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UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/038  
Order No.: 181 (NY/2018)  
Date: 19 September 2018  
Original: English

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**Before:** Judge Alessandra Greceanu

**Registry:** New York

**Registrar:** Nerea Suero Fontecha

ZONG

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

**ON SUSPENSION OF ACTION**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Elizabeth Gall, ALS/OHRM, UN Secretariat

## **Introduction**

1. On 17 September 2018, the Applicant, a Language Service Assistant at the G-4 level, step 2, on a temporary appointment with the Chinese Translation Service (“CTS”), Department for General Assembly and Conference Management (“DGACM”), filed an application for suspension of action during management evaluation pursuant to art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure, requesting suspension of the “[c]ontract non-extension decision [with the last day of service on 19 September 2018] ... based on untrue and biased performance evaluation”.

## **Factual and procedural background**

2. On 20 September 2017, the Applicant joined the United Nations on a six-month temporary appointment as a Language Service Assistant at the G-4 level, step 2, with the Chinese Translation Service, DGACM. The Applicant’s temporary appointment was initially set to expire on 19 March 2018. The Applicant’s temporary appointment was renewed on 20 March 2018 through 30 June 2018, and again on 1 July 2018 through 19 September 2018.

3. The Applicant received the Performance Evaluation Form for staff members holding temporary appointments (“P.333 form”) for the initial temporary appointment period of 20 September 2017-19 March 2018, which was signed by the Applicant and her First Reporting Officer (“FRO”) and Second Reporting Officer (“SRO”) on 26 March 2018. In the application for suspension of action, the Applicant submitted as follow regarding this performance evaluation (references to annexes omitted):

... The First Evaluation: the performance evaluation presents untrue and unsubstantiated information. Therefore, it is biased and unfair.

When I received my first evaluation form (March 2018), I was shocked, because my then FRO, [DY, name redacted], never provided me with any negative communication regarding my work performance, not to mention any oral warnings. I talked to my FRO about this (about late March). I said, “I don’t have these “issues”, and

even if I did, you should let me know first, and if I don't correct, then you can escalate the "issues" on paper." He agreed with my point, and he asked me to go to the SRO's office with him. [SRO] asked me if I received any feedback, I said no, and he asked [FRO] if he had given me any feedback. [FRO] said no. Then, he had no words to say, and quickly switched the topic. I couldn't ask him to switch back. At the end of the meeting, he repeated that he's not going to change the grade because he has already submitted the form to EO [Executive Office], and told me to look ahead.

The first evaluation (20 September 2017-19 March 2018) is untrue. It doesn't reflect my work performance. If I really had these "problems" for the past six months, then why didn't my FRO, whom I interact with on a daily basis, never communicate them with me? On the contrary, my SRO, who doesn't interact with me often, formed the idea that I have "problems", even though he has no facts to support the overall rating of C [partially meets performance expectations].

In the past six months (20 September 2017-19 March 2018), [FRO] has never given me any negative feedback. In fact, he has only praised me for my work performance orally and via emails. In these emails, he also copied [SRO] about my good work performance. After receiving these emails regarding my good performance, [SRO], however, never responded to them. I thought he's the Chief, maybe he's too busy to give me, a new G4 staff member, any attention. Later on, when [RJ, name redacted] became my FRO, [RJ] documented all my "mistakes" that he could find and copied it to [SRO], [SRO] suddenly became very involved and responsive to all his emails about my "bad" performance, and thanked [RJ] for "helping" me to improve. This contrast, however, is very shocking to me. I am doing the same work just like before, however, because the change of the new FRO, my performance deteriorated. My "bad" performance report seems to interest [SRO] a lot more than the "good" performance feedback from [DY]. Looking back now, I feel [DY] probably had sensed that [SRO] is biased towards me. He copied [SRO] about my good work performance, hoping [SRO] could evaluate my performance fairly and objectively.

As this first C, which means "partially meets performance expectations", is contradictory to [DY]'s positive feedbacks that I received on my work performance, I suspected that the "C" and the FRO's comments are both made by the SRO[...]. I have found evidence that my suspicion is actually true.

