



Before: Judge Francesco Buffa

Registry: Geneva

Registrar: René M. Vargas M.

YAVUZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Jérôme Blanchard, LPAS, HRMS, UNOG

Patricia Ilie, LPAS, HRMS, UNOG

Introduction

1. The Applicant, a former staff member with the United Nations Economic Commission for Europe (“UNECE”), contests the decision to separate him from service “by non-renewal for purported performance reasons” (“contested decision”).

Facts and procedural background

2. On 4 May 2017, the Applicant was appointed as Economic Affairs Officer (P-3), Agricultural Quality Standards Unit, Market Access Section, Division of Economic Cooperation and Trade (“DECT”), UNECE, on a one-year fixed-term appointment. The Unit was composed of a GS-5 Assistant, a P-4 who acted as the Applicant’s first reporting officer (“FRO”) and a P-5 who acted as the Applicant’s second reporting officer (“SRO”).

3. On 23 May 2017, the Applicant’s FRO met with him to discuss the performance evaluation process. The goals and expectations set for the Applicant, in the form of a workplan, were agreed upon and entered into *Inspira* on 16 June 2017.

4. According to the Applicant’s submissions, in a meeting with his FRO and SRO in August 2017, he was accused of having bad feelings towards his FRO. His teamwork and skills were allegedly also criticized at this meeting. The Applicant raised the fact that he found his FRO’s attitude and insulting behaviour problematic. The response was to inform the Applicant that he should be grateful to his FRO who had been instrumental in the decision to select him for the position.

5. This allegedly marked the beginning of a pattern of aggressive criticism and demeaning language used towards the Applicant by his FRO, which continued throughout his time in the Unit.

6. On 9 October 2017, the Applicant allegedly met with his SRO to discuss the harassment he believed he had been subject to. His SRO suggested that the perceived insults were the result of a cultural clash and that this was normal in the United Nations.

7. On 16 October 2017, the Applicant met with the Executive Officer at UNECE to discuss the situation. The Applicant expressed his opinion that his FRO and SRO had already decided to try to end his employment. The Executive Officer advised the Applicant to contact the Staff Coordinating Council, the Ombudsman, the Deputy Executive Secretary (“DES”), UNECE, and the Executive Secretary, UNECE. The Applicant subsequently made contact with the Staff Coordinating Council, the Ombudsman and the DES.

8. On 9 November 2017, the Applicant’s mid-term review was completed. His FRO informed him of performance shortcomings and that she intended to place him on a performance improvement plan (“PIP”).

9. On 5 December 2017, the Applicant received a PIP to be implemented from 8 December 2017 until 8 March 2018. The PIP included the expected goals for improvement, target activities, their deadlines as well as dates to review progress by the Applicant and his Supervisor. The Applicant provided comments on 11 December 2017.

10. By email dated 19 December 2017, the SRO informed the Applicant that two deadlines in the PIP had been amended as a result of his comments, that his other suggestions were rejected, and that the core part of the PIP was not negotiable and, therefore, could not be changed.

11. On 21 December 2017, 17 January 2018, and 8 February 2018, the Applicant met with his FRO and SRO to discuss his progress in meeting his PIP targets.

12. On 22 December 2017, the Applicant allegedly met with the DES, UNECE, to inform him of the situation. The DES allegedly told the Applicant that he was following the situation closely, and later indicated that the Applicant would be given the opportunity to work for a different supervisor to ensure an objective assessment of his performance.

13. On 19 February 2018, the Applicant requested a guarantee from his FRO that his contract would cover the period of the French language class he sought to enrol in, but his FRO declined to provide him with such a commitment. As a result, he forwarded the exchange between him and his FRO to the Staff Coordinating Council, who then forwarded it to the DES.

14. By email of 2 March 2018, the DES, UNECE, advised a representative of the Staff Coordinating Council as follows:

I have clear understanding with both my [Executive Secretary] and also [Executive Office] that [the Applicant] will be given a chance to work under another supervisor. However, we will have to deal with it once the period of the PIP ends, as we need to do it by the book and respect the PAS process.

