



**Before:** Judge Joelle Adda

**Registry:** New York

**Registrar:** Morten Michelsen, Officer-in-Charge

YAZBEK

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Esther Shamash, UNDP  
Federica Midiri, UNDP

## **Introduction**

1. On 10 March 2021, the Applicant, a former staff member of the United Nations Development Programme (“UNDP”) in Beirut, Lebanon, filed an application to contest the decision not to renew his fixed-term appointment beyond 30 September 2020 for performance issues. The Applicant claims that his manager was “determined not to give [him] a chance to succeed in [his] new job” and he was provided “no real chance of being able to perform to the best of [his] abilities”.

2. On 3 May 2021, the Respondent filed the reply submitting that the contested decision was lawful. The Respondent further submits that the Applicant failed to prove his allegation that his manager deliberately prevented him from carrying out his job successfully.

3. For the reasons stated below, the application is rejected.

## **Facts**

4. On 1 October 2019, the Applicant was appointed on a one year fixed-term appointment as Human Resources Analyst, National Officer in the UNDP Country Office in Lebanon. The Human Resources Analyst’s role was to head the Human Resources (“HR”) team composed of three Service Contract (“SC”) holders and one United Nations Volunteer, under the direct supervision of the Operations Manager. The Operations Manager held the position of HR Analyst/Head of HR from 2010 to 2018 before she was promoted to the Operations Manager.

5. Before the Applicant was separated on 30 September 2020, the Applicant received two performance evaluations and two performance improvement plans (“PIPs”): first performance evaluation for the period of October 2019-January 2020, first PIP for the period for February-March 2020, second performance evaluation for the period of March-July 2020, and second PIP in July-August 2020.

6. On 20 February 2020, the Applicant was called into a meeting with the Operations Manager and the Deputy Resident Representative (“DRR”) during which his performance issues were discussed. Following the meeting, the Applicant was provided with his performance evaluation from October 2019 to January 2020 for his review and signature and was told that a PIP would be shared shortly thereafter. The Operations Manager assessed the Applicant’s performance as “Below Standards” and made comments in four areas as follows:

a. Internal control: (a) Instructed his subordinates to do the work on his behalf using his credentials in violation of internal policies and (b) instructed SC holders to do work reserved for staff members;

b. Insubordination: Contrary to his supervisor’s instructions, (a) arrived late, (b) smoked on a non-smoking premise, and (c) failed to copy his supervisor on important correspondence;

c. Underperformance: (a) Missed several critical deadlines (payroll, database submission, classification of terms of reference); (b) objected to use of existing tools without proposing alternate, better solutions; (c) did not properly review work of the team as well as his work and presented poor-quality HR documents; (d) did not timely respond to internal clients’ requests; (e) did not listen to a supervisor’s instructions and proceeded to work on his own onboarding process instead of using an existing process; (f) failed to renew two staff members’ contracts timely which left them without valid contracts for several days; (g) made inappropriate jokes and sarcasm during job interviews;

d. Lack of leadership, management, and teamwork: (a) Was absent from the office during working hours numerous times without informing his supervisor or team members; (b) refused to attend informal team events; (c) did not allow time off to team members during the Christmas holidays which adversely affected the morale and team spirit of team members; (d) blamed his team members for his continuous underperformance.

7. On 24 February 2020, a first PIP was shared with the Applicant. Under PIP, several performance areas that needed to be improved during February-March 2020 were identified as follows:

- a. Recruitment: Proper HR representation in panel interviews; proper preparation and documentation for interviews/desk reviews; follow recruitment and selection rules and regulations; meet deadlines;
- b. Performance management document: 90 to 100 per cent completion rate;
- c. Payroll: Meet deadlines; provide accurate data and files to finance; take all HR actions accurately and on time; maintain a green HR dashboard;
- d. Following supervisor's instructions: Abide by supervisor's instructions/advice; copy supervisor on all correspondence;
- e. Be attentive to attendance;
- f. Leadership: Engage with the team; review the work of the team; take accountability; attend formal and informal meetings; inform the team while on leave/delay/break;
- g. Delay of work: Meet all deadlines and respond to requests on time and take appropriate actions;
- h. Other HR related work: Internship stipends, e-leave access, HR report and statistics, and HR workplan.

