to be satisfactory. There were glowing commendations for her work.

48. The Applicant was on sick leave for the first seven months of the year but there is no provision in the regulatory framework indicating that the appraisal for a shorter period of work during a particular year can be ignored or is not to be considered. On the contrary, after having been on sick leave to resolve issues of ill health that may have affected prior performance, it would have been reasonable to consider improvements on return from leave.

49. Even if the period of extension for rebuttal purposes is discounted, that amounted to a mere one-month period. As such it would have been reasonable to take into account the PAD for the full four months worked in 2018. Accordingly, the Tribunal's determination is that the non-renewal decision was neither rational nor fair, since there was a failure to consider relevant factors. If the decision had not been made, the Applicant could have been afforded at least a short renewal of her FTA to continue her satisfactory work.

### **Remedies**

50. The Applicant seeks only an award of compensation for moral and material damages. The Tribunal is authorised to make such an award pursuant to art. 10.5(b) of its Statute.

51. For an award of moral damages to be made there must be evidence of harm.<sup>5</sup> There is no evidence on record to justify an award of moral damages. Accordingly, no such award will be granted.

52. As to the claim for material damages, the Tribunal in *Quatrini* UNDT/2020/053 observed that

*Compensation for harm*

16. [C]ompensation under art. 10.5(b) of the Dispute Tribunal's Statute may be awarded for (a) pecuniary damages, such as income loss, and (b) non-pecuniary damages, such as stress, anxiety, and reputational harm.

*Pecuniary damages*

17. [I]n a non-renewal case, the compensable period is typically the same as the last appointment (see, for instance, *Gakumba* 2013-UNAT-387, para. 16, *Kasmani* 2013-UNAT-305, para. 36, and *Belkhabbaz* 2018-UNAT-895, para. 38).

53. The Applicant's last FTA was for a two-year period ending March 2018, but she was granted several extensions and worked until the end of January 2019. Thus, a period of approximately one year is to be deducted from her potential award.<sup>6</sup> Additionally, the Applicant presented no evidence of any steps taken to mitigate her loss by seeking alternate employment. She had therefore failed to meet her burden of proof to be awarded the full earnings for the remainder of a two-year FTA.<sup>7</sup>

54. It can reasonably be expected, that while the Respondent ought to have considered the positive PAD for 2018, the prior two years of unsatisfactory PADs would also be considered. As such, there is a possibility that even if the four months of satisfactory work performance in 2018 had been considered, the contract would not be renewed.

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<sup>5</sup> See *Israbhakdi* 2012-UNAT-277; *Mihai* 2017-UNAT-724; *Ashour* 2019-UNAT-899.

<sup>6</sup> *Quatrini*, para 18.

<sup>7</sup> *Quatrini*, para 23.

55. In all the circumstances, the Tribunal considers that an award of three months' salary as material damages under art 10.5(b) of its Statute is appropriate.

**Conclusion**

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

- a. The application succeeds in part on the merits;
- b. The Respondent shall pay the Applicant a compensation for material damages in the amount of three month's net base salary;
- c. The aforementioned compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States of America prime rate 60 days from the date this Judgment becomes executable; and
- d. All other claims are rejected.

*(Signed)*

Judge Eleanor Donaldson-Honeywell

Dated this 29<sup>th</sup> day of March 2021

Entered in the Register on this 29<sup>th</sup> day of March 2021

*(Signed)*

René M. Vargas M., Registrar, Geneva