I actually informally explained this to [the Applicant] and asked him to wait till the PIP period ends. But of course it is understandable that he is very worried.

In my assessment of the situation it is irrelevant whether his current supervisors will fail him on PIP or not.

For me there is no evidence of underperformance on his side, rather interpersonal problems and most likely lack of proper management/instruction.

15. The DES continued to monitor the situation and indicated in an email of 7 March 2018 to the Staff Coordinating Council that he understood that “[the Applicant’s] supervisors are maltreating [him]”. In a further email of 8 March 2018, he stated that “there [was] no intention to terminate [the Applicant]’s contract but to give him an opportunity under another supervisor”.

16. On 21 March 2018, the Applicant received a report regarding his performance on the PIP, which indicated shortcomings in the competencies of professionalism, teamwork and communication, the core value of respect for diversity, and three goals listed in his workplan.

17. By email of 11 April 2018, the Director, DECT, UNECE, informed the Applicant that she would act as his FRO and SRO from that date. She remained his FRO and SRO until her departure from UNECE on 30 November 2018.

18. On 28 May 2018, the Applicant received his performance appraisal (“e-PAS”) for the period from 4 May 2017 until 31 March 2018, with an overall rating of “partially meets expectations” signed by his initial FRO and SRO.

19. On 6 June 2018, the Applicant initiated a rebuttal process against his 2017-2018 e-PAS. Consequently, a Rebuttal Panel was set up and provided with case-specific documents, the legal framework, and guidelines. The Panel interviewed the Applicant, the FRO, the SRO, and another team member who was also under the FRO’s supervision.

20. As of June 2018, the Applicant’s appointment was extended on a monthly basis pursuant to the provisions of ST/AI/2010/5 (Performance Management and Development System) for the purpose of the completion of the rebuttal process.

21. During the time when the Director, DECT, UNECE, was his FRO and SRO, the Applicant was asked to carry out two tasks for another section, for which he received a positive evaluation. The Applicant was allegedly told that this was an attempt to secure an independent view of his performance.

22. On 17 December 2018, the Director, DECT, UNECE, who had left UNECE since 30 November 2018, provided her appraisal of the Applicant’s performance through an email addressed to the Executive Officer, UNECE. She stated that the Applicant:

was eager to carry out the assignment and had a pleasant disposition towards work” but “needs more guidance and direction than would normally be required from a P-3 staff member” and that he, when given an “opportunity to work with another section[,] ... finally produced a satisfactory output.

23. On 19 December 2018, the Rebuttal Panel released its report upholding the performance appraisal rating of “partially meets expectation”. The Panel found that the performance appraisal procedure was properly followed and that a change of rating was not warranted.

24. On 26 December 2018, the Applicant filed a complaint of harassment and abuse of authority under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) against his initial FRO and SRO as well as “all UNECE senior managers who were aware of the harassment and abuse ... but failed to observe their responsibilities under said bulletin” and “all relevant UNECE and UNOG Human Resources staff who rejected, or played a role in the rejection of [his] applications to receive a Carte de Legitimation”.

25. By memorandum dated 23 January 2019, the Chief, HRMS, UNOG, informed the Applicant of the decision not to extend his fixed-term appointment beyond 31 January 2019 for performance reasons.

26. On 30 January 2019, the Applicant requested management evaluation of the contested decision.

27. On 31 January 2019, the Applicant filed an application for suspension of action of the contested decision.

28. By Order No. 4 (GVA/2019) of 6 February 2019, the Tribunal ordered that the decision of 23 January 2019 not to renew the Applicant’s fixed-term appointment beyond 31 January 2019 be suspended pending the outcome of the management evaluation.

29. On 14 February 2019, the Executive Secretary, UNECE, provided a statement to the Executive Officer, UNECE, stating that he fully supported the Performance Management process in the Applicant's case, which included the implementation of a PIP from 8 December 2017 to 8 March 2018. He added that he had taken the decision to separate him from service after the rebuttal process was exhausted, and after numerous meetings with him, representatives from the Staff Coordinating Council, his FRO and SRO, the Division Director, the DES, the Executive Officer and the Ombudsperson. He stated that this decision also followed the standard processes for reviewing staff performance, as required by ST/AI/2010/5.