8. On the same day (24 February 2020), the Applicant wrote an email to the Resident Representative ("RR"), stating that his performance evaluation by the Operations Manager was unfair. He wrote that he started to get overwhelmed by tasks assigned to him from the first day without receiving proper support from HR staff and training and that the Operations Manager did not allow him to manage his team and to distribute work to his team members fairly, which caused delays and errors.

9. On 25 February 2020, the Operations Manager had a meeting with the HR team to redistribute the workload as a result of the resignation of a HR Assistant.

10. On 26 February 2020, the Applicant had a meeting with RR and DRR to discuss his complaint set forth in his email of 24 February 2020. The Applicant said that he was under stress and needed to see a specialist. He was invited to take a few days off and to provide a list of training needs when coming back from leave.

11. On 13 March 2020, the Applicant had a second meeting with RR and DRR to discuss his performance and PIP. It was decided that from 16 March 2020, the Applicant would be directly reporting to DRR. In addition, the Applicant was asked to provide his response to performance evaluation and PIP.

12. On 16 March 2020, the Applicant provided his response to his first performance evaluation:

a. Internal control: (a) He acknowledged that he shared his credentials with his staff, but stated that he was overloaded with work and hence asked his staff to complete certain tasks using his credentials. He stated that he was not aware of internal rules against such practice at the time and after that he respected rules; (b) Concerning assigning work to SC holders, he stated that he was not provided with any policies that restrict SC holders from doing tasks related to recruitment of staff members.

b. Insubordination: (a) He admitted that he was late a few times in the past four months but stated that it was due to unpredictable road conditions caused by the revolution, and he did not agree that his arriving late decreased productivity and exhibited poor leadership; (b) He did not dispute that he smoked in the building but stated that he was told that this was where smokers had a quick smoke and management unofficially tolerated it; (c) He admitted that he forgot to copy his supervisor a few times but it was not done on purpose. He also suggested that the practice of copying people on emails were wasting a lot of employees' time and it should be reconsidered.

c. Underperformance: (a) Regarding payroll, he wrote that January and February payrolls were processed on time, but he thinks that a deadline for payroll cut-off was unreasonable. Regarding HR database, he wrote that he was not provided with a clear description of the data required and did not know what was relevant and hence provided all HR data that only had to be filtered. He acknowledged that he missed deadlines relating to classification of terms of reference but stated that he was not able to keep up with workload; (b) He responded that he submitted suggestions that would streamline processes but none of his suggestions were considered and he should not be reprimanded for suggesting improvements; (c) He stated that it was impossible to check his staff's work while struggling with his own workload and still learning and trying to understand systems; (d) He did not deny that he did not provide responses timely but stated that he was overloaded and he was unable to complete all tasks timely without errors. He had asked for redistribution of work, but his request was only granted by the Operations Manager belatedly; (e) He simply wrote that he would like to present the onboarding process; (f) He acknowledged that there was a delay in contract renewal in one case but that it did not cause serious consequences. He stated that he did not remember the other case; (g) He denied that he acted inappropriately during interviews.

d. Lack of leadership, management, and teamwork: (a) He stated that he worked long hours and it was his team members who took long breakfast and lunch breaks; (b) He did not have time to attend team events; (c) He stated that since December entails extra work for HR office, he asked his team to prioritize work. He wrote that had his team members planned leave properly throughout 2019, they would not have had leave balance in December that could not be carried over to the next year.

13. On 27 and 31 March 2020, the Applicant provided his comments to first PIP. He acknowledged that he made mistakes but stated that he was given "too many tasks too fast". He believed that he had no real chance to succeed and that it looked like that the decision to terminate his employment had been made a while ago. He wrote that he needed detailed process maps that he could follow for their implementation and needed

training on recruitment, classification of terms of references, separations, operations database, etc.

14. On 31 March 2020, the Applicant, the Operations Manager, and DRR met to discuss the Applicant's performance and first PIP. The Applicant stated that he made mistakes in the first months of his employment but that he was given too many tasks too fast when he was not ready to handle the workload. He also stated that the evaluation was exaggerated. Due to the Applicant's disagreement with a performance evaluation, it was decided at the meeting that his performance evaluation for October 2019-January 2020 would be submitted to the local Talent Management Review Group ("TMRG").

