



**Before:** Judge Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

YAVUZ

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

---

**ORDER ON AN APPLICATION FOR  
SUSPENSION OF ACTION PENDING  
MANAGEMENT EVALUATION**

---

**Counsel for Applicant:**

Robbie Leighton, OSLA

**Counsel for Respondent:**

Bettina Gerber, HRLU/UNOG

Cornelius Fischer, HRLU/UNOG

## **Introduction**

1. By application filed with the Tribunal's Geneva Registry on 31 January 2019, the Applicant, an Economic Affairs Officer (P-3) at the United Nations Economic Commission for Europe ("UNECE"), requests suspension of action pending management evaluation of the decision to separate him at the close of business day on 31 January 2019 following the non-renewal of his fixed-term appointment for performance reasons.

2. By Order No. 3 (GVA/2019) of 31 January 2019, the Tribunal temporarily suspended the implementation of the contested decision until a determination is made on the Applicant's request for suspension of action pending management evaluation.

3. The Respondent filed a reply on 4 February 2019, together with three annexes. Two of these annexes were filed on an *ex parte basis* as, according to the Respondent, they contain confidential information. Having reviewed the documents, the Tribunal considers that they are relevant to the Applicant's case and do not contain confidential information. Thus, they will be released to the Applicant without any confidentiality measure.

## **Facts**

4. On 4 May 2017, the Applicant was appointed as Economic Affairs Officer (P-3) at UNECE working in the Market Access Section, Agricultural Quality Standards Unit, Economic Cooperation and Trade Division, on a one year fixed-term appointment. The Unit is 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").

5. According to the Applicant's submissions, on 18 May 2017, when his FRO saw him speaking with a colleague at a celebration in the Division, she called him over and told him not to speak to the colleague, using derogatory language towards that colleague. A few days later, the Applicant was invited for lunch by this same

colleague but, when he mentioned it to his FRO, she slammed her hand heavily on the table several times and shouted “No Korkut! No Korkut! I need your loyalty! I need your loyalty!” She then went on to describe how the concerned colleague and another colleague, again using derogatory language when she referred to the latter, were trying to take their jobs, referencing to the Agricultural Quality Standards Unit.

6. Still according to the Applicant’s submissions, when he was discussing with his FRO the formulation of several emails he had prepared, she told him “use your brain”. The Applicant took issue with the language used and the FRO’s response was allegedly to tell him that this was “a stupid remark”. This was followed a few days later by a meeting with the Applicant’s FRO and SRO when he was accused of having bad feelings towards his FRO. His teamwork skills were criticized. The Applicant raised the fact that he found her 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.

7. This allegedly marked the beginning of a pattern of demeaning language used towards the Applicant by his FRO which continued throughout his time in the Unit. The Applicant sought to address this problem through direct discussion with his FRO and in writing but without success.

8. According to the Respondent, the FRO met with the Applicant on 23 May 2017 to provide explanations on the evaluation process. The goals and expectations were agreed upon and entered into *Inspira* on 16 June 2017.

9. On 9 October 2017, the Applicant allegedly met with his SRO to discuss the harassment he believed he was 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.

10. On 9 November 2017, the Applicant’s mid-term review was completed. The FRO informed the Applicant of performance shortcomings and of her intention to place him on a performance improvement plan (“PIP”).

11. On 5 December 2017, the Applicant received a PIP to be implemented from 8 December 2017 until 8 March 2018, which included the expected goals for improvement, target activities and dates for improvement. The Applicant made comments upon it on 11 December 2017. On 19 December 2017, two deadlines in the PIP were amended as a result of the Applicant's comments but his other suggestions were rejected and the SRO indicated that the core of the PIP was not negotiable. The Applicant was asked to sign the PIP but the transmission email indicated that it would take effect irrespective of his signature.

12. Meetings about the PIP took place on 21 December 2017, 17 January 2018 and 8 February 2018 between the Applicant and his FRO and SRO.

