



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2022-UNAT-1217



**Ajay Sud
(Appellant)**
v.
**President
of the International Fund for Agricultural Development
(Respondent)**

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge Kanwaldeep Sandhu Judge Sabine Knierim
Case No.:	2021-1532
Date:	18 March 2022
Registrar:	Weicheng Lin

Counsel for Appellant:	Jordan Howells
Counsel for Respondent:	Bernard Eelco Szabó

JUDGE MARTHA HALFELD, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal or UNAT) has before it an appeal by Ajay Sud (Mr. Sud), a former staff member who served as a Legal Officer at the P-3 level with the International Fund for Agricultural Development (IFAD or Fund) in Rome.

2. Mr. Sud filed a Statement of Appeal with the Joint Appeals Board (JAB or Board) challenging the decision of the Administration to terminate his appointment for unsatisfactory performance during his probationary period.

3. On 8 December 2021, the JAB issued its Findings and Decision in Case 8/2019,¹ dismissing Mr. Sud's appeal and finding that there were no significant irregularities in the examined procedure. The Board explained it was within the wide discretionary powers of the President of the Fund to not confirm the Fixed Term Appointment (FTA) of a staff member during the 12-month probationary period.

4. For the reasons set out below, the Appeals Tribunal grants Mr. Sud's appeal and reverses the JAB Decision. The decision to terminate Mr. Sud's appointment with IFAD is rescinded. As an alternative to the rescission, the Fund may elect to pay compensation *in lieu* to an amount equivalent to two years' net base salary, plus interest until payment. The compensation awarded to Mr. Sud shall be paid within 60 days of this Judgment becoming executable. Interest will accrue on the total sum from the date of this Judgment at the current US Prime rate until payment. If the total sum is not paid within the 60-day period, an additional five percent shall be added to the US Prime Rate until the date of payment.

Facts and Procedure

5. On 22 May 2018, Mr. Sud accepted the position of Legal Officer at the P-3 level after going through a competitive selection process. He joined the Fund on 1 September 2018 on a three-year FTA and was initially assigned to the Institutional Unit of the Office of the General Counsel (LEG). His probationary period thus begun on 1 September 2018 and was expected to last until 31 August 2019.

¹ *Ajay Sud v. The International Fund for Agricultural Development*, Case 8/2019 dated 8 December 2020 (Impugned Decision or JAB Decision).

6. Of significant import in the discussion to follow is the issue of when Mr. Sud received his performance plan. Although he started on 1 September 2018, his performance plan, as reflected in the Probationary Form Upon Appointment, was not agreed to and signed on by both parties until 30 November 2018, that is three months later.

7. On 17 January 2019, Mr. Sud had a meeting with his supervisor and the Deputy General Counsel to discuss his performance as part of the Performance Evaluation System (PES). The assessment which followed this meeting was generally positive, and his supervisor noted that he could improve on two competencies during 2019: proactivity in reaching out to his clients, and strategic thinking and looking at the “big picture” when handling assignments.

8. In May 2019, following a reorganization of LEG, Mr. Sud was assigned to the newly established- Finance & Impact Investments Unit.

9. Subsequent to the January meeting, Mr. Sud had his mid-probation review on 3 May 2019 with his supervisor and the Deputy General Counsel. The assessment which followed the meeting shows that two competencies were identified as requiring improvement during the probation period: strategic thinking and organizational development, and managing time, resources and information. Mr. Sud was also informed that two additional performance feedback sessions during the rest of the probationary period were expected to be undertaken.

10. In addition to the performance issues that purportedly caused the termination of Mr. Sud’s appointment before the end of his probationary period, it is also alleged that he did not take well the refusal of the Administration to grant him a waiver to apply for a P-4 post before he had served at the Fund for at least 12 months. This is because there is a general requirement at the Fund that internal applicants must have at least served for a year in their current role prior to becoming eligible to apply for another post. In that regard, Section 2.6.1 (iv) of the Human Resources Implementing Procedures (HRIP) provides: “Internal applicants on indefinite or fixed-term appointments normally need to have served for at least 12 months in their current position as of the closing date of the vacancy announcement.”

