



## **Introduction**

1. The Applicant contests the non-renewal of her fixed-term appointment (“FTA”) beyond 31 December 2017 for reasons related to alleged performance shortcomings.

## **Facts and procedural history**

2. The Applicant served as a Coordination Officer (P-4), Jalalabad Field Office, United Nations Assistance Mission in Afghanistan (“UNAMA”), Department of Peacekeeping Operations (“DPKO”), under FTAs from 24 August 2010. Her last fixed-term appointment was due to expire on 31 December 2017 and was extended until 15 June 2018, date of her separation from service.

### *Applicant’s 2015-2016 performance evaluation*

3. On 2 February 2016 the Applicant’s First Reporting Officer (“FRO”) and Second Reporting Officer (“SRO”) proposed to the Applicant a performance improvement plan (“PIP”) for the period from February to May 2016; on 11 May 2016, the Applicant’s FRO proposed a new PIP for the period from 11 May to 10 October 2016. In both occasions, the Applicant objected to these PIPs.

4. On 15 June 2016, the Applicant electronically acknowledged that her performance review for the 2015-2016 cycle had been conducted, resulting in a rating of “partially meets performance expectations”. The Applicant’s FRO identified performance shortcomings for the core values of integrity, professionalism and respect for diversity, as well as for the core competencies of teamwork and client orientation. The FRO also identified weaknesses in the Applicant’s managerial competencies in the areas of managing performance and vision. The SRO stated that he was concerned that there was no improvement in some of the Applicant’s managerial competencies despite frequent requests for improvement.

5. The Applicant rebutted this performance evaluation. By memorandum of 27 November 2016, the rebuttal panel maintained the rating of “partially meets performance expectations”.

6. Upon request of the Applicant under sec. 15.5 of administrative instruction ST/AI/2010/5 (Performance Management and Development System) and as per instruction from the Acting Assistant-Secretary General (“Acting ASG”), Office of Human Resources Management (“OHRM”) dated 10 March 2017, the outcome of the rebuttal process for 2015-2016 was annulled, and the Applicant then agreed to the constitution of an ad-hoc rebuttal panel.

7. On 9 August 2017, the ad-hoc rebuttal panel submitted its report to the Acting ASG, OHRM, recommending that the Applicant’s 2015-2016 performance evaluation rating be maintained as “partially meets performance expectations”.

*Applicant’s 2016-2017 performance evaluation*

8. From January 2017 to March 2017, the Applicant was placed on a PIP, although she continued to object to it. This PIP was put on hold during her certified sick leave from 2 February to 25 April 2017.

9. On 31 March 2017, the Applicant’s FRO retired from the Organization but completed the Applicant’s performance evaluation for the 2016-2017 cycle.

10. By memorandum of 25 May 2017, the Chief of Staff, UNAMA, reminded the Applicant of the need to complete the PIP initiated by the retired FRO in January 2017 and to sign-off on the 2016-2017 performance appraisal. The Applicant reiterated her objection to the PIP on 30 May 2017, and the Chief of Staff, UNAMA, responded to the Applicant’s concerns on 19 June 2017.

11. On 10 June 2017, the Applicant electronically acknowledged that her performance review for the 2016-2017 cycle had been conducted. It resulted in a rating of “does not meet performance expectations”. The Applicant’s retired FRO identified performance shortcomings for the core values of integrity, professionalism and respect for diversity, and for each of the core competencies except for technological awareness. The retired FRO also identified weaknesses for each of the managerial competencies. The Applicant’s SRO, however, indicated some progresses on the Applicant’s work and several positive outcomes. He further noted that the PIP could not be implemented as the Applicant was on sick leave.

12. On 21

Case No. UNDT/GVA/2018/014

Judgment No. UNDT/2020/007

*The decision not*

26. The Respondent filed his reply to the application on 26 March 2018.

27. Following re-assignment of the case to the undersigned Judge on 1 October 2019, the parties, *inter alia*, agreed to the case being decided on the papers and they were given leave to file closing submissions by 12 December 2019.