15. On 6 April 2020, the Applicant received a reprimand for having requested his supervisee to provide him with the answers to the mandatory legal training course. This decision was not contested.

16. On the same day (6 April 2020), RR established a TMRG committee to review the Applicant's performance evaluation for October 2019-January 2020.

17. On 28 April 2020, DRR called a meeting with the HR team to discuss any issues and challenges of the HR team and impact of work redistribution after the resignation of a HR Assistant. The Applicant said that work redistribution was better than the old one, but he was still struggling as he was handling recruitments and was not able to keep up with the load of emails he was receiving.

18. On 2 May 2020, RR and DRR had a meeting with the Applicant to discuss his performance. It was agreed that the Applicant would share the list of tasks he was currently handling and the list of training he needed, and he would communicate with management concerning the status of his work and any challenges he was facing.

19. On 6 May 2020, the Applicant confirmed in an email that he would stop acting as the Head of HR and would handle a reduced workload which he considered reasonable. He requested that he be provided with process flow charts for various tasks to allow him to understand and implement them accurately.

20. On 8 May 2020, a follow-up meeting was held between RR, DRR and the Applicant during which it was decided that the tasks would be redistributed as agreed and the Applicant would share weekly updates. It was also agreed that the Applicant would be provided with a refresher training by one of the HR staff.

21. On 11 May 2020, DRR and the Operations Manager had a meeting with the HR team. The Applicant was behind schedule in several recruitment activities and DRR decided to redistribute certain tasks to other team members. The Applicant said at the meeting that he was still overwhelmed with tasks assigned to him.

22. On 19 May 2020, the TMRG issued a recommendation upon review of the Applicant's performance from October 2019 to January 2020. The TMRG reviewed documents provided by the Operations Manager and the Applicant, and interviewed the Operations Manager, the Applicant and six other individuals who had working relationships with the Applicant. The TMRG confirmed that the Applicant's performance did not meet the requirements of his job and recommended the immediate termination of his employment. The DRR and RR decided not to terminate the Applicant's employment at that time pending the Applicant's efforts to improve performance and did not share the TMRG report with him.

23. On 1 June 2020, RR had a meeting with the Applicant regarding the distribution of workload and sent a follow up email to him on the following day (2 June 2020). In this email, RR listed tasks handled by the Applicant, and with regard to his request for HR process charts, RR asked him to explain how such charts would be different from existing Standard Operating Procedures ("SOPs"). The Applicant responded on 4 June 2020 stating that tasks assigned to him were "fair load". With regard to SOPs, he wrote that the differences were "mainly in completeness and details".

24. On 8 June 2020, another meeting was held with the Applicant to discuss redistributing further tasks from his portfolio. As a follow up, on 15 June 2020, RR confirmed in writing additional tasks to be removed from the Applicant's portfolio and asked DRR to implement it. RR further asked the Applicant to confirm that he looked into SOPs and which specific processes required the development of detailed SOPs.



25. On 17 June 2020, DRR and the Operations Manager had a meeting with the Applicant to discuss redistribution of the tasks assigned to the Applicant. The meeting lasted for three hours, and towards the end of the meeting, the Applicant left a meeting room to go to a restroom, leaving behind his phone. Unbeknownst to DRR and the Operations Manager, their conversation in the absence of the Applicant was recorded by his phone, which was submitted to the Tribunal during the current proceedings. By Order No. 124 (NY/2021), for the reasons stated in that Order, the Tribunal granted the Applicant's request to submit a recording into evidence.