In relation to the first evaluation, I believe that [SRO] violated the UN procedures by bypassing the FRO, writing and deciding the grade for my FRO, [DY]. He pretended to be [DY] on the evaluation form, then he jumped back to his SRO role, and wrote "I concur with the

comments and rating entered by the FRO” (cited from my 1st p.333 form) which is a lie. In other words, [SRO] played two roles, both FRO and SRO, on my evaluation form. Moreover, after the role-playing, [SRO] did not note the fact that it is himself who wrote the FRO’s comments and decided the grade on the form. As the Chief of Chinese Translation Service, [SRO] abused his authority by manipulating my evaluation form, and intentionally gave me a C by neglecting FRO’s positive feedback on my work performance and replacing FRO to decide my grade. [SRO]’s authority, integrity, professionalism and mature judgment as the Chief of Chinese Translation Service and my SRO are questionable.

SRO is the Chief of Chinese Translation Service (CTS). In the CTS meeting, he has explicitly said: “performance evaluation is a very good tool, and we should use it wisely. if a staff is not doing good, we should let s/he know as early as possible. Otherwise, staff member will lose a good opportunity to improve. The result is terrible.” In reality[,] SRO has done the exact opposite of what he instructed others to do. The performance evaluation has been manipulated as a tool to separate me from [the] UN.

In early February 2018, [SRO] suddenly came to me and demanded that I drop my French class at the UN, with no reason provided. I was half way through the course, and I didn’t dare to ask him why. I didn’t understand why, because I know the UN encourages its staff to learn a new language, and it’s especially helpful for my job as a language service assistant. Other coworkers had no problem taking [the] UN courses. For example, [LY, name redacted], another front desk colleague, has taken multiple courses, and she never got any setbacks from the Chief. I’m the only staff member that has been demanded to drop the class.

I told [SRO], if I drop now, I’ll be charged with a penalty fee. He said he’ll write me an email to avoid the fee. In his email, he made an excuse saying our unit is understaffed, so I can’t continue my course. This reason is untrue. My class only took place during lunchtime. In our office, we have a rotation for the lunchtime shift (one person/day). Only one staff is required to stay in the office for lunch time shift. I only have one day’s lunchtime shift, and it’s not conflicting with my class’s schedule. Therefore, taking the French class will not affect my work. As he is the Chief, and also my SRO, he had all the power. As a new staff member that just worked there for four months, I had no choice but to obey the Chief’s demand. Now, I still don’t know the real reason. However, if he’s interested in keeping me for long term, he would let me take classes just like other coworkers, because improving language skills is beneficial for improving my role as a language service assistant. I feel that before starting reviewing my work performance in late March, [SRO] had already showed his bias

towards me as early as in February. He had decided not to keep me at CTS, and that's why I was the only one who was demanded to drop classes, and that's why I repetitively received Cs for my evaluation forms.

4. Subsequently, another e-performance document ("e-PAS") for the performance cycle 2017-2018 was completed in the form specific to a fixed term appointment for the same period, which was signed by the FRO on 26 April 2018, by the SRO on 27 April 2018, and by the Applicant on 3 May 2018. In the application for suspension of action, the Applicant submitted as follows regarding this performance evaluation:

... The Second Evaluation: [SRO] threatened me by stating that I should not rebut the second evaluation (the ePas)[.]

One week after signing my first evaluation, on 2 April 2018, I was told to write self-evaluation on my ePas. I wrote 1500 words about my performance at work, hoping my SRO could really get to know about my performance and evaluate fairly. However, against all facts and expectations, on April 27th, 2018, I still got a C. I went to the FRO's office for advice. So [FRO] and I talked to [SRO] again. The feedback we received from the SRO is that because the time of the ePas is close to the first evaluation form, in order to keep the consistency, I get a C. [SRO] said he wouldn't change his decision of giving me another C on my ePas because he has already decided. I didn't agree with the ePas, and I couldn't help, so I cried. I was new to the UN HR system, and I didn't know much about the evaluation process. [FRO] said, "Lihua, you can rebut. Right, Chief?" [SRO] had a harsh look, and said that I can rebut. However, if I do rebut, he won't renew my contract, and moreover, he'll write more "problems" in the evaluation part of my ePas. When we were leaving [SRO]'s office, [SRO] smiled to me and asked me to look ahead and forget about the past.

I was told that I should not use my right to rebut as otherwise, I would be separated from [the] UN. As I was scared, I did not rebut; but with the benefit of a hindsight, I think this amounts to serious misconduct on the part of [SRO]. It was not my intention to not to rebut. Given the conditions of my temporary contract, I had to obey SRO's decision if I still wanted my contract to be renewed. [SRO] again asked me to let the existing evaluations go, and look forward to my future evaluations. Instead of ensuring a fair evaluation process, the SRO plays a role in denying and obstructing my right to rebut. HR office has also told me that as a temporary staff, I am not supposed to have ePas. Creating an ePas for me is not even in the HR framework.