30. By letter dated 9 May 2019, the Applicant was informed of the outcome of his request for management evaluation, which upheld the contested decision.

31. The Applicant's contract was subsequently extended to allow the Applicant to exhaust his sick leave entitlements after his placement on sick leave. On 31 May 2019, the Applicant was informed of his separation from service, as further sick leave could not be approved by the Medical Service, UNOG, in the absence of a valid medical report.

32. On 31 May 2019, the Applicant was separated from service.

33. On 19 July 2019, the Applicant filed the application mentioned in para. 1 above.

34. On 30 August 2019, the Respondent filed his reply including three *ex parte* annexes.

35. On 26 January 2021, the present case was assigned to the undersigned Judge.

36. By Order No. 49 (GVA/2021) of 16 February 2021, the Tribunal found that the annexes to the reply shall remain *ex parte* and that the matter could be determined on the papers without holding a hearing, and ordered the parties to file their respective closing submission, which they did on 1 March 2021.

Parties' submissions

37. The Applicant's principal contentions are:

- a. The Applicant was provided with a legitimate expectation of renewal by the DES, UNECE;
- b. His performance was not been managed or evaluated in a fair manner;
- c. Likewise, the rebuttal process was flawed. The Applicant's due process rights were violated, and the Panel was not provided with complete information, particularly concerning the difficulties identified by senior management in the Applicant's supervisory relationship; and
- d. He was subject to harassment and abuse of authority in a deliberate attempt to remove him from employment at UNECE.

38. The Respondent's principal contentions are:

- a. The decision not to renew the Applicant's appointment due to unsatisfactory performance was lawful;
- b. The Applicant's performance was evaluated in full compliance with the applicable rules;
- c. The e-PAS rating of "partially meets performance expectations" was based on objective elements;
- d. The Applicant was granted full consideration by a Rebuttal Panel;
- e. The DES's statements and actions could not counterbalance the performance evaluation process;
- f. The Applicant was aware that his fixed-term appointment might not be renewed for performance reasons; and
- g. The Applicant's allegations of prohibited conduct were not substantiated.

Consideration

39. The present dispute concerns the non-renewal of the Applicant's fixed-term appointment due to alleged poor performance.

40. The Tribunal recalls that the starting point for the examination of the lawfulness of the decision not to renew the Applicant's fixed-term appointment for alleged poor performance is the well-established principle that a fixed-term appointment does not bear any expectancy of renewal (staff regulation 4.5(c); staff rule 4.13(c); see also *Ncube* 2017-UNAT-721, para. 15; *Appellee* 2013-UNAT-341, paras. 14-16).

41. However, in case of non-renewal of an appointment on the grounds of unsatisfactory performance, the Administration is required 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" (see *Sarwar* 2017-UNAT-757, para. 72; see also *Ncube*, para. 17). In this respect, the Appeals Tribunal 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 (see *Ncube*, para. 18; see also *Tadonki* 2014-UNAT-400, para. 56).

42. Nevertheless, a non-renewal decision can be challenged on the grounds that the Administration "has not acted fairly, justly or transparently with the staff member or was motivated by bias, prejudice or improper motive against the staff member". It is incumbent on the staff member to prove that such factors played a role in the non-renewal decision (see *Said* 2015-UNAT-500, para. 34).

43. Having reviewed the parties' submissions, the Tribunal notes that the Respondent has adduced evidence of performance shortcomings identified at the early stage of the Applicant's employment with UNECE, remedial actions taken promptly through a PIP, a detailed 2017-2018 e-PAS with a rating of "partially

meets performance expectations”, followed by a rebuttal process that upheld the rating. However, the Applicant has raised serious allegations of possible bias and lack of objectivity in the evaluation of his performance.

44. In view of the above, in determining the lawfulness of the contested decision, the Tribunal will examine the following issues:

- a. Whether the Applicant’s performance was managed or evaluated in a fair and objective manner; and
- b. Whether the Administration failed to consider relevant information in making the contested decision.