26. On 27 July 2020, DRR finalized the Applicant's performance evaluation for the period from March to July 2020. DRR assessed his performance as "Not delivered". In the comments section, it was noted that "the [Applicant's] performance was very weak in terms of handling recruitments, meeting deadlines, communication and client orientation as well as planning and organization and good management" as he "disrespect[ed] the priorities of management of the [country office]" and "miss[ed] deadlines". It was also noted that the Applicant "has lack of professionalism and dedication to improve his performance" despite the country office's investment in time and efforts to help him improve his performance by providing induction meetings and on-the-job trainings. As a result, "management of the [country office] was forced to reassign tasks of [the Applicant] to other HR members and operations manager to fill the gap". DRR noted that when the Applicant's reporting line was changed to him, he observed that the Applicant "failed in dealing with issues based on set of priorities and plans" and he was "incapable of coordinating the different teams and he always failed to follow-up on the tasks assigned to him". DRR concluded that the Applicant's "lack of professionalism impacted the HR unit's performance and the [country office] reputation".

27. On the same day (27 July 2020), DRR shared with the Applicant a second PIP for the duration of one month. In the second PIP, three areas (recruitment, payroll, and performance management and development ("PMD")) and three competencies (application of technical competencies, delivery, and leadership and communications) were identified that required improvement:

- a. Recruitment: Proper HR representation in panel interviews; proper preparation and documentation for the interviews/desk reviews and quality of interview reports; follow recruitment and selection rules and regulations; meet deadlines as per SOPs and hiring unit's urgency to fill the gap;
- b. Payroll: All payroll actions are to be completed on the 10<sup>th</sup> of every month; data and files shared with finance colleagues must be accurate and complete; all payroll actions are to be taken timely;
- c. PMD: 100 per cent completion rate of all PMDs;
- d. Application of technical competencies: HR work executed by a staff member and checked by an HR Analyst must be accurate and free of error; Advice provided internally and externally must be accurate and free of error;
- e. Delivery: All established deadlines and requirements are to be met and executed free of error;
- f. Leadership and communications: Staff member should possess the competencies required to generate commitment, excitement and excellence in others; staff member should be able to synthesize information to communicate independent analysis, which includes responding to requests timely, responding to client needs, and conveying messages in a clear and organized manner.

28. On 27-28 August 2020, the Applicant was notified verbally and in writing that his fixed-term appointment would not be renewed upon its expiration on 30 September 2020 due to his underperformance.

29. The Applicant's fixed-term appointment expired on 30 September 2020.

30. On 26 October 2020, the Applicant submitted a request for management evaluation to contest the decision not to renew his fixed-term appointment for performance reasons.

## Consideration

31. A fixed-term appointment does not carry any expectancy of renewal and expires automatically without prior notice on the expiration date pursuant to staff regulation 4.5(c) and staff rules 4.13(c) and 9.4. The Administration is, nevertheless, required to provide a reason for such a non-renewal upon the affected staff member's request or the Tribunal's order, and, as the Appeals Tribunal held in *Islam* 2011-UNAT-115, "when a justification is given by the Administration for the exercise of its discretion it must be supported by the facts" (see *Islam* 2011-UNAT-115 (paras. 29-32); *Obdeijn* 2012-UNAT-201 (paras. 33-39); *Pirnea* 2013-UNAT-311 (paras. 33-34)).

32. If the applicant claims that the decision was ill-motivated or based on improper motives, the burden of proving any such allegations rests with the applicant (see, for instance, *Azzouni* 2010-UNAT-081, para. 35; *Obdeijn* 2012-UNAT-201, para. 38).

33. For the review of an administrative decision based on performance evaluation, the Appeals Tribunal provided in *Sarwar* 2017-UNAT-757 (para. 74) that the Dispute Tribunal must give deference to the Administration's appraisal of a staff member's performance and decide whether there is a rational objective connection between the information available and the finding of unsatisfactory work performance:

... [the Dispute Tribunal] 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 [Dispute Tribunal] 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.

34. If there is procedural deficiency in the performance evaluation process, the Dispute Tribunal needs to decide "whether the procedural non-compliance materially

and adversely affected the rights of [a staff member] so as to deny [him or her] a proper performance assessment” (see *Sarwar*, para. 84). The Appeals Tribunal held that “the ultimate question of procedural fairness is whether the staff member was aware of the required standard and was given a fair opportunity to meet it” (see *Sarwar*, para. 88).