5. On 27 June 2018, a P.333 form for the period of 1 April 2018-30 June 2018 was signed by the Applicant, the FRO, and the SRO. In the application for suspension of action, the Applicant submitted as follows regarding this performance evaluation (references to annexes omitted):

... The Third Evaluation: [SRO] failed to communicate with me regarding my evaluation before giving me another C, and again as a FRO, [RJ] failed to evaluate my true performance by not providing solid examples that were identified as partially meeting expectation.

On 27 June 2018, I received my third performance evaluation (p.333), which was a C. When I asked the FRO for any examples that led to his conclusions, he said he couldn't think of any now, but will get back to me via email. However, I still haven't received any examples today. I told [RJ] that I wanted to talk to my SRO about this C. He didn't want to talk, but he told my FRO to assure me that no matter what grade I get, it would not affect my contract renewal. Even though there is no solid example showing my "problems", they wouldn't change their conclusions. From the perspective of my FRO and SRO, the actual grade on the evaluation form, and on what basis I have been given a C do not seem to matter much. At that time, I was waiting for my contract renewal, and I didn't even have a valid ground pass. I couldn't say no because it would offend them, and I would lose my contract immediately.

After receiving my third C, I was very confused because [RJ] makes me believe that he thinks highly of me. In April 2018, [RJ] became the new programming officer. As he had no experience of how to work as a programming officer before, he had lots of questions of the front desk's work. At that time, I gave him a significant amount of support, because I was the staff member who was covering 100% of [XZ, name redacted] (on vacation) and 70%-80% of [YL, name redacted]'s work (even though [YL] didn't take leave, and was still working in the office). I had a very heavy workload during that period, and I played a major role in ensuring the functionality of the front desk in the Chinese Translation Service. [RJ] appreciated my support to him, and said to me "Lihua, I know you have done a lot of work in the office, and you are also doing very well. I and other colleagues all see it, and we'll recognize your work." When he said that to me, I was very touched because I felt he recognized my hard work. During that period, SRO was in China. Before SRO left for China, SRO told me he'll ask [XZ] to check my work and give me a score when he comes back. When SRO and [XZ] came back to work, [XZ] told me that I can get 90 out of 100 for the work that I have done when she's away.

However, against all facts and expectations, I still got a C. I asked a senior colleague, [BB, name redacted], to ask FRO why he gave me a C, because [BB] and FRO are good friends for many years. [BB] told me that FRO told her that the giving me a C is SRO's decision, and refused to talk more about it.

6. The Applicant submits that the above-described three evaluation forms affected her chance to stay at CTS/DGACM and her ability move to another office within the United Nations:

The Chief explicitly told me to go to other offices. He said he's not changing the Cs, but he'll write me a recommendation letter. When I asked him to write a letter for me, he said he would ask EO. However, I never heard back. I find this self-contradictory. One month ago, I got an interview at DGACM/Documents Management Section, and the interviewer was very interested in me because I knew all the workflow at DGACM. I was told the hiring manager was ready to hire me. However, after I submitted my evaluation forms, they selected someone else. I am worried that these Cs are devastating for my career at the UN. These Cs not only eliminate any chances for me to stay at CTS, but also inevitably block my way moving to other UN offices.

In summary, the three evaluations fail to reflect the substance of my work; instead, they show abuse of authority. My supervisors have used my contract renewal as leverage to get my submission to their power and not to rebut for the negative evaluations that they imposed on me. Based on this ground, my supervisors repetitively abused their power, fooling me, comforting me and deliberately keeping give me Cs at the same time. The decision of giving me three Cs for my three evaluations is illogical and self-contradictory.

Because C indicates "partially meeting expectations", and if my work performance is so poor then my contract should and will not be renewed again and again. If my contract is being renewed again and again, and I am even getting an increasing amount of work, this means that my performance is good enough to have more jobs done. I am good enough to be hired and handle more and more jobs, however, I'm not considered as good enough to get a B, because the treatment I get CTS is not fair.

Even though I have received three Cs, and was placed on a PIP, SRO and FRO still allocated a significant amount of new jobs to me from August 1st, 2018. If I am already identified as having difficulties with my current jobs in my hands, and I therefore need to improve myself to work on these "problems", why am I receiving more new jobs at the same time? This would further deteriorate my work performance and lead to the decrease of quality of work in CTS. If the Chief is a

reasonable and accountable manager, he should be aware of these, and avoid giving me more new jobs because this affects the implementation of the PIP, the quality of work at CTS and further decreases my work performance at the same time.