**Parties' submissions**

28. The Applicant's principal contentions are:

- a. Her 2016-2017 performance evaluation was vitiated by several shortcomings, as found by the rebuttal panel, including non-compliance with applicable deadlines, lack of documentary evidence that she failed to

e. The contested decision is not substantiated by the facts. The Applicant consistently demonstrated good performance, and this was notably confirmed in her latest performance appraisal for the period from 1 April through 31 December 2017 (2017-2018 performance evaluation cycle); and

f. Consequently, on the grounds of material omission and misinterpretation of the law, the Applicant requests the Tribunal to rescind the contested decision dated 13 December 2017 of non-renewal of her fixed-term appointment, and to extend her reqnd0t

d. The Applicant was also provided the opportunity to challenge both her 2015-2016 and 2016-2017 performance appraisals, but her unsatisfactory performance ratings were upheld. The fact that the Applicant and the FRO were not interviewed in respect of the 2016-2017 performance appraisal rebuttal does not vitiate the process as the rebuttal panel considered that it had sufficient information to review the Applicant's performance, including the Applicant's detailed and extensive documentation, the FRO written evaluation and the evaluation provided by the SRO in writing and orally to the rebuttal panel;

e. The Applicant's 2017-2018 performance evaluation rating is not relevant as it was not part of the legal basis in support of the contested decision; and

f. Consequently, the Respondent asks the Tribunal to dismiss the application in its entirety.

### **Consideration**



*Merits of the case*

33. The dispute is about the non-renewal of the Applicant's fixed-term contract owing to alleged poor performance. As to the merits, the Tribunal shall examine the following issues:

- a. Whether the Applicant's performance for the 2015-2016 and 2016-2017 cycles was evaluated in accordance with the provisions of ST/AI/2010/5;
- b. Whether the Organization failed to consider relevant information by not taking into account the Applicant's performance appraisal for the period from 1 April through 31 December 2017; and
- c. Whether the decision not to renew the Applicant's FTA due to performance reasons was lawful.

Whether the Applicant's performance for the 2015-2016 and 2016-2017 cycles was evaluated in accordance with the provisions of ST/AI/2010/5

34. Section 10 of ST/AI/2010/5 sets the legal framework for addressing performance shortcomings and unsatisfactory performance. In summary, it provides for the following steps:

- a. Upon identification of a performance shortcoming, implementation of remedial measures such as counselling, transfer to more suitable functions, additional training and/or the institution of a time-bound PIP (see sec 10.1 of the instruction); and
- b. If remedial actions do not rectify the situation, and the performance evaluation at the end of the performance cycle results in a rating of "partially meets performance expectations", preparation of a written PIP is to be made in consultation 888 8.565002w

35. Said section also provides for administrative actions that may result if the performance shortcoming is not remedied or from unsatisfactory performance. These are:

a. Performance shortcomings not rectified by undertaken remedial actions may result in the withholding of a within-grade salary increment, the non-renewal of an appointment or the termination of an appointment for unsatisfactory service in accordance with staff regulation 9.3 (see sec 10.3 of the instruction); and

b. Performance appraised as “does not meet performance expectations” despite implementation of remedial actions and a written PIP, initiated not less than three months before the end of the performance cycle, may result in the termination of an appointment (see sec 10.4 of the instruction).

36. In the present case, the Applicant was given ongoing performance feedback by her FRO and SRO and was also provided with the opportunity to challenge both her 2015-2016 and 2016-2017 performance appraisals before different rebuttal panels, but her unsatisfactory performance ratings were upheld.

37. The record shows that the Applicant’s 2015-2016 performance appraisal rating was reviewed and confirmed by two rebuttal panels, which maintained the rating as “partially meets performance expectations”. The Applicant does not raise any specific concern about this rebuttal process and/or the resulting performance evaluation rating.