35. In the Applicant’s closing submissions dated 7 and 28 February 2022, he submits that he was overloaded with excessive tasks which caused delays and minor mistakes in his performance and that he was not allowed to act as Head of HR but was instead forced to perform clerical tasks. He submits that despite promises to reduce his workload, his workload was not reduced but he decided not to protest any further. The Applicant further submits that the Operations Manager abused her authority and planned to force him out from the first day. To support his claim of bad faith, he presents a statement of a former HR officer and an audio recording of a meeting of June 2020 which allegedly reveals that the Operations Manager and DRR had already decided not to renew his contract long before the actual decision was made in August 2020. In addition, the Applicant argues that there were several procedural irregularities in the performance evaluation process, which will be discussed in more detail below.

36. In the Respondent’s closing submission dated 16 February 2022, he submits that record shows that the Applicant’s performance was unsatisfactory despite support provided by his supervisors, and the process for two performance appraisals was fair and proper. The Respondent further submits that the Applicant failed to cooperate with respect to the implementation of two PIPs. Regarding the TMRG process, the Respondent submits that while management, not the Applicant, requested the TMRG process and the TMRG’s recommendation was not shared with the Applicant, the Applicant was not prejudiced by the TMRG’s process as management did not act on the TMRG’s recommendation to terminate the Applicant’s appointment immediately. Therefore, the Respondent submits that under *Sarwar*, any procedural errors occurred during the performance evaluation process did not invalidate the contested decision. The Respondent further submits that the Applicant’s claim of bad faith is not supported by evidence and therefore is without merit.

37. In light of the parties' submissions and the relevant jurisprudence, the Tribunal considers that there are three legal questions to be determined: (a) whether performance standards required of the Applicant were reasonable and the finding of poor performance was supported by evidence; (b) whether there were significant procedural deficiencies in the performance evaluation process; and (c) whether the contested decision was tainted by ill-motivation or bad faith.

*Whether performance standards required of the Applicant were reasonable and the finding of poor performance was supported by evidence*

38. In this case, the Applicant's supervisors documented numerous examples showing his performance shortcomings in meeting minutes, emails, and two performance evaluations. The Applicant mostly does not deny that he made mistakes and delays occurred, although he tries to characterize these mistakes as "minor" and not "significant". However, the Tribunal must accord deference to the Administration's appraisal of the Applicant's performance, and considering that the Applicant mostly does not dispute the underlying facts of the finding of poor performance, the Tribunal finds that the finding of poor performance is supported by evidence.

39. The Applicant's main argument is rather related with the performance standard required of him. The Applicant argues that performance standard required of him was unreasonable because he was overloaded with excessive clerical tasks below his level and was not allowed to delegate tasks to his team members as Head of HR. In particular, he takes issue with the Operations Manager's instructions that he could not assign work related to recruitment of staff members to his team members who are SC holders, arguing that there is no such policy prohibiting him from assigning those types of work to SC holders. In fact, he argues, the Operations Manager assigned the same type of work to SC holders when she was Head of HR.

40. In response, the Respondent submits that "limitations to the type of work carried out by [SC] holders, which were the Applicant's team members, stems from the very nature of their contract modality as explained in the UNDP applicable policy". Under the applicable policy, it is provided that "[SC] is a modality for hiring

individuals under a non-staff contract” and SC is intended to be used “for non-core support services in the UNDP Office that would normally be outsourced to a company, i.e. custodial, security and IT service” and therefore “hiring local office personnel for core functions (i.e. staff functions that are of a continuing nature and are part of UNDP’s central work...)” is considered improper under the policy.

41. As the Appeals Tribunal stated in *Sarwar*, “performance standards generally fall within the prerogative of the Secretary-General and, unless the standards are manifestly unfair or irrational, other bodies should not usurp the function of setting performance standards” (see para. 81). The Applicant’s supervisors set performance standards with limitations on the use of services from HR staff who are SC holders. Considering the provisions of the applicable policy stated above that limit the use of services of SC holders to non-core support services, the Tribunal accepts that it was within the Organization’s discretion to not permit SC holders from engaging in recruitment of staff members, which is reasonably considered core functions. Even if the Organization previously allowed SC holders to perform work related to recruitment of staff members, the Organization can reconsider its practice and change it in line with the applicable policies.