7. According to the unsigned document submitted by the Applicant, the Performance Improvement Plan (“PIP”) was created on 6 July 2018 for the duration of 9 July 2018-10 September 2018. The Applicant also submitted the signed PIP for the updated duration of 16 August 2018-10 September 2018, which was signed by the Applicant’s FRO and SRO on an unknown date.

8. By email dated Friday, 14 September 2018, the Applicant’s SRO notified the Applicant that “after careful evaluation of your performance, we have decided not to recommend you for extension of contract. Your last day of service will be 19 September 2018.”

9. On Sunday, 16 September 2018, the Applicant submitted the request for management evaluation to the Management Evaluation Unit (“MEU”).

10. On Monday, 17 September 2018, the Applicant filed an application for suspension of action pending management evaluation. On the same day, the case was assigned to the undersigned Judge. By email to the parties, sent on the same day, the New York Registry acknowledged receipt of the application for suspension of action and requested the Respondent to file a reply by Tuesday, 18 September 2018, at 11:30 a.m., together with all the relevant documents, including the Applicant’s letter of contract and latest performance evaluations in question.

11. On the same day, as instructed by the Tribunal, the Applicant filed a signed copy of the application. On the same day at 8:31 p.m., the Applicant further filed a submission stating that she needed a fair treatment at the Tribunal since there is no rebuttal process for temporary staff.



12. On 18 September 2018, the Respondent filed his response to the application for suspension of action together with relevant documentation.

### **Applicant's submissions**

13. The Applicant's principal contentions may be summarized as follows:

#### *Prima facie unlawfulness*

a. The three performance evaluations (two P.333 forms and one e-PAS), PIP, and the non-extension decision do not reflect the Applicant's real work performance but are products of failing management, managerial misconducts, and lack of managerial accountability at the DGACM. These three evaluation forms have a direct adverse impact on the status of the Applicant's current contract renewal, her job prospects at the United Nations and her reputation. In fact, these three evaluations reflect biased and unfair treatment that she received at CTS, and it also shows managerial irresponsibility.

b. Moreover, these three evaluations are not in conformity with the United Nations policies and procedures. The PIP is only for "regular" staff members, not for temporary staff. According to the United Nations policies, the minimum time for the PIP implementation is three months, but the Applicant was only given two months. This is not a reasonable time for the Applicant to improve, and this shows that the PIP is not used as a tool for her to improve because of the lack of time and lack of support.

c. These three evaluations and the PIP are not made in good faith. Instead of serving as fair and true work performance evaluations, these three evaluations have been manipulated as a tool to separate the Applicant from the CTS and the United Nations system. The Applicant cannot renew her contract at CTS, and it is extremely difficult for her to find a new job at the United Nations with these negative evaluations forms and PIP in her profile.

*Urgency*

- d. The implementation date is extremely close.

*Irreparable damage*

- e. The Applicant will be separated from the Organization and the negative performance evaluation will destroy her future job prospects at the United Nations.

**Respondent's submissions**

14. The Respondent's principal contentions may be summarized as follows:

*Prima facie unlawfulness*

a. The Dispute Tribunal has repeatedly held that the prerequisite of *prima facie* unlawfulness requires that an applicant establish that there are serious and reasonable doubts about the lawfulness of the contested decision. An applicant needs to present a "fairly arguable case" that the contested decision is unlawful (*Jaen* Order No. 29 (NY/2011), para. 24; *Villamorán* UNDT/2011/126, para. 28). The Dispute Tribunal need not find that the decision is incontrovertibly unlawful (*Mills-Aryee* UNDT/2011/051, para. 4).

b. Temporary appointments may be granted for a period of less than one year to meet seasonal or peak workload and specific short-term requirements (staff rule 4.12(a)). A temporary appointment may be exceptionally extended beyond 364 days on the limited grounds set out in staff rule 4.12 (b) and sec. 14.1 of ST/AI/2010/4/Rev.1 (Administration of temporary appointments). One such ground is if a "special project at a headquarters duty station unexpectedly continues for more than one year". An exceptional extension of a temporary appointment requires a written justification (sec. 14.3). The Secretary-General has a broad discretion in determining organizational needs,

including staffing requirements (*Lee* 2014-UNAT-481, para. 28; *Simmons* 2013-UNAT-425, para. 31).