13. On 22 December 2017, the Applicant allegedly met with the Deputy Executive Secretary, UNECE, upon recommendation of the Executive Officer, UNECE, to inform him of the situation. The Deputy Executive Secretary allegedly told the Applicant that he was following the situation and indicated that the Applicant would be given the opportunity to work for a different supervisor to ensure an objective assessment of his performance.

14. On 19 February 2018, the Applicant sought to enrol in French classes, for which he was requested to provide a guarantee from his supervisor that his contract would cover the period of the class. The Applicant's FRO declined to provide such a commitment, which the Applicant understood as indicating that his appointment would not be renewed. As a result, the Applicant forwarded the exchange to the Staff Coordinating Council who forwarded it to the Deputy Executive Secretary, UNECE.

15. By an email of 3 March 2018 to the representative of the Staff Coordinating Council, the Deputy Executive Secretary, UNECE, indicated that after discussions with the Executive Secretary and the Executive Officer, UNECE, a decision had been made that the Applicant would be given the opportunity to work for a different supervisor. The Deputy Executive Secretary, UNECE, continued to monitor the situation and indicated in an email of 7 March 2018 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 (sic.)”.

16. From 15 March 2018, the Applicant was on sick leave. Having been informed of the Applicant’s leave, the Deputy Executive Secretary, UNECE, indicated on the same day that he would be arranging an appropriate solution upon return of the Executive Secretary and Executive Officer, UNECE.

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

18. By email of 11 April 2018, the Director, Division of Economic Cooperation and Trade, UNECE, informed the Applicant that she would act as her FRO and SRO. She remained the Applicant’s FRO and SRO until her departure from UNECE on 30 November 2018.

19. On 28 May 2018, the Applicant received his performance appraisal for the period from 4 May 2017 until 31 March 2018, with an overall rating of “Partially meet performance expectations” signed by his initial FRO and SRO.

20. The Applicant initiated a rebuttal process of his performance appraisal on 6 June 2018.

21. As of June 2018, the Applicant’s appointment was extended on the basis of the provisions of ST/AI/2010/5 for the purpose of the completion of the rebuttal process.

22. During the period when the Director, Division of Economic Cooperation and Trade, UNECE, was the Applicant’s FRO and SRO, he 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.

23. On 17 December 2018, the Director, Division of Economic Cooperation and Trade, 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 needed more guidance and direction than would normally be required from a P-3 staff member. This performance appraisal was filed *ex parte* by the Respondent with his reply, which suggest that it had not been provided to the Applicant before.

24. On 19 December 2018, the Rebuttal Panel released its report upholding the performance appraisal.

25. On 26 December 2018, the Applicant filed a complaint for harassment and abuse of authority under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) against the FRO, the SRO, "all UNECE senior managers who were aware of the harassment and abuse... but failed to observe their responsibilities under said bulletin" and "[a]ll relevant UNECE and UNOG Human Resources staff who rejected, or played a role in the rejection of [his] applications to receive a Carte de Légitimation". According to the Respondent, the Applicant sent his complaint to the Assistant-Secretary-General, Office of Human Resources Management, and was informed that the proper recipient of the complaint was the Executive Secretary, UNECE. The Applicant did not proceed to file a complaint to the Executive Secretary, UNECE.

26. On 25 January 2019, the Applicant was informed of the decision not to renew his appointment beyond 31 January 2019 for performance reasons.

27. On 30 January 2019, he filed a request for management evaluation.

### **Parties' contentions**

28. The Applicant's primary contentions may be summarized as follows:

*Prima facie unlawfulness*

- a. He has been provided with a legitimate expectation of renewal by the Deputy Executive Secretary, UNECE, who unequivocally represented to him that he would be given the possibility to work under another supervisor and thus not be separated for performance reasons on the basis of the PIP and the performance evaluation provided by a supervisory relationship described as maltreatment by UNECE's senior management;
- b. His performance has not been managed or evaluated in a fair manner. No shortcoming has been identified against clear performance indicators;
- 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;
- d. He has been subject to harassment and abuse of authority in a deliberate attempt to remove him from employment at UNECE;

*Urgency*

- e. The Applicant has been provided with four working days' notice of the non-renewal of his appointment. Urgency is clearly made out and not of his creation.
- f. Any extension of appointment for sick leave purpose is of a different quality to the Applicant's current appointment and a recovery would result in separation prior to receipt of a management evaluation response;

*Irreparable damage*

- g. It has consistently been established that monetary compensation is insufficient to compensate the frustration, unhappiness and loss of chance of career opportunities associated with the non-renewal of a fixed-term appointment.

