
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/001

Judgment No.: UNDT/2018/043

Date: 22 March 2018

Original: English

Council, requiring the Division to prepare briefing materials at short notice and sometimes under intense media scrutiny.

MEWAD has over thirty (30) New York based staff members, and it manages the backstopping [the Tribunal takes judicial notice that MEWAD serves as a support, reinforcement for the two Special Political Missions in Iraq and Afghanistan] for two of large and complex Special Political Missions [] in the United Nations

Nations Special Coordinator for the Middle East Peace Process

planning processes on Syria and Yemen.

the founder

On 17 May 2016, the Applicant was provided with her performance review for the period 2015-2016. The document was completed by the [] and the [] -Secretary-

The Applicant was on mission from 7 June 2016 to 20 June 2016 for meetings in Paris, a conference in Brussels and meetings in Beirut and, thereafter, she was on sick leave. She returned to the office on 11 July 2016.

On 22 July 2016, the Applicant met with her FRO.

The Applicant

On 10 November 2016, the Applicant received an email from the FRO which summarized the discussion of 3 November 2016 in relation to the mid-point review performance and PIP. The document highlighted areas where improvement had been achieved, and areas which still required attention.

On 14 November 2016, the Applicant met with her FRO and continued their discussion on the PIP.

The PIP ended on 30 November 2016.

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31 December 2016.

On 1 December 2016, the Applicant received an email from
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information that the FRO had entered into the mid-term review of her performance document in Inspira [a United Nations online performance system], including the conclusion that the Applicant had
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She also received notification in this email that she would be separated from the United Nations.

On 6 January 2017, the MEU upheld the contested decision of
stated as follows:

The limited judicial review

20. According to the consistent jurisprudence of the Appeals Tribunal, the judicial review of a non-renewal decision is limited. For instance, in *He* 2016-UNAT-686, the Appeals Tribunal found in para. 39 that:

Our jurisprudence holds that a fixed-term appointment has no expectation of renewal. Nevertheless, an administrative decision not to renew a fixed-term appointment can be challenged as being unreasonable on the grounds that the Administration has not acted fairly, justly or transparently, or was motivated by bias, prejudice or improper motive against the staff member. The staff member carries the overall burden of proof to show that such factors played a role in the administrative decision [*Said* 2015-UNAT-500, para. 34, citing *Asaad* 2010-UNAT-021, para. 10]. Such a challenge invariably will give rise to difficult factual disputes. The mental state of the decision-maker usually will be placed in issue and will have to be proved on the basis of circumstantial evidence and inference drawn from that evidence.

21. Further, in *Islam* 2011-UNAT-112 (paras. 29-32), the Appeals Tribunal noted that when a justification is given by the Administration for the exercise of its discretion, it must be supported by the facts.

Applicable law

22. ST/AI/2010/5, sec. 10, on identifying and addressing performance shortcomings and unsatisfactory performance states that:

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

10.2 If the performance shortcoming was not rectified following the remedial actions indicated in section 10.1 above, and, where at the end of the performance cycle performance does not meet performance expectations, a performance improvement plan shall be prepared by the [FRO]. This shall be done in consultation with the staff member and the [SRO]. The [PIP] may cover up to a six-month period.

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

10.4 Where at the end of the performance cycle performance is not satisfactory, an appointment may be terminated as long as the remedial actions indicated in section 10.1 above included a [PIP], which was initiated not less than three months before the end of the performance cycle.

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

member to improve his or her performance. The duration of the performance improvement plan may vary depending on the nature of the performance issue. [PIPs] may cover up to a period of six months (see Section 10.2 of ST/AI/2010/5).

piece of evidence provided and would determine the legal value attached to it, if any. The Tribunal considers that all the facts should be taken in consideration to determine whether the decision on the results of the PIP implementation or on all the evidence and facts submitted before it. The Tribunal takes note that the documents submitted contained evidence related to events/accounts starting from September 2012 to January 2017, which included three e-PAS reports and evidence related to them (including the rebuttal and decision to uphold), the PIP and evidence related to its establishment and implementation, as well as evidence related to the Administration to separate the Applicant on the ground of poor performance.

Was the institution of a PIP justified and what was its purpose, and was it established in a fair manner and without bias?

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contract would not be renewed?

25. It follows from the Guideline that mechanism that allows the staff member an opportunity to clearly demonstrate

outcome of the PIP was predetermined even before its institution, for instance the non-term appointment, this would render the entire process futile and therefore improper.

26. The Applicant contends that the FRO told her during a meeting held with him on 7 March 2016 that her SRO did not want to renew her contract (due to expire on 2 September 2016) and that they wanted to institute a three months PIP following which they would separate her. The Respondent contends instead that the FRO informed the Applicant during

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remedial measures. Given the evidence submitted before it, the Tribunal considers that the FRO and the SRO did put in place several measures to assist the Applicant to improve her functions, such as by appointing a mentor for her at the USG level from outside DPA as well as a management coach paid for by DPA for approximately eight months with whom she had thirteen (13) sessions in person and/or by phone.