c. The procedures for performance evaluation of staff members are set out in sec. 6 of ST/AI/2010/4/Rev.1. The performance management procedures set out in ST/AI/2010/5 do not apply to staff members holding temporary appointments. A performance evaluation is only required to be issued for a temporary appointee at the end of the temporary appointment. A temporary appointment does not carry any expectancy of renewal and expires automatically without prior notice (staff regulation 4.5(b) and staff rules 4.12(c) and 9.4) (*Abdalla*, 2011-UNAT-138, para. 22; *Igbinedion*, 2014-UNAT-411, para. 26).

d. The reasons given for a non-renewal of appointment must be supported by the facts (*Obdeijn* 2012-UNAT-201, para. 5). A non-renewal decision may be challenged on the grounds that the decision was motivated by improper motives. The applicant has the burden of proving that such factors played a role in the decision (*Hepworth* 2015-UNAT-503, para. 43).

e. Unsatisfactory performance is a lawful reason for non-renewal of appointment (*Ncube* 2017-UNAT-721, para. 17; see also *Said* 2015-UNAT-500, para. 34; *Morsy* 2013-UNAT-298, para. 18; *Ahmed* 2011-UNAT-153, para. 49). The purpose of performance evaluation for temporary appointees include the protection of the Organization's efficiency and the accountability of staff members' for upholding the highest standards of efficiency, competence and integrity (*Ncube* 2017-UNAT-721, para. 18; see staff regulation 1.3(a), staff rule 1.3(a) and sec. 6 of ST/AI/2010/4/Rev.1).

f. Performance standards generally fall within the prerogative of the Secretary-General. Unless the standards are manifestly unfair or irrational, the Dispute Tribunal should not substitute its judgement for that of the Secretary-General (*Sarwar* 2017-UNAT-757, para. 74). The Dispute Tribunal must

accord deference to the Organization's appraisal of the performance of a staff member. It 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 appointment, based on the performance appraisal (*Said* 2015-UNAT-500, para. 40).

g. The Applicant was initially appointed to the Organization as a Language Service Assistant, at the G-4 level, under a six-month temporary appointment on 20 September 2017. The Applicant's temporary was appointment was renewed on 20 March until 30 June, and again on 1 July 2018 until 19 September. The Applicant reaches the 364-day mark under her temporary appointment on 19 September 2018.

h. As a Language Service Assistant, the Applicant worked on the Front Desk of the Chinese Translation Service. From 20 September 2017 to 19 March 2018, the Applicant's FRO and SRO provided the Applicant with oral feedback and coaching regarding her work. They explained that she needed to improve her interpersonal communication skills and demonstrate initiative with respect to tasks and projects. The Applicant's FRO and SRO recorded the Applicant's shortcomings in a performance evaluation for this period (P.333 form) and gave the Applicant a rating of "partially meets performance expectations".

i. The Organization demonstrated goodwill towards the Applicant by extending her temporary appointment (from 20 March to 30 June 2018) notwithstanding her performance evaluation. It did so as the Applicant's Reporting Officers had confidence that she had the ability to improve her performance based on the feedback provided by them.

j. From 1 April to 30 June 2018, the Applicant's FRO and SRO continued to guide and coach the Applicant on how to improve her performance. The SRO had at least five meetings with the Applicant to

provide her with oral feedback and instructed other staff members on the Front Desk to continue to retrain and support the Applicant. The FRO had at least eight long conversations with the Applicant to guide her. While the Applicant showed some improvement, performance shortcomings remained, including a failure to show attention to detail, and a lack of interpersonal skills. The FRO and SRO documented the shortcomings in a performance evaluation (P.333 form). Again, the Organization demonstrated goodwill towards the Applicant by extending her temporary appointment (from 1 July to 19 September 2018) notwithstanding her performance rating of “partially meets expectations”.

k. To give her a further opportunity to improve her performance, the Applicant was placed on a PIP from 9 July to 10 September 2018. The Organization was not required to do so under ST/AI/2010/4/Rev.1. The purpose of the PIP was to convey to the Applicant the seriousness of her performance issues. The PIP identified clear performance targets and identified specific instances where she did not demonstrate the required competencies and skills (communication, teamwork, attention to detail and attendance). The PIP left the Applicant in no doubt about what she was required to do to improve. The Applicant failed to attend two meetings to discuss the progress of the PIP.