42. With regard to the Applicant’s claim that he was assigned “too many tasks too fast” that were clerical in nature and thus below his level, the Tribunal notes that the job responsibilities listed in the vacancy announcement for HR Analyst included the “[provision] of support to effective human resources management focusing on the achievement of the following results”:

- Management of recruitment processes including job descriptions, vacancy announcement, screening of candidates, organization and participation in the interview panels;
- Preliminary review of submissions to the Local Appointment and Promotion Board (LAPB);
- Management of contracts in and outside Atlas. Monitoring and tracking of all transactions related to positions, recruitment, HR data, benefits, earnings/deductions, retroactivity, recoveries, adjustments and separations through Atlas;

- Management of International staff entitlements and position funding delegated to the HR Unit;
- Development and management of rosters.

43. While it may have been more desirable if he was allowed to take on tasks gradually, the record does not support the Applicant's claim that he was given "too many tasks too fast" as the tasks assigned to him were consistent with his job responsibilities as HR Analyst. In addition, the record does not support his argument that the assigned tasks were below his level as they were related to recruitment, management of contracts, HR data, benefits and earnings, separations, etc. which fall under the duties of a HR Analyst. The Tribunal therefore finds that the amount and types of tasks assigned to the Applicant are not manifestly unfair or irrational.

44. Accordingly, the Tribunal finds that performance standards required of the Applicant were not unreasonable and that the finding of unsatisfactory work performance is supported by evidence.

*Whether there were significant procedural deficiencies in the performance evaluation process*

45. The Applicant argues that there were significant procedural deficiencies in the performance evaluation process:

- a. Performance evaluations: His performance was reviewed two times within the first year while performance is normally reviewed on a yearly basis under the policy. In addition, the performance evaluation was not agreed on, no mid-year review was conducted, no learning and development goals were set, and no SMART (i.e., specific, measurable, attainable, relevant and time-bound) objectives were set;
- b. PIP: PIP did not include clear targets for improvement and was subjective and had an unreasonable timeline as it required to achieve all objectives within a month. In addition, no actual support was provided during PIP, no periodic check-ins were scheduled, and there was no final review;

c. TMRG: The decision of TMRG was not disclosed to him, which deprived him of his right to submit a rebuttal request. DRR had a conflict of interest to serve as a Chairperson of TMRG, being his supervisor and a supervisor of the Operations Manager. He was not provided with a chance to provide names of individuals who could testify positively to his work.

46. During the relevant period, two PMD policies were in place: PMD Policy (10 February 2017) and PMD Policy (26 March 2020).

47. Regarding the frequency of performance reviews and PIPs, under both policies, performance is expected to be reviewed annually but also to be “monitored through formal and informal check-ins and reviews”. Under the 2017 PMD Policy, a staff member is to be provided “a reasonable amount of time” to improve performance after notification of performance shortcomings (para. 41). It is recommended that “at least 3 months are provided ... to improve performance” (2017 PMD Policy, Procedures, 7.0.1). Under the 2020 PMD Policy, it is also provided that PIPs are generally of 3 months each (para. 48). However, especially for a new hire, it is provided that “[i]f poor performance is observed within the first year of service in UNDP, time for performance improvement and implementation of remedial measures may be reduced” (2017 PMD Policy, para. 45). The 2020 PMD Policy also includes a similar provision (para. 51). Therefore, considering that the Applicant was within the first year of service, the Tribunal finds that the frequency of performance review and a shorter time provided to improve performance in themselves did not violate the applicable policies.

48. However, the performance evaluations and PIPs were far from perfect. The Respondent acknowledges that the performance evaluations and PIPs were not finalized but attempts to blame the Applicant for incompleteness arguing that management could not finalize these performance records due to the Applicant’s noncooperation. These claims are without merit. Both 2017 and 2020 PMD Policies give supervisors authority to complete performance goals and reviews in performance evaluations and PIPs in the absence of feedback or input from a supervisee. It was the supervisors and management who were responsible for completing all performance processes they initiated.