37. ST/AI/2010/5, sec. 10.1, also provides for other remedial measures such as the institution of a PIP. The Guideline states that the purpose of instituting a PIP is to provide a mechanism that allows a staff member an opportunity to demonstrate improved performance. The Tribunal notes that although the Applicant contends that the PIP was instituted in bad faith and in order to separate her rather than to allow her to improve her performance, the Respondent claims that the FRO and SRO, after trying to assist her in improving her management and communication performance

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the FRO and the Applicant to this effect had been submitted in evidence, notably one email from the FRO addressed to the Applicant and copied to the SRO dated 10 November 2016, to which the Applicant did not reply, where the FRO specifically referred to email exchanges confirming that she was consulted in detail on the draft PIP and also at a meeting on 18 May 2016 between the FRO and the Applicant and another meeting on 2 June 2016 between the SRO, the FRO and the Applicant. The FRO also stated that the Applicant provided some comments which they subsequently integrated. For instance, they approved her request to extend the PIP duration to six months and they did so in order to give her the maximum amount of time to implement the PIP and to enable her to take annual leave and undertake mission travel. The FRO also referred to another comment that the Applicant had asked them to remove, namely a reference related to the challenges she faced in her relationship with her Deputy Director (name redacted, Mr. DM). The FRO explained that this relationship was difficult when the Deputy first took up his functions but that since it had improved over time, they had agreed to remove it from the PIP.

42. The Tribunal notes that, under sec. 10.2 of ST/AI/2010/5, the FRO shall with the staff member the performance shortcoming was not rectified following the remedial actions sec. 10.1. As a matter of process, the FRO is therefore only to consult with the staff member regarding the PIP, which is therefore not subject of negotiation between the FRO and the staff member.

43. With regard the establishment of the PIP had been forced on her, the Tribunal notes that she did not provide any evidence, for instance, in the form of an email or a comment on a document, showing any such disapproval. On the contrary, the evidence presented demonstrates that the Applicant not only did not oppose the establishment of the PIP but, instead, participated in its elaboration and provided comments to her supervisors to improve its content and make it fairer to her, as shown in email exchanges between the Applicant and the FRO copied to the SRO dated 2 June and 10 June 2016. Also, a note of the 2 June 2016 meeting that the

Respondent submitted disagreement to the establishment of the PIP, but the note also mentions that she agreed to observe the terms of the document. Therefore, the Tribunal considers that this note constitutes evidence that the PIP was not forced upon the Applicant. In addition, the Tribunal notes that the Applicant did not submit a request for management evaluation with the MEU to contest the decision to institute a PIP.

44. Further, as regards the fact that the Applicant refused to sign the PIP, the Tribunal notes that the FRO, in an email dated 1 December 2016 to the Applicant and
- to the Applicant]

she has not commented on these remarks in either of the documents, which would strongly infer that she did not disagree with those comments. Further, the Tribunal observes that the Applicant did not refer to this alleged bias in her application and in the joint submission and that only her counsel mentioned it during the hearing.

its implementation, namely on 22 July 2016, 28 or 29 September 2016, 3 November 2016, 14 November 2016 and 1 December 2016. The parties, however, disagree on the content of the four first meetings, specifically on whether they discussed the implementation of the PIP or not.

50. The Applicant claims that she has had discussions about the implementation of the PIP on three (3) occasions during the period of the PIP. In particular, she claims in her application that she had three (3) meetings with her FRO which focused on her PIP on 3 November 2016, 14 November 2016, and 1 December 2016. She also states that the substance of what was discussed during the 22 July 2016 and 29 September 2016 review since no discussions related to the PIP took place. The Applicant states, in the joint submission dated 26 January 2018, that the first time she discussed her PIP with the FRO was during the meeting they had on 28 or 29 September 2016; the second time was on 14 November 2016, and the third time was on 1 December 2016 in which she discussed with her FRO and SRO the overall evaluation of the PIP. She also claims that the meeting held on 22 July 2016 focused only on a proposal for a new post for her within the Secretariat and the one held on 3 November 2016 did not focus on the PIP but instead on her mid-point review and the successes of MEWAD.

51. The Respondent contends, however, that the Applicant and the FRO discussed the PIP implementation on five (5) occasions during the PIP period. He avers that the 22 July 2016 meeting focused on the PIP and the possibility of exploring a new post for the Applicant, and submitted on 7 February 2018 an exchange of emails between the Applicant and his assistant (name redacted, Ms. CH), where the latter, on 21 July 2016, [22 July 2016] meeting is to quickly check in on the progress of the PIP and any support [the Applicant] might need. The Respondent also states that the Applicant's assistant, Ms. CH, has shown that the Applicant has not discussed the PIP with her FRO during the PIP period.