l. Despite every effort from the Applicant’s Reporting Officers and the other staff of the Front Desk, the Applicant’s performance did not improve. In the PIP, the FRO recorded the Applicant’s performance shortcomings over the PIP period in extensive detail, with reference to specific instances where she failed to demonstrate the required standards of communication, teamwork, attention to detail and attendance.

m. In view of the Applicant’s demonstrated unsatisfactory performance, no organizational interest would be served in recommending an exceptional extension of the Applicant’s temporary appointment beyond 364 days.

n. The Applicant has not established that the contested decision is *prima facie* unlawful. Speculation and arguments are not evidence. The Applicant has not adduced any form of evidence to support her allegations.

o. The FROs (DY and RJ), SRO and XZ all deny the allegations made by the Applicant. Given the time limit to file the Reply it is not possible to respond in detail to all of the factual assertions in the Application. The SRO did not act as FRO in lieu of DY. The Applicant was asked not to continue with her French lessons as her performance needed to be improved. XZ did not give the Applicant a rating of “90 out of 100” for the work she did during XZ’s absence. The Applicant completed 90% of the work, leaving the most difficult tasks for XZ to complete upon her return.

p. The Applicant’s performance shortcomings are well documented in her performance evaluations and reference numerous specific instances when the Applicant did not meet the expected performance standards. The Reporting Officers made good faith efforts to address the Applicant’s performance shortcomings. Further, the Applicant has not adduced evidence that she has followed the Organization’s procedures for addressing complaints of prohibited conduct, including harassment and abuse of authority.

15. The Tribunal notes that the Respondent does not explicitly contest the other two conditions, namely, urgency and irreparable harm.

### **Considerations**

16. Article 2.2 of the Dispute Tribunal’s Statute states:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause

irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

17. Article 8.1(c) of the Dispute Tribunal's Statute states that an application shall be receivable if "... [a]n applicant has previously submitted the contested administrative decision for management evaluation, where required".

18. Article 13.1 of the Dispute Tribunal's Rules of Procedure provides:

The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.

19. The Tribunal considers that, for an application for suspension of action to be successful, it must satisfy the following mandatory and cumulative conditions:

- a. The application concerns an administrative decision that may properly be suspended by the Tribunal;
- b. The Applicant requested management evaluation of the contested decision, which evaluation is ongoing;
- c. The contested decision has not yet been implemented;
- d. The impugned administrative decision appears *prima facie* to be unlawful;
- e. Its implementation would cause irreparable damage; and
- f. The case is of particular urgency.

*Whether the application concerns an administrative decision that may be properly suspended by the Tribunal*

20. The Tribunal notes that in the present case, the contested decision is the non-renewal of the Applicant's contract which is due to expire on 19 September

2018. As stated by the Appeals Tribunal in *Obdeijn* 2012-UNAT-201, para. 31, “[...] where the applicable [s]taff [r]egulation and [r]ules provide that a [fixed-term appointment] does not carry an expectancy of renewal and is *ipso facto* extinguished on expiry, a non-renewal is a distinct administrative decision that is subject to review and appeal”.

21. The Tribunal concludes that the application concerns an administrative decision that may properly be suspended by the Tribunal, and the first condition is fulfilled.

*Ongoing management evaluation*

22. An application under art. 2.2 of the Dispute Tribunal’s Statute is predicated upon an ongoing management evaluation of the contested decision. The Applicant submits that she filed her request for management evaluation on 16 September 2018, which is not contested by the Respondent. Accordingly, the Tribunal finds that the request for management evaluation was initiated prior to the filing of the suspension of action. The Tribunal notes that there is no evidence on record that the MEU has completed its evaluation. The Tribunal therefore finds that the Applicant’s request for such evaluation is still pending and that the contested decision is the subject of an ongoing management evaluation for which reason the second condition is fulfilled.

*Whether the contested administrative decision was implemented*

23. The Applicant’s contract is set to expire on 19 September 2018. Therefore, the Tribunal concludes that the contested decision is not yet implemented.

24. Consequently, the first three cumulative and mandatory conditions presented above have been fulfilled.

*Whether the impugned administrative decision appears prima facie unlawful*

25. The Tribunal notes that the Applicant was initially appointed on 20 September 2017 for six months, and her appointment was subsequently extended twice: from



20 March 2018 through 30 June 2018 and from 1 July 2018 through 19 September 2018.

26. The Tribunal further notes that three performance evaluations have been issued during the Applicant's temporary appointment from 20 September 2017 through 19 September 2018: P.333 form for the period of 20 September 2017-19 March 2018, e-PAS for the period of 1 April 2017-31 March 2018 [which should read 20 September 2017-31 March 2018], and P.333 form for the period of 1 April 2018-30 June 2018.