29. The Respondent's primary contentions may be summarized as follows:

*Prima facie unlawfulness*

a. The contested decision is a proper exercise of managerial discretion. The Administration is entitled to not renew a fixed-term appointment when the staff member's performance is rated as "partially meets performance expectations";

b. The Applicant's performance was properly and fairly evaluated. He was given clear goals and given regular feedback. The Applicant rejected the feedback provided and had difficulties to communicate with his colleagues and supervisors. He was given the opportunity to improve through a PIP which clearly identified the required actions and dates of implementation. He then received feedback and counselling on an ongoing basis;

c. The Applicant's performance appraisal was based on objective elements and confirmed by the rebuttal panel after a thorough examination of over 2000 pages of documents and extensive interviews;

d. The Applicant was made aware from his mid-term review onwards of his performance issues and could thus expect that his appointment would not be renewed. The message of the Deputy Executive Secretary, UNECE, did not create a legitimate expectation of renewal as the alternative he proposed was based on an incomplete account of the situation.

**Consideration**

30. Article 2.2 of the Tribunal's Statute provides that the Tribunal shall be competent to suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. These three requirements are cumulative and must all be met in order for a suspension of action to be granted.



*Prima facie unlawfulness*

31. The Tribunal recalls that the threshold required in assessing this condition is that of “serious and reasonable doubts” about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99 (GVA/2015)).

32. It is settled law that a fixed-term appointment does not bear any expectancy of renewal (staff regulation 4.5(c); staff rule 4.13; *Syed* 2010-UNAT-061; *Appellee* 2013-UNAT-341). A non-renewal decision can be challenged on the grounds that it is arbitrary, procedurally deficient, or the result of prejudice or some other improper motivation (*Said* 2015-UNAT-500; *Assale* 2015-UNAT-534). The staff member alleging that the non-renewal decision is based on improper motives carries the burden of proof with respect to these allegations (*Nwuke* 2015-UNAT-506; *Hepworth* 2015-UNAT-503).

33. Non-renewal of an appointment on the ground of poor performance must be justified by the evidence and “[i]t is incumbent on the Secretary-General to provide sufficient proof of incompetence, usually on the basis of a procedurally fair assessment or appraisal establishing the staff member’s shortcomings and the reasons for them” (*Sarwar* 2017-UNAT-757; see also *Ncube* 2017-UNAT-721). The Appeals Tribunal further held in *Ncube* that “[i]f the Administration can present an e-PAS which is in full accord with the provisions in ST/AI/2010/5, it is then up to the staff member to prove that the content or the findings of the e-PAS are not correct. If, on the other hand, the e-PAS suffers from procedural irregularities, an evaluation can only be upheld if it was not arbitrary and if the Administration proves that it is nonetheless objective, fair and well-based”. For an assessment to be “procedurally fair” it must not be tainted by bias, retaliation or prejudice. Objectivity is essential (*Belkhabbaz* UNDT/2018/071).

34. In the present case, the Respondent has adduced *prima facie* evidence of performance shortcomings identified at the early stage of the Applicant’s employment with UNECE, remedial actions taken promptly through the issuance

of a PIP, a detailed end-of-cycle performance appraisal with a rating of “partially meet performance expectations”, followed by a rebuttal process which upheld the rating. This process coupled with the outcome of the performance appraisal could possibly justify the non-renewal of the Applicant’s fixed-term appointment under sec. 10.3 of ST/AI/2010/5 (Performance Management and Development System), which provides that an appointment may not be renewed if performance shortcomings are not rectified following remedial actions taken under sec. 10.1. These remedial actions include the implementation of a PIP.