11. It is also alleged that Mr. Sud did not take well that another staff member, who he previously supervised for a brief period at the European Bank for Reconstruction and Development (EBRD), was selected for the P-4 post he was eyeing and eventually became his supervisor. This

allegedly caused a conflict at work, and this was mentioned in the mid-point review that occurred in May.

12. Following receipt of the mid-point evaluation dated 17 May 2019, Mr. Sud provided detailed comments on 20 May 2019. A little more than a month later, on 27 June 2019, the Fund decided to terminate his appointment. A meeting was held on that date in which the staff member was informed that his appointment would be terminated for unsatisfactory performance during probation, effective 28 August 2019, and that he would be placed on special leave with full pay (SLWFP) until that date. In the termination letter, the Fund wrote:

Unfortunately, despite the efforts made during the probationary period to bring your performance (objectives and competencies) to the level required to this position, including informing you at a very early stage of areas needing improvement, regular verbal and written feedback and coaching, and the outreach and support of two different supervisors as well as the Deputy General Counsel, your performance, attitude and behavior have not demonstrated any significant improvement. All this has been recorded in the Probationary Form and the recommendation made at the end of your probationary period has been to terminate your appointment.

13. On 25 July 2019, Mr. Sud submitted the decision of the Administration to terminate his appointment for Mandatory Administrative Review. The decision was upheld by the Administration, and on 27 November 2019, Mr. Sud filed a Statement of Appeal before the JAB challenging the termination decision.

The JAB Decision

14. On 8 December 2020, the JAB issued the Impugned Decision, finding that Mr. Sud's appointment was terminated in accordance with the rules and procedures set in place and based on the opinion of the appropriate authorities. The JAB highlighted that the Administration has broad discretion in deciding whether a staff member during the probationary period can continue to work with the Organization or not.

15. The Board, in conclusion, stated the following:

[T]he JAB wishes to remind the Administration, as a concern of general character, that hiring overqualified personnel for a given job very often is proved not be a wise decision. People may, for reasons of their own, accept the offer made to them, unfortunately frustration and dissatisfaction may soon arise and consequently have negative and far reaching negative effects in the work environment. It is also true that correcting a

performance issue with a new or any staff member is a shared responsibility with both the staff member and their manager working together for a positive outcome. For a new staff member, under probation, issues of performance directly impact the imminent confirmation of an employment contract.

As for the Administration, it is true that the Administration is protected by the rule governing the probationary period, but it is equally true that non-confirmation or interruption of a new staff member's contract is unfortunate, and can also indicate a failure of the system. The JAB notes that these considerations may be useful for future recruitments to both, the individuals aspiring to come to IFAD and become staff members, and for the Administration, but they do not change the substance and the outcome of the present case.

16. The JAB thus rejected Mr. Sud's appeal in its entirety.

Procedure before the Appeals Tribunal

17. On 4 March 2021, Mr. Sud filed an appeal against the Impugned Decision, and the appeal was registered with the Appeals Tribunal as Case No. 2021-1532. On 7 May 2021, the Respondent filed his answer.

Submissions

Mr. Sud's Appeal

18. The staff member submits that the JAB erred in applying Staff Rule 2.5 (e) to the instant case. Mr. Sud argues the Organization failed to assess him as required by the rules. It also failed to timely communicate its concerns to him and provide him with a meaningful opportunity to remedy any purported failings. In that regard, Mr. Sud submits that the requirements for assessing performance during the probation period, under Section 2.20.1 of the HRIP, were not met.

19. First, Mr. Sud argues that contrary to the requirement that a performance plan be prepared no later than three weeks after a staff member has taken up his or her appointment, in his case, this information was provided to him three months later, on 30 November 2018.

20. Second, Mr. Sud remarks the meeting that occurred on 17 January 2019 was part of PES and did not actually constitute part of the formal process, as specified under Section 2.20.1 of the HRIP. Nevertheless, the staff member notes the feedback that he received at the January meeting was overwhelmingly positive. In particular, his supervisor wrote: "Ajay is capable of handling his

work with very little assistance from his supervisor. He is accurate and detail-oriented and he can be counted on to complete assignments thoroughly. Ajay was quick to build a good relationship across departments. He is thoughtful and courteous towards others.”