45. Before examining each of these issues, the Tribunal will first elaborate upon the rules and procedures governing performance management set forth in ST/AI/2010/5.

Rules and procedures governing performance management

46. The Tribunal notes that the “objectiveness, transparency and legality of a performance evaluation [stem] primarily from the procedures indicated in the applicable Administrative Instruction [ST/AI/2010/5]” (see *Tadonki* 2014-UNAT-400, para. 55).

47. The purpose of ST/AI/2010/5, as elaborated in its section 2.1, is “to improve the delivery of programmes by optimizing performance at all levels”, which will be achieved by (emphasis added):

- (a) Promoting a culture of high performance, personal development and continuous learning;
- (b) Empowering managers and holding them responsible and accountable for managing their staff;
- (c) Encouraging a high level of staff participation in the planning, delivery and evaluation of work;
- (d) Recognizing successful performance and addressing underperformance in a **fair and equitable** manner.

48. Section 5 of ST/AI/2010/5, entitled “Reporting officers and additional supervisors”, provides in its relevant part that:

5.1 A first reporting officer shall be designated for each staff member at the beginning of the performance cycle. The first reporting officer is responsible for:

- (a) Developing the workplan with the staff member;
- (b) Conducting the midpoint review and final evaluation;
- (c) Providing ongoing feedback on the overall work of the staff member throughout the performance cycle;
- (d) Advising, supporting and coaching the staff member on professional development and in the development of a personal development plan;
- (e) Developing a performance improvement plan in consultation with the staff member in the case of performance shortcomings or underperformance, if applicable;
- (f) Ensuring that all e-PAS and/or e-performance documents of staff supervised are completed in accordance with the prescribed procedures.

49. Pursuant to section 5.3 of ST/AI/2010/5, a SRO, who shall be the FRO’s supervisor or equivalent, is responsible for *inter alia* ensuring that the FRO understands and applies the Performance Management and Development System principles and procedures properly and fairly (see also *Sarwar 2017-UNAT-757*, para. 8).

50. Under section 7.1 of ST/AI/2010/5, during the course of the performance cycle, the FRO and the staff member should hold conversations and dialogue, formally and informally, to address recognition for good performance and “any shortcomings as they become apparent at any time during the cycle” (see also *Sarwar 2017-UNAT-757*, para. 10).

51. Section 10 of ST/AI/2010/5, entitled “Identifying and addressing performance shortcomings and unsatisfactory performance”, sets forth the legal framework for addressing performance shortcomings and unsatisfactory performance, providing that (emphasis added):

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

10.2 If the performance shortcoming was not rectified following the remedial actions indicated in section 10.1 above, and, where at the end of the performance cycle performance is appraised overall as “partially meets performance expectations”, a written performance improvement plan shall be prepared by the first reporting officer. This shall be done in consultation with the staff member and the second reporting officer. The performance improvement plan may cover up to a six-month period.

10.3 If the performance shortcoming was not rectified following the remedial actions indicated in section 10.1, a number of administrative actions may ensue, including the withholding of a within-grade salary increment pursuant to section 16.4, the non-renewal of an appointment or the termination of an appointment for unsatisfactory service in accordance with staff regulation 9.3.

.....

10.5 Should unsatisfactory performance be the basis for a decision for a non-renewal of a fixed-term appointment and should the appointment expire before the end of the period covering a performance improvement plan, the appointment should be renewed for the duration necessary for the completion of the performance improvement plan.

52. Pursuant to section 11 of ST/AI/2010/5, entitled “Implementation and monitoring by heads of departments and offices”, primary responsibility for the timely execution of the Performance Management and Development System, overall compliance and consistent and fair implementation rests with the head of department/office/mission. The senior management team of each department/office/mission may provide guidance addressing performance

shortcomings at the departmental/office/mission level (section 11.6 of ST/AI/2010/5).