35. However, the Applicant has raised serious allegations of possible bias and lack of objectivity in the evaluation of his performance by the FRO and the SRO, together with possible issues of harassment and abuse of authority that may have impaired the ability of the FRO and the SRO to adequately fulfil their supervisory roles. The Applicant’s allegations are *prima facie* supported by documentary evidence which shows that senior management in UNECE, in particular the Deputy Executive Director, 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 Deputy Executive Director 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.

36. From 2 March 2018, the Deputy Executive Secretary, 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 the PIP is completed. This commitment actually materialised on 11 April 2018 when the Director, Division of Economic Cooperation and Trade, UNECE, replaced the Applicant’s FRO and SRO as his unique supervisor. The Director, Division of Economic Cooperation and Trade, UNECE, also asked the Applicant to carry out an assignment for another section to provide him an additional opportunity to work under another supervisor.

37. The Deputy Executive Director 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 Deputy Executive Director, 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”.

38. The actions taken by the Deputy Executive Director, UNECE, suggest that he considered that it would be problematic in the circumstances to take a decision on the Applicant’s appointment renewal solely based on the evaluation provided by the FRO and the SRO and that the Applicant ought to be given a further opportunity to demonstrate his capacity to fulfil his functions.

39. The Respondent asserts in his reply that the Deputy Executive Director, UNECE, was not fully aware of the situation at the time he wrote the above-mentioned emails and that he changed his views when he was given a more complete picture of the Applicant’s performance. At this preliminary stage, no evidence has been provided to support these allegations and the case presented to the Tribunal rather shows that the Applicant was effectively removed from the supervision of the FRO and the SRO until the contested decision.

40. Despite these expressed concerns about the capacity of the FRO and the SRO to adequately supervise the Applicant and objectively evaluate his performance, the contested decision appears to be 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 appears 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, Division of Economic Cooperation and Trade, UNECE, or by the other section for which he had worked were taken into account.

41. The Tribunal finds that there appears to be a disconnect between the actions taken by the Deputy Executive Director 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. This

unusual situation raises serious and reasonable doubts about the objectivity of the Applicant's performance appraisal which forms the basis of the contested decision. The rebuttal process does not cure this possible irregularity as there appears to have been no consideration by the panel of any difficulty in the supervisory relationship. Therefore, the Tribunal finds that the contested decision is *prima facie* unlawful.

### *Urgency*

42. The contested decision not to renew the Applicant's appointment beyond its expiry on 31 January 2019 was taken on 23 January 2019 and notified to the Applicant on 25 January, that is only four days prior to the Applicant being separated from service. The criterion of urgency is therefore fulfilled.

### *Irreparable damage*

43. It is settled law that loss of career opportunity with the Organization amounts to harm that cannot be adequately repaired through financial compensation (*Saffir* Order No. 49 (NY/2013), *Farrimond* Order No. 200 (GVA/2013), *Moise* Order No. 208 (NY/2014)). Also, the Tribunal has repeatedly ruled that harm to professional reputation and career prospects, as well as harm to health, or sudden loss of employment, may constitute irreparable damage (*Calvani* UNDT/2009/092, *Villamoran* UNDT/2011/126, *Ullah* UNDT/2012/140).

44. Given that the Applicant's current fixed-term appointment is the first he had with the United Nations, and that the non-renewal of his appointment is based on poor performance, the Applicant's professional reputation may foreseeably be tarnished and his career prospects with the Organisation may certainly be limited. The Tribunal finds that these damages caused to the Applicant would be irreparable and could not be adequately compensated at a later stage.

### **Conclusion**

45. In view of the foregoing, it is 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.

*(Signed)*

Judge Rowan Downing

Dated this 6<sup>th</sup> day of February 2019

Entered in the Register on this 6<sup>th</sup> day of February 2019

*(Signed)*

René M. Vargas M., Registrar, Geneva