21. Although, the supervisor did include areas of growth in her review (strategic thinking and organizational development, and managing time, resources and information), they were general in nature and did not specify that two International Swaps and Derivatives Association (ISDA) agreements needed to be executed during the probationary period. Mr. Sud argues the JAB erred in considering that these two agreements needed to be signed during his probation when in fact there is no such mention in neither his performance plan nor in the PES assessment of January 2019. As such, the JAB relied entirely on the affidavits presented by the Administration and did not consider the absence of such requirement in the PES report or in the performance plan.

22. For the signing of two ISDA agreements to become a condition of employment and yet never makes its way in the actual performance plan or in the PES assessment is patently unfair, submits the staff member. He notes if IFAD had wished to use this specific measure of performance to determine his probation, then the Fund should have said so explicitly in the PES assessment.

23. Mr. Sud also argues that he received conflicting information from the General Counsel about what needed to be prioritized in his unit. He notes on 25 September 2018, the General Counsel sent an e-mail stating the following: “Given the tight schedule and importance of the matter, I ask each of you to put other matters aside and make [the proposed amendments to the Agreement Establishing IFAD] your top priority so that LEG can deliver our work on time. Thank you all for your crucial contributions in getting this important initiative forward.”

24. Additionally, Mr. Sud also posits had IFAD not prematurely terminated his appointment, eight weeks before the end of his probation, he would have actually been able to get two ISDA agreements signed. This makes the decision of the Administration even more perverse, he argues.

25. Regarding the mid-point review, which is the first formal feedback under the HRIP, the staff member argues that such review ought to have been scheduled in March 2019 but did not happen until May 2019, nine months into his appointment and a mere eight weeks before his contract was prematurely terminated. Given that the staff member had to accomplish certain objectives within a specified timeframe, or at least he was expected to, the strict timeline should

have been respected. Therefore, a two-month delay in conducting the mid-point review impacted the ability of the staff member to remediate any identified underperformance.

26. Importantly, Mr. Sud notes that at the mid-point review in May 2019, it was unequivocal, as recorded in Section II of the Probationary Form Upon Appointment, that he would have until the end of his probation to satisfy the stated requirements, that is until 31 August 2019.

27. Furthermore, Mr. Sud argues not only he was not afforded the opportunity to improve until the end of the probationary period, but also the JAB improperly relied on the Judgment in *Sarwar* in finding that his termination was justified.² Mr. Sud notes in *Sarwar*, the staff member was granted an additional eight months after his probation to improve his performance whereas in the instant case, his appointment was cut short two months before the end of the probationary period. Therefore, from the time of his mid-point review, which was written up and finalized on 20 May 2019, he had only a little more than a month to make certain improvements, before he was terminated on 27 June 2019 – two months before the end of his probation.

28. Consequently, Mr. Sud submits that IFAD had failed to discharge its obligations to:

- (1) timely notify him of the alleged failures and discharge its duties under the Rules and HRIP;
- (2) clearly notify him of the consequences of failing to remedy them;
- (3) set out explicit steps to enable him to satisfy the Fund's requirements;
- (4) give him sufficient time, opportunity and support to do so; and
- (5) properly evaluate his performance at a final review, with a chance for rebuttal.

29. Regarding the other issues raised in the JAB Decision, namely the allegation that Mr. Sud did not take well that he was not allowed to apply for a P-4 post before the end of his probation, Mr. Sud argues the issues concerning these events at work were only provided to give some context in which the IFAD Decision was made, they were not the subject of his appeal.

30. Finally, Mr. Sud also submits the JAB made several errors in procedure, which actually demonstrates its bias in favor of the Respondent.

² *Sarwar v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-757.

The Respondent's Answer

31. As a preliminary matter, the Respondent notes that Mr. Sud seeks to introduce new evidence, which was not part of the record reviewed by the JAB. This evidence, which has been included under Annex 13 to the Appeal Brief, consists of an Additional Statement that Mr. Sud sought to submit to the JAB belatedly on 30 November 2020. The JAB refused on account that it was about to render decision in the case and could not accept additional documentation at that point. The Respondent thus asks this Tribunal to deny admission of Annex 13 to the Appeal Brief, except in so far as it pertains to claims of procedural errors.