53. Staff members who disagree with a “partially meets performance expectations” rating given at the end of the performance year may initiate a rebuttal pursuant to section 15 of ST/AI/2010/5, entitled “Rebuttal process”, that provides in its relevant part that (emphasis added):

15.1 Staff members who disagree with a “partially meets performance expectations” or “does not meet performance expectations” rating given at the end of the performance year may, within 14 days of signing the completed e-PAS or e-performance document, submit to their Executive Officer at Headquarters, or to the Chief of Administration/Chief of Mission Support, as applicable, a written rebuttal statement setting forth briefly the specific reasons why a higher overall rating should have been given.

...

15.3 After receiving a copy of the rebuttal statement, the head of department/ office/mission, or his or her representative, shall, within 14 days, prepare and submit to the rebuttal panel a brief written statement in reply to the rebuttal statement submitted by the staff member. A copy of the reply to the rebuttal statement shall be given to the staff member. Unless geographical location makes it impractical, the panel **shall** hear the staff member, the first and second reporting officers and, at the discretion of the panel, other individuals who may have **information relevant** to the review of the appraisal rating. Telephone statements may also be taken where geographical separation so dictates.

15.4 The rebuttal panel shall prepare, within 14 days after the review of the case, a brief report setting forth the reasons why the original rating should or should not be maintained. ...

...

15.6 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.

Whether the Applicant's performance was managed or evaluated in a fair and objective manner

54. The Tribunal recognizes that its role is not to review *de novo* the Administration's evaluation of the Applicant's performance but rather to determine whether the rules and procedures governing performance evaluation were complied with (see *Ncube* UNDT-2016-069, para. 127). In this respect, the Tribunal recalls that section 2.1 of ST/AI/2010/5 requires that staff members' performance be managed or evaluated in a "fair and equitable manner". This means that performance evaluation should be objective and bias-free.

55. In the present case, the Tribunal notes that the Applicant has adduced evidence of possible bias and lack of objectivity in the evaluation of his performance by the FRO and the SRO. For example, the documentary evidence on record shows that (i) the Applicant's FRO was unwilling to discuss face-to-face with him a task assigned under the PIP despite several requests (see annexes 25 to 28 to the application) whereas, regarding a subsequent similar assignment, she blamed the Applicant for his failure to seek face-to-face guidance (see annexes 29 and 30 to the application); and (ii) the Applicant's FRO and SRO asked him to improve his respect for diversity via the PIP but failed to provide concrete examples of poor performance in this respect despite his explicit request for clarification (see annex 3 to the application). With respect to these substantiated examples, the Respondent has not provided evidence to the contrary. Thus, the Tribunal is of the view that even assuming that the FRO and the SRO evaluated the Applicant's performance in a fair and an objective manner, they certainly failed to "proactively assist" the Applicant to remedy his performance shortcomings in accordance with section 10.1 of ST/AI/2010/5.

56. Moreover, the undisputed interpersonal issues between the Applicant and his FRO have further impaired the ability of the FRO and the SRO to objectively evaluate his performance. This is supported by the documentary evidence showing that senior management in UNECE, in particular the DES, had expressed serious concerns about the treatment the Applicant received from his FRO and SRO and their ability to continue to supervise his work. In an email of 2 March 2018, the

DES referred to “interpersonal problems and most likely lack of proper management/instruction”, and in a subsequent email of 7 March 2018, he expressed his understanding that the Applicant was “maltreated” by his supervisors.

57. From 2 March 2018, the DES, UNECE, took concrete measures to change the Applicant’s supervisory line and to ensure that “he [would] be given a chance to work under another supervisor” after completion of the PIP. This commitment in fact materialised on 11 April 2018 when the Director, DECT, UNECE, replaced the Applicant’s FRO and SRO as his unique supervisor. The Director, DECT, UNECE, also asked the Applicant to carry out an assignment for another section to give him an additional opportunity to work under another supervisor.

58. Therefore, the actions taken by the DES, UNECE, further support the Tribunal’s finding that the FRO and the SRO failed to evaluate the Applicant’s performance in a fair and objective manner.

59. Moreover, the Tribunal finds that there is a disconnect between the actions taken by the DES to change the Applicant’s supervisory line due to perceived difficulties in the supervisory relationship, and the subsequent decision not to renew the Applicant’s appointment based on an assessment of his performance by these same supervisors who were removed from their roles, as further discussed in para. 65 below. This unusual situation further undermines the objectivity of the Applicant’s performance appraisal.