27. Section 6 of ST/AI/2010/4/Rev.1 provides that “[a]t the end of the temporary appointment, regardless of duration, the programme manager shall issue a performance evaluation on a standard performance evaluation form for staff members holding temporary appointments.” It results that only one performance evaluation is mandatory (“shall”) and to be issued in case of a temporary contract at the end of the contract, regardless of its duration, and such performance evaluation(s) is not to be issued at the end of each period if the contract is extended, since the extension of a temporary contract in itself can be justified by and therefore certifies per se at least a satisfactory performance of the staff member; otherwise, the extension(s) cannot not be granted.

28. Therefore, the Tribunal considers that, according to the mandatory requirement set forth in ST/AI/2010/4/Rev.1, one performance evaluation should have been issued at the end of the Applicant's temporary appointment, i.e. 19 September 2018. However, the Administration issued in total three unnecessary evaluations: two different performance evaluations for the period 20 September 2017 to March 2018, one performance evaluation from April to June 2018, and no performance evaluation from July 2018 to September 2018, which is contrary to the mandatory requirement set forth in ST/AI/2010/4/Rev.1, being based on an erroneous interpretation of section 6. The Applicant's mandatory evaluation performance corresponding to the entire period of her temporary contract, namely 20 September 2017-19 September 2018, was not completed yet.

29. The Tribunal considers that even if the Administration's interpretation of sec. 6 of ST/AI/2010/4 /Rev.1, in the sense that performance evaluations were to be issued for each period when a temporary appointment is renewed successively, was to be considered correct, after a careful review of performance evaluation documents, the Tribunal concludes that the existing performance evaluation documents suffer from procedural irregularities, including discrepancies and contradictions as presented below.

30. In the P.333 form for the period of September 2017-March 2018, the following core competencies were rated as "Requires Development": Communication, Planning & Organizing, Creativity, Client Orientation, and Commitment to Continuous Learning. The Tribunal notes that Teamwork and Technological Awareness were rated as "Fully Competent". The overall rating was graded as "[p]artially meets performance expectations". In the comments section, the FRO wrote that "[the Applicant] is somewhat passive...needs to be a more proactive and faster learner in order to be able to handle a myriad of front desk functions."

31. On the other hand, in the e-PAS for the period of 1 April 2017-31 March 2018, three Core Values were rated as either Outstanding or "Fully Competent". Only two Core Competencies were included, in which Teamwork was rated as "Fully Competent" and Technological Awareness was rated as "Requires Development". The Tribunal notes that this evaluation contradicts the rating of "Fully Competent" for Technological Awareness in the P. 333 form issued for the almost same period. The Tribunal further notes that while four criteria were rated as "Outstanding" or "Fully Competent" and only one criterion was rated as "Requires Development" and thus majority of the evaluation criteria (four out of five) were evaluated as satisfactory, the overall rating was graded as "partially meets performance expectations".

32. In the "overall comments" section of the e-PAS, the FRO provided the following comments, which the Tribunal considers to appear to be overall positive and specific to a satisfactory performance, since the Applicant received satisfactory

ratings in the majority of the evaluated criteria, and not to support the overall rating of “partially meets performance expectations”:

[the Applicant] met most of her goals she set for herself in the work plan ... She helped other staff members of the Front Desk in the daily operations. She is willing to learn and to take jobs when requested. She has learned to fulfil effectively some of the functions of the Front Desk ... The staff member needs further development in learning about the operations and the myriad of functions of the Front Desk, including all the systems and tools used by FD staff to function fully effectively as a FD staff.