38. The Applicant (also) Tj ( 65997314 0 89 0 Td ( )Tj4gg98364 0 Td 0 T8( )T6 45.95999146 0Tj 292r9)

to her rebuttal request, and the rebuttal panel decided not to interview individuals

raised similar issues, was interviewed and did not result in a change of the performance rating.

43. In addition, it must be noted

Whether the Organization failed to consider relevant information by not taking into account the Applicant's performance appraisal for the period from 1 April through 31 December 2017

48. In December 2017, the Organization informed the Applicant the

53. The situation of the present case is therefore completely different from the one examined by this Tribunal in *Kotanjyan* UNDT/2018/077 (not appealed), where the Organization gave that Applicant opportunities to improve his performance and to comply with the PIP, but it was at some point faced with an impasse due to the lack of that Applicant's cooperation leading to the non-renewal of the FTA.

54. The Tribunal found incoherent to neglect available recent good performance results of a staff member at the same moment when the Organization examines a poor performance of the past when pondering whether to renew a contract.

55. In ow

*Ahmed* 2011-UNAT-153, the Appeals Tribunal held that “if based on valid reasons and in compliance with procedural requirements, fixed-term appointments may not be renewed.”

60. As a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal for an employee receiving a satisfactory performance evaluation, *a fortiori* it does not carry any expectancy for a staff member whose performance was found unsatisfactory.

61. In the UNAT’s case-law, it is well established that unsatisfactory performance constitutes a legitimate basis for the non-renewal of a staff member’s fixed-term appointment (*Said*, referring to *Morsy* 2013-UNAT-298; *Ahmed*).

62. In particular, the Appeals Tribunal held that a staff member whose performance was rated as “partially meets performance expectations” has no legitimate expectancy of renewal.

66. Some aspects of the present case are like those examined in *Dzintars*, where the non-renewal was based on a performance rating that had been upgraded. In that Judgment (see paras. 30 and 31), the Appeals Tribunal was of the opinion “that an improvement of the performance rating should have automatically led to the withdrawal of the non-renewal order and a reconsideration of the decision based on the improved rating” and that “the decision of non-renewal ought to have been taken on the basis of the upgraded [performance]rating”.

67. This Tribunal already found in *Zong* UNDT-2018-38, that the Organization should have had to evaluate the Applicant’s performance during the last part of the contract before deciding not to renew it.

68. Furthermore, the Tribunal considers that in line with the Organization’s duty of care towards its staff members, and consistent with the spirit of the remedial actions provided for in ST/AI/2010/5, the Organization must make every effort to consider in good faith relevant performance information available to it prior to separation of a staff member when opting not to renew an appointment on grounds of unsatisfactory performance.

69. The Tribunal finds that the Organization failed to promptly evaluate and consider satisfactory results achieved by the Applicant during the last performance cycle of her contract, and to balance, where appropriate, those results with the previous performance evaluations. These facts were relevant to the Organization’s decision to not to renew the Applicant’s FTA on performance grounds, and their lack of consideration consequently makes the non-renewal decision unlawful.

#### *Remedies*

70. The remedy of rescission of an administrative decision generally entails the undoing of the decision. The Tribunal has found that the Organization failed to comply with the requirements of ST/AI/2010/5 and that the decision to separate the Applicant from service based on performance grounds was unlawful.

71. The Tribunal considers it appropriate to order the rescission of the decision to separate the Applicant from service.



72. In accordance with art. 10.5(a) of its Statute, the Tribunal will set an amount of compensation that the Respondent may elect to pay as an alternative to rescission of the decision. (DECIDES:45.3948956)Tj ET Q 1 0 0 1 0 179.986

73. Considering the Applicant's length of service and the legal shortcomings described above, the Tribunal sets the amount of compensation in lieu to nine months' net base salary.

### **Conclusion**

74. In view of the foregoing, the Tribunal DECIDES: