



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Nerea Suero Fontecha

KITAGAWA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alister Cumming, ALS/OHRM

Introduction

1. On 9 October 2018, at 5:07 p.m., the Applicant, a team assistant at the G-4 level on a fixed-term appointment with the Language and Communications Programme Learning, Development and Human Recourses Services Division, Office of Human Resources Management (“OHRM”) in New York, filed an application for suspension of action during management evaluation pursuant to art. 13 of the Dispute Tribunal’s Rules of Procedure, requesting that the decision not to renew his fixed-term appointment beyond 9 October 2018, which was notified to him on 8 October 2018 and scheduled to be implemented on 9 October 2018, be suspended pending management evaluation.

2. On 9 October 2018, the case was assigned to the undersigned Judge.

3. On 9 October 2017, at 5.53 p.m., the Registry acknowledged receipt of the application and transmitted it to the Respondent. The Tribunal instructed the Respondent to submit his reply by 1:00 p.m. on Thursday, 11 October 2018.

4. The Tribunal further informed the parties that, due to the urgency of the matter (the deadline for the implementation of the contested decision being 9 October 2018) and pursuant to arts. 19 and 36 of the Dispute Tribunal’s Rules of Procedure, the implementation of the contested decision pending the consideration of the application for suspension of action under art. 2.2 of the Dispute Tribunal’s Statute was granted and that a reasoned written order was to follow.

5. By Order No. 197 (NY/2018) dated 10 October 2018, the Tribunal granted, without prejudice to the Tribunal’s determination of the application for suspension of action under art. 2.2 of the Dispute Tribunal’s Statute, the suspension of the implementation of the decision not to renew the Applicant’s fixed-term appointment beyond 9 October 2018 until the Tribunal rendered its decision on the application for suspension of action, or until further order.

6. On 11 October 2018, the Respondent filed his reply contending *inter alia* that the Application is not receivable on two grounds. Firstly, the Application is not receivable *ratione temporis* as the Applicant failed to request management evaluation of the contested decision within the 60-day time limit under Staff Rule 11.2(c) and Article 8(1)(c) of the Dispute Tribunal's Statute. Secondly, the contested decision has been implemented. The Applicant had a fixed-term appointment which expired on 9 October 2018 and he was separated from the Organization effective that day.

7. On 12 October 2018, at 10.39 a.m., the Tribunal instructed by email the Applicant to file his response, if any, to the Respondent's reply and the Respondent to file the following additional information by 4:00 p.m. Friday, 12 October 2018:

1. The legal basis for the Respondent's submission that the decision not to renew the Applicant's appointment became effective at the close of business 9 October 2018 (para. 13 of the Respondent's reply);

2. A full and clear explanation regarding the Administration's implementation of the separation decision before the issuance of the acknowledgment of the present case, including the Judge's instructions that, pursuant to articles 19 and 36 of the Dispute Tribunal's Rules of Procedure, the implementation of the contested decision is suspended pending the consideration of the application for suspension of action under article 2.2 of the Dispute Tribunal's Statute (followed by Order 2018-NY-197 (*Kitagawa*));

3. Copies of any documents mentioned in the email dated 20 July 2018 from Ms. [name redacted for privacy] to the Applicant regarding his separation, if and when completed by the Applicant (annex 2, Respondent's reply);

4. A copy of the Applicant's initial letter of appointment, and the subsequent letters of extension of his appointment up to 9 August 2018;

5. Confirmation of when the Applicant's SRO [Second Reporting Officer] was separated from the Organization and when he was contacted by the Rebuttal Panel; and

6. A copy of all the evidence gathered by the Rebuttal Panel.

8. On 12 October 2018, the parties duly filed their additional submissions.

Background

9. In the application for suspension of action, the Applicant submitted as follows regarding the facts to be relied on (references to annexes omitted):

... It is with understanding that my fixed-term appointments do not carry expectancy of renewal and that the decision was made on the grounds of unsatisfactory performance. However, the entire e-PAS process was irregular and flawed. I have been unfairly assessed in my e-pas as failing to perform my duties rather than the fundamental issue, which is the communication with the FRO [First Reporting Officer] as identified by the Ombudsman's office. This was then led by a Subjective Rebuttal selection process in which the E.O [Executive Office] did not comply with ST_AI_2010_5. This followed a Subjective Rebuttal process, collaborated with the fact that the panel rushed the decision as a result due to non-renewal of my contract on 09-10-2018. I believe the panel did not read the further evidence I was requested to provide on Friday 05-10-2018 ...

Parties' submissions

10. The Applicant's principal contentions are as follows:

... 1.E-pas related matters: [as per par. 4.1 c of ST/AI/2010/5] lack of discussion during the reporting period. 2.E-pas related matters: [as per par. 5.1 c/d of ST/AI/2010/5] 3.E-pas related matters: [as per par. 5.3 e of ST/AI/2010/5] SRO never intervened and resolved any disputes or miscommunications regarding my performance shortcomings between me and my FRO. 4.E-pas related matters: [as per par. 7.1 of ST/AI/2010/5] shortcoming was not identified. 5.E-pas related matters: [as per par. 9.2 of ST/AI/2010/5] Additional core competencies were added from four to six along with additional goals in my workplan. 6.E-pas related matters: [as per par. 9.8/9 of ST/AI/2010/5] My unsuccessful criteria were not defined and the FRO failed to define the majority of goals/keys I did not meet. 7.E-pas related matters: [as per par. 10.1 of ST/AI/2010/5] FRO/SRO failed to take remedial measures on a regular basis nor did they identify performance shortcoming and provide means of remedy/remedial measures. 8..E.O Rebuttal selection: [as per par. 11-15 & 14.1 & 15.3 of ST/AI/2010/5] I am told by E.O that it was the FRO/SRO who are the subject of this rebuttal representing the Head of Department. I am concerned with the panel selection. 9.E.O Rebuttal selection: [as per

par. 14.2 of ST/AI/2010/5] Exclusions of my selection of panel members without replacements and limiting the pool of panel members that I could select from. 10.Rebuttal Process: [as per par. 15.3 of ST/AI/2010/5] No efforts were made by the panel to contact my additional FRO's [Names Redacted] for the rebuttal process. My pertinent files & statement I have provided the EO for HoD was shared with Mr. [Name Redacted], an action which was advised against by OHRM in E.O's e-mail. Mr. [Name Redacted] has used the statement to slander my rebuttal statement and put it forward as the statement represented by HoD to the rebuttal panel. 11.Rebuttal Process: E.O collaborated the fact that the panel rushed the decision of result due to non-renewal of my contract. The panel did not read the additional evidence I provided requested to provide on Friday. 12.Rebuttal Process: Final decision from rebuttal panel does not refer to any documents on my performance, as per FRO's decision to not extend my contract due to my [Performance Improvement Plan ("PIP")].

Urgency and irreparable harm

11. The Applicant indicated that his contract expires on 9 October 2018 and therefore he will separate from the Organization on 9 October 2018, the date of filing of the application for suspension of action.

12. The Respondent's principal contentions in his reply are as follows:

The Application is not receivable ratione temporis

a. The Applicant failed to request management evaluation of the contested decision within the 60-day time limit under staff rule 11.2(c) and Art. 8(1)(c) of the Dispute Tribunal's Statute. The Applicant's 9 October 2018 request for management evaluation was outside this time frame;

b. As a mandatory first step before filing a case before the Dispute Tribunal, the Applicant must request management evaluation of a contested decision, in accordance with staff rule 11.2. Such a request should be lodged within 60 days of the Applicant being notified of the contested decision.

c. The time for challenging an administrative decision starts with the notification of that decision. On 20 July 2018, the Applicant was notified that his appointment would not be renewed beyond 9 October 2018. On the same day, the staff member sent the Applicant administrative information regarding his separation effective 9 October 2018. Accordingly, the Applicant was aware on 20 July 2018 that his appointment would not be renewed further and that he would be separated from service on 9 October 2018.

d. If the Applicant wished to challenge this decision, the time for him to raise such a challenge started on 20 July 2018. He should have requested management evaluation within 60 days thereafter i.e. by 18 September 2018. Instead, he waited until 9 October 2018.

e. The deadline for requesting management evaluation cannot be waived. This failure by the Applicant to exhaust internal administrative remedies renders the Dispute Tribunal incompetent to review the decision.

The contested decision has been implemented

f. The Dispute Tribunal has held that suspension of action may only be granted if the implementation of the contested decision “is still possible and at stake” (*Abdalla* Order No. 4 (GVA/2010)). If the decision has already been implemented, there is no longer a matter for the Dispute Tribunal to suspend and the application is not receivable.

g. The contested decision has been implemented. The last day of the Applicant’s appointment and service was 9 October 2018. His security pass expired on that day. The decision not to renew the Applicant’s appointment became effective at the close of business on that day and he was separated from service at that time.

h. The contested decision had therefore been implemented by the time of the filing of the Application and the issuance of the Dispute Tribunal's Order, as communicated by email on 9 October 2018 at 17:53. Suspension of the contested decision by the Dispute Tribunal is no longer possible.

The contested decision was lawful

i. The Applicant has failed to establish that the contested decision is *prima facie* unlawful. The decision not to renew his appointment was lawful.

j. It is well established that a fixed-term appointment does not carry an expectation of renewal. Unsatisfactory performance is a lawful reason for the non-renewal of appointment. The procedures for performance evaluation of staff members are set out in ST/AI/2010/5 Performance Management and Development System. 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. Any procedural irregularities in the performance evaluation process do not necessarily result in a subsequent contested decision being found unlawful. 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.

k. The Applicant's performance was properly assessed in accordance with ST/AI/2010/5. During the 2017-2018 performance cycle, and in accordance with section 10.1, the Applicant's first reporting officer ("FRO") continually evaluated the Applicant's performance. During the course of that cycle, the FRO identified performance shortcomings. These were documented in the mid-point review of the Applicant's performance evaluation. In order to

assist the Applicant in remedying the identified shortcomings, the FRO decided to institute a performance improvement plan (“PIP”). On 22 January 2018, the FRO sent a PIP to the Applicant. In implementing the PIP, the FRO provided detailed feedback to the Applicant on his performance. The final evaluation of the PIP took place on 25 June 2018. During that evaluation, the Applicant was informed that his performance had remained unsatisfactory during the implementation of the PIP.

l. The Applicant’s fixed-term appointment was due to expire on 31 July 2018. On 26 June 2018, the FRO informed the Applicant that his appointment would not be renewed beyond that date. On 11 July 2018, the FRO provided his final comments on the Applicant’s e-PAS for the 2017-2018 cycle. The Applicant’s performance was rated as “partially meets expectations”.

m. On 13 July 2018, the Applicant’s appointment was renewed until 9 August 2018. On 20 July 2018, the Applicant was informed that his appointment would not be renewed beyond 9 October 2018.

n. On 9 August 2018, the Applicant initiated a rebuttal of his performance evaluation in accordance with section 15 of ST/AI/2010/5. The Rebuttal Panel completed its report on 8 October 2018.

o. The Panel concluded that the Applicant’s performance rating of “partially meets” expectations should be maintained. The decision not to renew the Applicant’s appointment beyond 9 October 2018 had already been taken on 20 July 2018. It was notified to him on that date. Section 15.6 of ST/AI/2010/5 only required the Administration to extend the Applicant’s appointment when the rebuttal process was ongoing. As the rebuttal process was complete, there was no basis to extend the Applicant’s appointment any further. Accordingly, at the close of business on 9 October 2018, the Applicant was separated from service. The Administration properly assessed

the Applicant's performance as "partially meets" expectations. Accordingly, it was lawful not to renew his appointment and to separate him from service.

Any urgency has been created by the Applicant

p. Self-created urgency does not satisfy the requirements for suspension of an administrative decision.

q. The Applicant knew from 20 July 2018 that his fixed-term appointment would not be renewed beyond 9 October 2018. The Applicant could have sought management evaluation of that decision then.

r. Instead, he waited until after the Dispute Tribunal's close of business on 9 October 2018 to file a request for suspension of action. Any urgency has been created by the Applicant.

s. In view of the foregoing, the Respondent requests that the Application be dismissed.

13. The Respondent's further submissions filed on 12 October 2018 are as follows:

The legal basis for the Respondent's submission that the decision not to renew the Applicant's appointment became effective at the close of business 9 October 2018

a. Staff rule 9.4 provides that "A temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment." Section 7.1 of ST/AI/2013/1 Administration of fixed-term appointments provides that "A fixed-term appointment expires on the expiration date specified in the letter of appointment." In the case of *Andreyev* (2015-UNAT-501), the Appeals

Tribunal held that, “it is our settled jurisprudence that a fixed-term contract ends with the effluxion of time.”

- b. Accordingly, at the close of the business day on 9 October 2018, the Applicant’s fixed-term appointment expired. The decision not to renew his appointment was implemented at that time. Any steps that the Administration takes to process the administrative formalities of a separation from service, which are not necessarily taken prior to the expiration of the appointment, do not mean that the employment relationship extends beyond the date of the of the expiration.

A full and clear explanation regarding the Administration’s implementation of the separation decision before the issuance of the acknowledgment of the present case

- c. The Applicant’s separation from service was not an administrative decision. It is the consequence of an administrative decision i.e. the contested decision not to renew the Applicant’s appointment. Accordingly, the Administration did not take any positive action to implement the contested decision. It happened automatically.
- d. To administratively process a separation from service, certain steps are taken, including the processing of the separation in Umoja and the generating of the relevant personnel action form. In the case of the Applicant, no administrative actions had been taken to process the Applicant’s separation from service, prior to the acknowledgement of the present case by the Dispute Tribunal and the subsequent e-mail instruction. In accordance with the Dispute Tribunal’s instruction and subsequent Order No. 197 (NY/2018), no actions have since been taken.

Confirmation of when the Applicant's Second Reporting Officer ("SRO") was separated from the Organization and when he was contacted by the Rebuttal Panel

- e. The Applicant's SRO separated from the Organization on 16 June 2018. The Chair of the Rebuttal Panel wrote to the SRO on 5 October 2018. No response was received.

Consideration

The mandatory and cumulative conditions for suspending an administrative decision

14. 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.

15. Article 8.1(c) of the 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".

16. Article 13.1 of the Tribunal's Rules of Procedure states:

... 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.

17. 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 properly be suspended by the Tribunal

18. The Tribunal notes that it is uncontested that the contested decision in the present case, namely the decision not to renew the Applicant's fixed-term appointment beyond 9 October 2018, is an administrative decision subject to review by the Tribunal, including its implementation being suspended pending management evaluation. Consequently, the first cumulative and mandatory condition presented above is fulfilled.

Whether the Applicant requested management evaluation of the contested decision and whether the evaluation is ongoing

19. As results from the further documentation provided by the Respondent on 12 October 2018, the Applicant, a long serving staff member, was initially appointed as a clerk with the Department of General Assembly Affairs and Conference Services on

a temporary assignment for a short-term appointment on 25 October 1999. His temporary appointment was subsequently extended until 24 April 2000. On 25 April 2000, the Applicant was appointed on a fixed-term appointment until 30 June 2000. Between 1 July 2000-June 2003 the Applicant's six months fixed-term contract was extended periodically. On 1 July 2003, the Applicant was appointed on a one year fixed-term contract expiring on 30 June 2004 which was extended for another year until 30 June 2005. On 21 August 2006, the Applicant was appointed on two years fixed-term contract until 20 August 2008. Between 21 August 2008 and 20 August 2014, the Applicant was appointed on fixed-term appointments renewed every year. He was further extended on fixed-term appointments between 21 August 2014 and 21 September 2014, 21 September 2014 and 20 August 2015, 21 August 2015 and 30 November 2015, 1 December 2015 and 29 February 2016, 1 March 2016 and 31 December 2016, 1 January 2017 and 31 December 2017, 1 January 2018 and 30 June 2018, 1 July 2018 and 31 July 2018 and 1 August 2018 and 9 October 2018. The Applicant was appointed on a fixed-term with Department of General Assembly Affairs and Conference Services on 25 April 2000. He was appointed to his current position as a team assistant with the Language and Communications Programme Learning, Development and Human Resources Services Division, OHRM in New York on 21 August 2015.

20. The Tribunal notes that the Applicant was initially informed on 26 June 2018 by his FRO that based on the final evaluation of the Applicant's PIP, the FRO decided not to extend his appointment beyond the end of July 2018. On 13 July 2018 the Applicant's FRO wrote to MS. LL, informing her that based on the advice provided by Performance Management, an extension of nine days of the Applicant's contract was requested, so his last day at the Organization will be 9 August 2018.

21. On 20 July 2018 at 1:58 p.m., an assistant with the Executive Office, Department of Management, Human Resources, informed the Applicant that his contract has been extended through 9 August 2018 and he was requested to come and sign his new letter of appointment. On the same day - 20 July 2018, at 3:46 pm, the

Applicant was further sent a second email from the Executive Office attaching memorandum regarding his separation from the Organization together with attached documents for the Applicant's information and actions, such as the exit interview, pension form and separation payments form. On 27 July 2018, the Applicant signed his last letter of fixed-term appointment with the expiration date 9 October 2018. The new letter of appointment superseded the non-renewal decision notified to the Applicant on 26 June 2018.

22. On 9 August 2018, the Applicant filed an application for rebuttal of his performance evaluation in accordance with section 15 of ST/AI/2010/5. The Tribunal notes that the Applicant's contract was extended before he filed the application for rebuttal and it appears that the extension of his contract was not based on rule 4.13 of ST/AI/2013/1 (Administration of fixed-term appointments) which states as follows:

Extension of probationary period on fixed-term appointment for staff recruited upon successful completion of a competitive examination pursuant to staff rule 4.16

4.13 A staff member recruited upon successful completion of a competitive examination pursuant to staff rule 4.16 shall be granted a continuing appointment after two years on a fixed-term appointment, subject to satisfactory service. Where service has not been satisfactory during the two-year probationary period, the fixed-term appointment may exceptionally be extended under the same terms and conditions for a further period of up to one year. If the staff member does not have two years of satisfactory service, he or she will be separated from service upon expiry of appointment or terminated for unsatisfactory performance in accordance with staff regulation 9.3 (a) (ii) and staff rule 9.6 (c) (ii).

23. The Tribunal notes that the Rebuttal Panel completed its report on 8 October 2018. The Tribunal further notes that pursuant to arts 15.4 and 15.5 of ST/AI/2010/5 the decision of the rebuttal panel is the final decision on the staff member's performance evaluation and is a distinct decision from the initial performance evaluation prepared by the FRO and SRO. The rebuttal panel can either maintain the initial overall rating or can establish/designate a new rating on the evaluation

performance. The decision of the rebuttal panel is binding on the head of the department/office /mission and on the staff member concerned, subject to the ultimate authority of the Secretary-General as Chief Administrative Officer of the Organization who may review the matter as needed on the basis of the record.

24. In the light of these provisions, the Tribunal considers that the Applicant was only aware of the final administrative decision on the date of the completion of the Rebuttal Panel report, namely on 8 October 2018 when he was officially provided with a copy of the report and therefore informed that the rebuttal panel established the final outcome of his performance evaluation as being was the one previously determined by his FRO and SRO “partially meets expectations”. This decision represents ultimately the reason for the Applicant’s non-renewal and the last notification that his contract will expire on 9 October 2018 after his performance evaluation was maintained was sent on 9 October 2018. The Applicant filed a management evaluation request of the contested decision on 9 October 2018, the last day of his contract, from his official United Nations’ email and when while being on the United Nations premises, within 60 days from the day of the 9 October 2018 notification, and the evaluation is currently pending. Consequently, the second cumulative and mandatory condition presented above is fulfilled.

Whether the contested decision has not yet been implemented

25. The Tribunal notes that pursuant to Order No. 197 (NY/2018) issued on 10 October 2018, the Tribunal suspended the contested decision until the Tribunal has rendered its decision on this application, or until further order. The Respondent further confirmed in his further submissions on 12 October 2018 that “... the Administration did not take any positive action to implement the contested decision... To administratively process a separation from service, certain steps are taken, including the processing of the separation in Umoja and the generating of the relevant personnel action form. In the case of the Applicant, no administrative actions had been taken to process the Applicant’s separation from service, prior to the

acknowledgement of the present case by the Dispute Tribunal and the subsequent e-mail instruction. In accordance with the Dispute Tribunal's instruction and subsequent in Order, no actions have since been taken."