33. In the P.333 form for the period of 1 April 2018-30 June 2018, all Core Values (Integrity, Professionalism, Respect for Diversity/Gender) and three Core Competencies (Planning & Organizing, Technological Awareness, and Commitment to Continuous Learning) were rated as “Fully Competent”, and only two Core Competencies (Communication and Teamwork) were rated as “Requires Development.” Despite the fact that the majority of the evaluation criteria were rated as satisfactory (six out of eight), the overall rating was graded as “[p]artially meets performance expectations”. In the overall comments, the FRO provided the following comments, which the Tribunal considers to appear to be overall positive and specific to a satisfactory performance, since the Applicant received satisfactory ratings in the majority of the evaluated criteria, and not to support the overall rating of “partially meets performance expectations”:

[The Applicant] has made conscious efforts in learning from senior coworkers in term[s] of communication skills and teamwork. he has covered various FD functions ... while coworkers were on leave. She has been more proactive in fulfilling her work plans and made improvements in her work. [The Applicant] still needs to pay more attention to both written and verbal communication, team work, attention to detail, so as to become a fully-fledged FD staff who can operate independently and reliably and contribute to the maintenance of cordial and productive relations among FD staff and to a productive and harmonious working environment in the Service.

34. The Tribunal further notes that while the Applicant was notified by email dated 14 September 2018 that her contract will not be renewed beyond 19 September 2018 due to her performance, there is no evidence on record that the Applicant was

provided with the final performance evaluation “[a]t the end of the temporary appointment” as required by sec. 6.1 of ST/AI/2010/4.

35. Furthermore, the Tribunal notes that while the Applicant was placed on the PIP, the performance management procedure provided in ST/AI/2010/5, this procedure is specific and applicable only to “staff members who hold appointments of at least one year” and “does not apply to staff holding temporary appointments” (sec. 1 of ST/AI/2010/5). Thus, there was no legal basis to place the Applicant on the PIP.

36. Moreover, the Tribunal considers that the extensions of the Applicant’s temporary contracts appear to represent a confirmation of her satisfactory performance since none of the extensions of her temporary contracts could have been granted in the absence of a satisfactory performance and therefore contradict the above mentioned partial evaluations.

37. Therefore, in light of the various procedural irregularities presented above committed in the performance assessment process, namely (a) the lack of the Applicant’s mandatory performance evaluation at the end of her contract for the entire period of 20 September 2017-19 September 2018, (b) the contradictions between the extensions of the Applicant’s contract which could have been granted only as a result of at least a satisfactory performance of the Applicant, which supersede *ab initio* the rating of “partial meets expectations”, (c) concluded by the unwarranted two different partial performance evaluation documents for the same period 20 September 2017-31 March 2018, (d) followed by another partial evaluation with the same rating for the period 1 April-30 June 2018, (e) which all contain discrepancies among individual ratings, overall rating and overall comments, and (f) the placement of the Applicant on the PIP without any legal basis to do so, the Tribunal is satisfied that the contested decision appears to be unlawful and that the condition of *prima facie* unlawfulness is fulfilled.

*Is there an urgency?*

38. The Tribunal considers that the condition of urgency is fulfilled, which is not contested by the Respondent, since the Applicant's appointment is due to expire on 19 September 2018. The Tribunal notes that the contested decision was notified to the Applicant on Friday, 14 September 2018 and the application for suspension of action was filed on Monday, 17 September 2018. The Tribunal considers that the Applicant filed the present application for suspension of action within a reasonable time and concludes that the urgency was not self-created.

*Is there an irreparable harm to be caused by the implementation of the contested decision?*

39. The Tribunal considers that the contested decision, if implemented, has the potential to cause the Applicant irreparable harm since she would be separated from the Organization. In the circumstances, the Tribunal is satisfied that the condition of irreparable harm is fulfilled, which is not contested by the Respondent.

40. In this sense the Tribunal observes that the Appeals Tribunal held that when the performance document 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" (*Ncube* 2017-UNAT-721) and wrote that "lesser procedural irregularities in the performance assessment process may be cured in the rebuttal process" (*Sarwar* 2017-UNAT-757).

41. However, under sec. 6.1 of ST/AI/2010/4, the Applicant, as a staff member holding temporary appointment, is not entitled to the rebuttal process. She can only submit a written explanatory statement if she disagrees with the performance rating, which will be placed in the official status file, together with the performance evaluation document. Thus, especially for a staff member holding temporary appointment, like in the present case, such procedural irregularities cannot be cured in the rebuttal process and the contested decision if implemented can result in an irreparable harm to her career at the United Nations.

42. In the circumstances, the Tribunal is satisfied that the condition of irreparable harm is fulfilled.

43. In light of the above,

IT IS ORDERED THAT:

44. The application for suspension of action is granted in relation to the decision not to renew the Applicant's temporary appointment due to performance and to separate her from the Organization, and the implementation of this decision is suspended pending management evaluation.

*(Signed)*

Judge Alessandra Greceanu

Dated this 19<sup>th</sup> day of September 2018