52. The Respondent also states that the Applicant's assistant, Ms. CH, has shown that the Applicant has not discussed the PIP with her FRO during the PIP period. The Respondent also avers that the 28 or 29 September 2016 meeting focused on the PIP; the 3 November 2016 meeting focused on the PIP; the 14 November 2016 meeting focused on the PIP; and the 1 December 2016 meeting focused on the PIP.

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Leadership and guidance issues

60. In response to the allegations of her lack of leadership and strategic guidance, the Applicant referred to a note she had [redacted], SRO] (through [Mr. MJ, FRO]) : Letter from [non-governmental organizations,

Management issues with SPMs faced by the Applicant

61. The FRO and SRO stated at the hearing, which is also submitted by the Respondent, that the Applicant faced management issues with SPMs. In particular, the FRO and the SRO stated that the DPA had inherited a SPM in 2014 and that the Applicant never went there on mission despite several requests. The SRO stated at the hearing that it was a very important SPM and it was carefully followed. He also stated that any Director at the D-2 level should have known that she needed to go there on mission to assess the situation and to meet the staff in the SPM, and that he and the FRO should never have had to insist that she needed to go there. The Tribunal notes that the FRO, in an email dated 1 December 2016 and addressed to the -point r had not undertaken a mission to this SPM during the past two years and that he had assessed this as a failure on her part and as a result of poor planning of duty trips across the Division. The Applicant submitted in evidence an email dated 18 October 2016 that she sent to her FRO in which she explained that she had planned her trip to that SPM to take place that month but that she had had to subsequently cancel the trip and decided to stay in New York instead to monitor the developments in another urgent dossier covered by the Division. In light of the evidence presented before it, the Tribunal notes that, although the Applicant had planned to undertake a mission to the SPM in question, she never actually went there during the two (2) years that

present request, as pointed out by the FRO in his 10 November 2016 email to the Applicant, showed a serious shortcoming on her part in planning duty trips. In light of the above, the Tribunal considers that the travel request does not appear to have been reasonably thought through by the Applicant, as she was not promised any contract extension at that time and the PIP implementation period would have ended during her mission. The Tribunal is of the opinion that a D-2 level manager should have been able to understand the weight such a request was carrying and that the Applicant should have been more conscious and concerned that the future of her contract depended on the outcome of the PIP which was due to expire during the requested mission. The Tribunal therefore considers that the FRO and the SRO acted with fairness and reason towards the Applicant by not granting her request and that such rejection does not reflect that the Administration had already pre-determined the outcome of the PIP.

Communication issues

68. An issue arose during the PIP implementation relating alleged lack of communication skills. The Respondent states that, on 16 June 2016, he had received an email from a Special Envoy complaining that the Division had provided him with talking points for a meeting with high-ranking United Nations officials which contained information that did not reflect the situation in the country concerned accurately and that he had felt obliged to re-write them shortly before the meeting. The FRO stated during the hearing that the content of these talking points was incorrect because MEWAD had failed in its obligation to consult the Special Representative of the Secretary- of the concerned SPM. He also stated that he had immediately written to the Applicant and the SRO to inform them about the situation and that they would try to fix it on the ground. The Applicant

2016 that although she had improved in certain aspects of her work, some shortcomings related to communicating and providing strategic guidance to her staff remained, mentioning as an example illustrating this remark

MEWAD retreat, it was apparent that the Division was seeking such strategic

75. The Tribunal notes that with regards to the managerial competency of communicating, the FRO and SRO raised the incident related to the talking points for the Special Envoy that contained incorrect information. The Tribunal considers that this incident was rightfully mentioned during the PIP evaluation meeting on 1 December 2016.

76. ST/AI/2010/5 sec. 10.3 provides that [i]f the performance shortcoming was not rectified following the remedial actions indicated in sec[.] 10.1, a number of

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SRO only provided her with a copy of the finalized PIP on 7 December 2016, one day after she lodged a management evaluation request with the MEU.

80. The Applicant also alleged during the 1 December 2016 meeting that, in relation to the r of 10 October 2016 to uphold the grading of of her 2015-2016 performance evaluation report, she disagreed and told the SRO and FRO that she was not given a good opportunity to present her position to the rebuttal panel, that the panel did not review the documents she had submitted to them and that she had only been given 40 minutes to speak to them and plead her case.

81. The Applicant further alleges that numerous stakeholders have provided the FRO and SRO with letters and emails of recommendation. She claims that her work was appreciated and recognized by these stakeholders, both internal and external to the United Nations such as United Nations Ambassadors, a United Nations Executive Director, a United Nations Resident Coordinator, and an internal staff member under her supervision and that despite these documents, the Administration/FRO and SRO acted in an unfair and non-transparent manner in separating her from the Organization.