49. As the Respondent acknowledges, the TMRG process that was initiated on 6 April 2020 as per RR's instructions was mired with procedural irregularities. The 2020 PMD Policy, which took effect on 26 March 2020, provides in relevant part as follows:

34. The TMRG reviews the outcomes of all the annual performance reviews in the respective office/Bureau. The TMRG is not required to separately endorse each of the reviews for individual staff members, however, it will have the authority to discuss and change the final outcomes of the annual performance review for individual staff members, if necessary, either of its own initiative, or as a result of a request by the supervisee.

35. Comments by the TMRG, if any, are required to be recorded in the on-line PMD tool and make up part of a formal performance record of the respective staff members. The TMRG will not address the questions of renewal of a staff member appointment or of awarding the within-grade salary increment in its comments.

IX. Resolution of disputes

52. Supervisees who do not agree with the results of the annual performance review by the supervisor must request that TMRG considers their case. This is to be done in the on-line PMD tool. The request for the TMRG review should be made within 10 working days of the date that the supervisee received the notification of the completion of the performance review by the supervisor from the on-line PMD tool. Such supervisees can provide additional information for the TMRG to review, as needed.

53. If a supervisee does not agree with the final annual performance review as confirmed by the TMRG, they may submit a formal request for rebuttal. Recourse to the rebuttal process does not suspend the outcome of the performance review until the final rebuttal decision. A request for rebuttal must be submitted within 15 working days from the date they are notified of the final decision of the TMRG. Exceptions can be made in cases when in the opinion of the Chair of the Rebuttal Panel circumstances are beyond the control of the supervisee.

54. Only the performance reviews with the not fully satisfactory rating may be rebutted. Consideration by the TMRG is a mandatory step before the submission of a rebuttal request.

50. Under the policy, it is a supervisee who has right to request TMRG review when she or he does not agree with the results of the performance review. Management had no right to request a TMRG review of the Applicant's performance evaluation. Further, the PMD policy provides that "[c]omments by the TMRG, if any, are required to be recorded in the on-line PMD tool and make up part of a formal performance record of

the respective staff members”. Therefore, not sharing the outcome of TMRG review further violated the PMD policy. In addition, the PMD policy provides that “[t]he TMRG will not address the questions of renewal of a staff member appointment”, and therefore TMRG exceeded its authority when it recommended the immediate termination of the Applicant’s appointment. Therefore, TMRG review initiated by management was invalid.

51. However, this does not necessarily mean that by not notifying him of the outcome of TMRG review, the Organization deprived the Applicant of his right to request a rebuttal. The Applicant received the performance evaluation for the period of October 2019-January 2020 on 20 February 2020 and therefore the 2017 PMD Policy was in effect at the time. Under the 2017 PMD Policy, a staff member who disagrees with the results of the performance review “may request a review by [TMRG]” for informal resolution (para, 46). If “the dispute ... is not resolved through the TMRG deliberations, or if the staff member prefers, the staff member may choose to file a formal rebuttal request” (para. 51). In the accompanying Procedures, it is provided that a staff member should request TMRG review within two weeks of receipt of the review by the supervisor (5.0.2). The 2020 PMD Policy also sets a similar time limit in that “the request for the TMRG review should be made within 10 working days” from the date a staff member is notified of the performance evaluation (para. 52). Upon receipt of the performance evaluation on 20 February 2020, the Applicant took no action to resolve his disagreement with the performance evaluation. He did not request the TMRG review within two weeks from 20 February 2020 nor did he request a rebuttal, when he had every right to request either process within the time limit. Therefore, this argument is rejected.

52. While some procedural irregularities were committed in this case as noted above, the finding of procedural irregularities does not inevitably make the contested decision unlawful. As the Appeals Tribunals stated in *Sarwar*, “the ultimate question of procedural fairness is whether the staff member was aware of the required standard and was given a fair opportunity to meet it”. Considering a number of emails exchanged between the Applicant and his managers, numerous meetings held for the discussion of his performance, two performance evaluations and two PIPs, there is no question

that the Applicant was made aware of the required performance standard. The record also shows that managers listened to the Applicant's concerns about workload and reduced his workload and provided him with an opportunity to receive additional refresher on-the-job trainings and referred him to SOPs that could help him understand the processes better. The Tribunal therefore considers that the Applicant was given a fair opportunity to meet performance standards.