60. However, the rebuttal process did not cure this irregularity as there was no consideration by the Panel of any difficulty in the supervisory relationship.

61. Accordingly, the Tribunal finds that the Applicant’s performance was not managed or evaluated in a fair and objective manner.

Whether the Organization failed to consider relevant information in making the contested decision

62. The Tribunal recalls that in determining the lawfulness of an administrative decision, it should “consider whether relevant matters have been ignored and irrelevant matters considered” (see *Samwidi* 2010-UNAT-084, para. 40).

63. In the present case, given UNECE's senior management's expressed concerns about the capacity of the FRO and the SRO to objectively evaluate the Applicant's performance, the DES reassured the Applicant several times that no decision on his appointment would be taken based on the PIP prepared and evaluated by the FRO and the SRO, as evidenced by his emails of 2, 8 and 15 March 2018. In his email of 8 March 2018, the DES, UNECE, explicitly told the Staff Coordinating Council that "there is no intention to terminate [the Applicant's] contract but to give him an opportunity to improve".

64. However, the Tribunal observes that the contested decision was based on the work he performed prior to the end of the 2017-2018 performance cycle on 31 March 2018 under the supervision of his initial FRO and SRO, and their sole evaluation of his performance. Indeed, it results from the Respondent's submissions that the decision not to renew the Applicant's appointment followed immediately his performance appraisal completed on 28 May 2018, and that no subsequent evaluation of his performance by the Director, DECT, UNECE, or by the other section for which he had worked were taken into account.

65. Moreover, the evidence on record, more specifically annexes 17 and 18 to the application, shows that when the Director, DECT, UNECE, gave the Applicant an opportunity to work in another section in November 2018 absent direct influence of his initial FRO and SRO, his work/output was considered to be of "a very good quality" by that section. Therefore, the Tribunal finds incoherent to neglect the more recent good performance results of a staff member when the Organization examines whether to renew a contract based on unsatisfactory performance. The Organization's failure to consider the more recent improvement of the Applicant's performance also infringes its obligation to ensure that performance evaluations be objective, fair and well based (see *Andelic* UNDT/2020/007, not appealed, para. 58; see also *Tadonki* 2014-UNAT-400, para. 56).

66. In this respect, the Tribunal wishes to point out that the Organization's duty of care towards its staff members and the purpose of ST/AI/2010/5 require the Organization to make every effort to consider in good faith all relevant performance information prior to its decision not to renew a fixed-term appointment on grounds of unsatisfactory performance (see *Andelic*, para. 68).

67. The Tribunal recalls its finding that the Organization failed to manage or evaluate the Applicant's performance in a fair and objective manner and did not consider the Applicant's more recent satisfactory performance. These facts were relevant to the Organization's decision not to renew the Applicant's fixed-term appointment on performance grounds, and their lack of consideration consequently makes the contested decision unlawful.

68. Accordingly, the Tribunal finds that the decision not to renew the Applicant's fixed-term appointment for alleged unsatisfactory performance is unlawful.

Remedies

69. In his application, the Applicant seeks rescission of the decision or compensation in the alternative. He further seeks moral damages on the grounds that the manner in which his performance was evaluated, and the contested decision led him to suffer for the first time from a depression requiring significant sick leave, treatment and medication. In this respect, he provides medical evidence describing the conditions suffered. Additionally, the Applicant alleges that his maintenance on short-term contracts following the contested decision has caused him further significant harm. The Respondent contends that harm has not been sufficiently proven pursuant to art. 10.5(b) of the Tribunal's Statute.

70. The Tribunal recalls that the remedies it may award are outlined in art. 10.5 of its Statute as follows:

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

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or

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

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

Rescission of the contested decision

71. The Tribunal has found that the decision not to renew the Applicant's fixed-term appointment for alleged unsatisfactory performance is unlawful.