26. Therefore, the contested decision is not yet implemented. Consequently, the third cumulative and mandatory condition presented above is fulfilled.

Whether the impugned administrative decision appears prima facie unlawful

27. The Tribunal notes that the Rebuttal Panel is required and mandated by section 15 of ST/AI/2010/5 to complete certain procedural steps, including "[u]nless geographical location makes it impractical, the panel shall hear the staff member, the first and second reporting officers and, at the discretion of the panel, other individuals who may have information relevant to the review of the appraisal rating" (section 15.3 of ST/AI/2010/5). As results from the email sent by the Chair of the Rebuttal Panel's to the Applicant's former SRO, the Rebuttal Panel met with the Applicant and his FRO. Although the Rebuttal Report states that the Panel interviewed both the Applicant, his FRO, and two other witnesses, the copy of all the evidence gathered by the Rebuttal Panel as provided by the Respondent on 12 October 2018 pursuant to the Tribunal's instructions, does not contain copies of the mandatory interviews of the Applicant and his FRO by the Panel recorded in writing or of the testimonies of the other two witnesses. Also there was no clear reason why the SRO, was not further contacted after 5 October 2018 and appears the process was finalized without a very important testimony in order to be finalized before 9 October 2018 - the expiration date of the Applicant's contract. The Tribunal observes that actually pursuant to art. 4.13 of the ST/AI/2013/1 the contract is to be extended until the finalization of the rebuttal process, not *vice versa*, the rebuttal process is to be finalized before the expiration of the contract. It appears that the Applicant's contract should have been extended until the entire evidence was gathered, including the testimony of the Applicant's former SRO, and properly recorded by the Rebuttal Panel in writing.

28. The Tribunal underlines that the Rebuttal Panel is required to interview the staff member, the FRO, the SRO and any other persons considered to have relevant information and that these testimonies must be recorded in writing because they are part of the evidence gathered by the Rebuttal Panel. The Rebuttal Panel's decision while binding on the head of the department/office/mission and on the staff member concerned, is subject to the ultimate authority of the Secretary-General as Chief Administrative Officer of the Organization who may review the matter as needed on the basis of the record. In the absence of a complete record containing the entire evidence evaluated by the Rebuttal Panel a proper review is not to be possible.

29. The Rebuttal Panel report does not include any specific reference to the content and the relevance of the testimonies before the panel and there is no mention of the new evidence requested by the Applicant in order to capture this relevant evidence.

30. Based on the foregoing, the Tribunal concludes that it appears that the mandatory provisions of ST/AI/2010/5 were not followed by the Rebuttal Panel and, consequently the decision not to renew the Applicant's fixed-term appointment beyond 9 October 2018 for reasons of poor performance appears to be *prima facie* unlawful.

31. The Tribunal is of the view that it appears to be necessary for these legal aspects to be addressed, clarified and corrected during the management evaluation review including if necessary by resending the matter to the Rebuttal Panel in order to ensure that the Applicant's due processes right are respected and to allow the Secretary-General to properly exercise his discretion in relation to the legality of the contested decision.

Is there an urgency?

32. The Tribunal considers that the condition of urgency is fulfilled, since the Applicant's appointment was due to expire on 9 October 2018. The Tribunal notes

that the contested decision was notified to the Applicant on the 8 October 2018 at the completion of the Rebuttal Report and the application for suspension of action was filed on 9 October 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?

33. The Tribunal considers that the contested decision, if implemented, has the potential to cause the Applicant irreparable harm since he 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.

34. In light of the above,

IT IS ORDERED THAT:

35. The application for suspension of action is granted in relation to the decision not to renew the Applicant's fixed-term appointment beyond 9 October 2018, and the implementation of this decision is suspended pending management evaluation.

(Signed)

Judge Alessandra Greceanu

Dated this 16th day of October 2018