53. In sum, the Tribunal finds that the procedural non-compliance did not materially and adversely affect the rights of the Applicant so as to deny him a proper performance assessment.

*Whether the contested decision was tainted by ill-motivation or bad faith*

54. Finally, the Tribunal will decide whether the contested decision was tainted by ill-motivation or bad faith of the Operations Manager as claimed by the Applicant. As stated above, the burden of proving any such allegations rests with the applicant.

55. To support his claim of bad faith, the Applicant presents a statement of a former HR officer and an audio recording of a meeting of June 2020.

56. In her statement, the former HR officer wrote that when the Operations Manager was Head of HR, she used to manage the HR team very differently from how the Applicant was allowed to operate. For example, HR team members who are SC holders assisted her with recruitment of staff members, she did not copy the then Operations Manager in all her emails, and HR team members had her credentials. She also wrote that when the Applicant did not allow HR team members to take leave at the end of 2019, her colleagues complained to DRR in writing, but she declined to join her colleagues. She wrote that the Operations Manager accused her of taking sides with the Applicant. In fact, as the tension was rising between the Applicant and the Operations Manager, the Operations Manager continuously accused her of taking a stand with the Applicant. She felt that the Operations Manager and DRR targeted the Applicant and constantly criticised the Applicant at team meetings. She herself resigned a few months after the Applicant's separation and filed a complaint against the Operations Manager for creating toxic work environment "filled with bullying,

harassment, abuse of authority, preferential treatment, and a pronounced lack of professionalism”.

57. According to a transcript of an audio recording of a meeting of June 2020 that the Applicant submitted, the Operations Manager and DRR had a conversation for a few minutes in the absence of the Applicant. The Operations Manager said that “she feels like vomiting” and the Applicant was a “sick person”. DRR told the Operations Manager that he would tell the Applicant that they were ready to assist him whenever he comes to them, to which the Operations Manager commented, “you’re trying to confuse him with that”. The Operations Manager said, “two months are too much”. The Applicant submits that this recording shows that the Operations Manager and DRR had already decided not to renew his contract long before the actual decision was made in August 2020.

58. In DRR’s statement of 10 January 2022 submitted to the Tribunal, he provided comments about the audio recording. He wrote, “[i]n the recorded conversation I was advising the [Operations Manager] that we should work as colleagues, brothers and sisters, and that anything that [the Applicant] needs we should continue providing”. He further wrote that he “did not have the plan to terminate or not to renew his contract” as he did not “have the authority to terminate or extend contracts” anyway as such authority rests with RR. However, he wrote, “the conversation took place after TMRG advised and recommended immediate termination of his contract”.

59. In the Operations Manager’s statement of 7 January 2022 submitted to the Tribunal, she stated that a recorded conversation was from the third meeting that was held to discuss the redistribution of the Applicant’s workload and wrote, “I mentioned in the recording that the issues have been repeating themselves over and over again to no avail and that repetitive meeting on the same topic were becoming counter-productive. I mentioned that this was not acceptable”.

60. The former HR officer’s accounts show that there was tension between the Applicant and the Operations Manager, and the recorded conversation also supports such accounts. As she admits in her statement, it is clear that the Operations Manager

got frustrated with performance of the Applicant. While it is regrettable that the Operations Manager used emotive language towards the Applicant in the recorded conversation, there is no evidence that the Operations Manager had a predisposed opinion of the Applicant and his performance based on any improper reasons. Further, statements of RR and DRR show that it was RR who decided to not renew the Applicant's contract "based on the evaluation of his supervisors, the outcomes of the two successive PIPs, and the recommendations of the TMRG that took place in May 2020" in consultation with the Office of Human Resources and the Legal Office. The Applicant does not claim that RR was biased against him.

61. Accordingly, The Tribunal finds that the Applicant failed to prove that the contested decision was tainted by ill-motivation or bad faith.

### **Conclusion**

62. In light of the foregoing, the Tribunal rejects the application.

*(Signed)*

Judge Joelle Adda

Dated this 10<sup>th</sup> day of May 2022

Entered in the Register on this 10<sup>th</sup> day of May 2022

*(Signed)*

Morten Michelsen, Officer-in-Charge, New York