72. As there is no information before it regarding whether the post initially encumbered by the Applicant has been filled, the Tribunal finds that the appropriate remedy is the rescission of the unlawful decision not to renew the Applicant's fixed-term appointment and the reinstatement of the Applicant in the same position he previously encumbered (see for similar rescission in case of non-renewal of a fixed-term appointment, *Quatrini* UNDT/2020/053, not appealed; *Loose* UNDT/2020/038; *Applicant* UNDT/2020/016; *Andelic*, and *Maslei* UNDT/2015/041).

Determination of the compensation in lieu

73. The Tribunal notes that the contested decision constitutes an "administrative decision [that] concerns appointment" within the scope of art. 10.5(a) of the Tribunal's Statute. Therefore, the Tribunal must set an amount that the Respondent can choose to pay as an alternative to the rescission of the contested administrative decision and the reinstatement of the Applicant pursuant to art. 10.5(a).

74. As to the amount of the compensation in lieu, art. 10.5(b) of the Tribunal's Statute sets forth the rules for its determination, stating that, apart from exceptional circumstances, it "shall normally not exceed the equivalent of two years' net base salary of the applicant". In this respect, the Appeals Tribunal found that "the amount of in-lieu compensation will essentially depend on the circumstances of the case"

and that “due deference shall be given to the trial judge in exercising his or her discretion in a reasonable way following a principled approach” (see *Ashour* 2019-UNAT-899, para. 21).

75. The Tribunal recalls that in determining the amount of the compensation in lieu, it must take into account “the specific circumstances of the case, and in particular the type and duration of the contract held by the staff member, the length of his/her service, and the issues at the base of the dispute”; and that it is reasonable to “grant the largest compensation in cases of termination of permanent appointments of senior staff members, and to limit the compensation in cases of non-renewal of [fixed-term appointments] for recently appointed staff members (where there is not a security of tenure, but only a chance of renewal)” (see *Quatrini*, para. 14).

76. Applying the above-mentioned criteria to the specific case at hand, and having considered the seniority of the Applicant, the type of contract held, and the chance of renewal of the contract in a position still required by the Administration, the Tribunal sets the amount of the compensation in lieu at three months’ net-base salary at the grade and level that the Applicant held at the time of his separation from service (see, e.g., *Quatrini* and *Andelic*).

Compensation for harm

77. The Tribunal recalls that art. 10.5(b) of its Statute requires that harm be supported by evidence. In this respect, the Appeals Tribunal has consistently held that “it is not enough to demonstrate an illegality to obtain compensation: the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages resulting from the illegality on a cause-effect lien” and requires that “the harm be directly caused by the administrative decision in question” (see *Ashour*, para. 31; see also *Kebede* 2018-UNAT-874, para. 20).

78. Regarding the alleged moral damage, the Tribunal notes that the Applicant provides medical reports dated 5 April 2019, 2 July 2019 and 8 July 2019 describing the conditions suffered by referring to alleged harassment only, which will be addressed by the Tribunal in Case No. UNDT/GVA/2020/006, but not to the contested non-renewal decision. Therefore, the Tribunal finds that the Applicant fails to establish the causal link between the contested decision and the alleged moral damage.

79. With respect to the alleged harm caused by his maintenance on short-term contracts, the Tribunal notes that the Applicant has not provided any evidence to substantiate it. Consequently, the Tribunal cannot award him any compensation in this respect.

80. Accordingly, the Tribunal rejects the Applicant's claim for compensation for alleged harm.

Conclusion

81. In view of the foregoing, the Tribunal DECIDES that:

- a. The decision not to renew the Applicant's fixed-term appointment is rescinded and the reinstatement of the Applicant is ordered;
- b. Regarding compensation in lieu under art. 10.5 of the Tribunal's Statute, the Respondent is to pay the Applicant an amount equivalent to three months of his net-base salary at the grade and level that he held at the time of his separation from service;
- 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 prime rate 60 days from the date this Judgment becomes executable; and

d. The Applicant's request for compensation for harm under art. 10.5(b) of the Tribunal's Statute is rejected.

(Signed)

Judge Francesco Buffa

Dated this 31st day of May 2021

Entered in the Register on this 31st day of May 2021

(Signed)

René M. Vargas M., Registrar, Geneva