82. The Respondent argues, on the contrary, that the separation process was lawful, that it was conducted in a fair manner and, in accordance with ST/AI/2010/5, secs. 10.3 and 10.4 which provides that shortcomings still remain after the implementation of a PIP, the Administration may take the decision not to renew his/her appointment.

83. According to the Appeals Tribunal in *Said* 2015-UNAT-500, it is not the role of the Dispute Tribunal to examine whether it would have made the same decision as the Administration not to renew the Applican based on the performance appraised. The Appeals Tribunal also ruled in *Obdeijn* 2012-UNAT-201 that the role of the Tribunal is to look at whether the Administration followed the applicable rvice for unsatisfactory

services. Further, in *Hepworth* 2015-UNAT-503, the Appeals Tribunal ruled that any decision to separate a staff member must be supported by the facts and not be vitiated by bias or improper motive.

84. [redacted] at the separation was done in an unfair manner and was tainted with flaws, the Tribunal notes that the FRO and SRO convened a formal final meeting with the Applicant on 1 December 2016 to discuss her overall performance evaluation during the six month PIP implementation period. During that meeting, the FRO, SRO and Applicant, according to the content of the meeting minutes, discussed the targets of the PIP, namely the leadership/strategic guidance, planning and organization, and communication and professionalism. The FRO and SRO mentioned that the Applicant had improved in some areas, without mentioning them specifically, and by bring the performance [of the Applicant] to the level of a Director at the D[-]2 lev but that unfortunately shortcomings remained in the three above-mentioned areas and they provided her with concrete examples of incidents that occurred during the PIP implementation.

85. In addition, the Tribunal observes [redacted] sive FROs and the SRO all referred to her lack of leadership and strategic guidance and communication in her three e-PAS reports and that the rebuttal panel, in its decision, also referred to this issue.

86. [redacted] SRO provided her with a copy of the finalized PIP on 7 December 2016, one day after she contacted the MEU, instead of on 1 December 2016 during the meeting, the FRO and SRO confirmed that the copy was handed over to the Applicant on 7 December 2016. They also stated that the decision not to renew her contract was taken on 1 December 2016, after the PIP comment that they had provided feedback to the Applicant in email exchanges, other communications and during the meetings of 22 July 2016, 29 September 2016,

3 November 2016, 14 November 2016 and 1 December 2016. The Tribunal has reviewed the above-mentioned evidence and considers that the FRO and SRO provided sufficient feedback to the Applicant on her performance in the e-PAS reports and during the PIP implementation.

87. With regards the letters and emails of recommendation addressed to the Applicant, the Tribunal indeed observes that many stakeholders commended her work. However, the Tribunal notes that there are mechanisms in place aimed at

-PAS reports, rebuttal process, and PIP process. The Tribunal also notes that the Applicant and the FRO and SRO have made use of these available channels and that following negative reviews of her performance, they made the decision not to renew her appointment. The Tribunal also observes that the FRO, in one of his comments contained in Section 7 of the -PAS report for 2015-2016

received positive feedback on occasion for her interaction with senior management and partner made reference to these recognitions given by external stakeholders. The Tribunal, however, considers that these letters of recommendation do not constitute official records, namely performance evaluation records, but that they are rather documents external to the United Nations evaluation process. In light of the above, the Tribunal considers that these documents cannot be viewed as

taken in consideration by the FRO in his 2015-performance.

88. he Tribunal notes that the Applicant received her 2015-2016 e-PAS report with the grading of

rebuttal within the 14 days required by ST/AI/2010/5, sec. 15.1. In her rebuttal, she was also given the opportunity to select the three (3) panel members, in conformity with ST/AI/2010/5, sec. 15.2. The rebuttal panel subsequently interviewed the Applicant on 15 September 2016 and issued its report on 10 October 2016 upholding

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that the Applicant used her right to rebut a negative performance assessment in accordance with ST/AI/2010/5, sec. 15, that the Applicant lodged her rebuttal in accordance with the applicable text and that the rebuttal panel subsequently issued a decision confirming the unfavorable evaluation, pointing out her managerial deficiencies. The Tribunal notes that the SRO took the decision not to renew her appointment based on poor managerial performance, and that the rebuttal panel

identified similar managerial performance deficiencies in its decision. The Tribunal

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the performance [of the Applicant] to the level of a Director at the D[- ; (c) the FRO and SRO did not provide the Applicant with examples of areas of improvement during the PIP evaluation meeting on 1 December 2016. As ruled by the Appeals Tribunal in *Luvai* 2010-UNAT-014, minor errors in the process in

present case, the Tribunal considers similarly that the procedural flaws observed were insignificant to the outcome of the PIP process and therefore did not render the subsequent appeal successful.