32. Substantively, the Respondent submits the JAB correctly applied the law to this case and based on the evidence in the file, it established that:

- (i) the Appellant had been aware of the performance standard expected of him from early on in his employment with IFAD;
- (ii) he was timely and repeatedly reminded of this standard;
- (iii) he had been informed of his performance shortcomings; and
- (iv) after having received ample opportunities to remedy his shortcomings and improve his performance, he kept failing to meet the required performance standard and his appointment was terminated.

33. Relying on *Sarwar*,³ the Respondent explains the JAB's conclusions rest on a reasonable basis and sufficient proof establishing that Mr. Sud's performance fell short of the expected standard and that there was a valid and fair reason for the termination of his appointment.

34. First, the Respondent argues Mr. Sud knew from early on in his appointment the standard of performance required for his role, and this standard was further clarified and repeated throughout the probationary period. Regarding the fact that the performance plan was not filed within the first three weeks of appointment, the Respondent argues that the JAB was correct to find no significant procedural irregularities that would somehow invalidate the termination decision. In fact, the Respondent notes Mr. Sud was promptly made aware of the specific objectives required of him. In that regard, the Respondent submits an e-mail, which was sent to Mr. Sud on 10 September 2018 stating:

³ *Sarwar* Judgment, *op. cit.*, paras. 72 and 80.

Dear Ajay,

As discussed, please find attached the documentation related to the ISDA letter with BNP. BNP received IFAD's ISDA Schedule template prepared by LEG in May 2018. During the month of June, BNP requested on multiple occasions that IFAD provides a Self-Disclosure Letter irrespective of LEG's advice that IFAD had previously taken the position not to provide said letter as the institution should be exempted from such a requirement (attached FISCO briefing prepared by [N]). Last August, BNP requested some further EMIR documentation (attached).

[H] is familiar with the Self-Disclosure Letter request as it came up in the context of the Bank of Nova Scotia ISDA agreement negotiations (see attached).

Please have a look and follow-up with TRE [H].

Thank you and best regards.

35. The Respondent also included the e-mail below to further his argument that Mr. Sud was aware of the objectives that were expected of him. The e-mail below was sent on 3 October 2018, and it said:

Dear Ajay,

I spoke with [K] and given that you will work with me on the legal aspects of the private sector strategy, it will make sense that you get familiar with supplementary funds from private sector, such as the Rockefeller Foundation. In this respect, please note that we have also been asked to streamline the process of receiving funds from the private sector, this should been included in the PSS. I will send you the rest of the documents by separate mail.

Thank you and best regards.

36. In the same vein, an e-mail sent on 25 September 2018 should have made Mr. Sud aware of the objectives expected of him. The e-mail said:

Dear All - Following up on the meeting led by [L] earlier today regarding private sector lending, I would appreciate your giving this matter the highest priority. As the four of us discussed together on Friday evening, this is a key IFAD initiative to propose to the December Board and upcoming February GC, and LEG needs to lead the draft amendments to the AEI and the amendment to the policy, and help drive it forward.

Dear [C] - thanks for the helpful briefing today after the OPV meeting. I will ask you to kindly convene a meeting with [S] and Ajay tomorrow to go through the specific deliverables below (and others as you see fit) and the timing required so that LEG can fulfill the requests by OPV in this matter.

Dear Ajay - I understand that [G] circulated a table containing the language that is in the charter of comparator institutions reflecting their authority to lend to private sector. That should provide you with reference language that you can replicate in our AEI. Please prepare such draft and share with [C] by close of business tomorrow.

Dear [S] - as discussed on Friday, please work on proposing edits to the Policies. I understand that there are sections are not for LEG to edit. However, we need to flag those sections for the relevant unit and include comments indicating what is the appropriate unit that should propose edits. Ideally, this edited draft of the Policies should be forwarded to [C] by no later than c.o.b. on Thursday.

Given the tight schedule and importance of the matter, I ask each of you to put other matters aside and make this your top priority so that LEG can deliver our work on time. Thank you all for your crucial contributions in getting this important initiative forward.

Best regards, [K]

37. The Respondent submits four other e-mails that purportedly conveyed to Mr. Sud the major activities and key results expected of his position. In addition to three general e-mails that were sent to all staff members, this one was sent specifically to Mr. Sud on 12 September 2018:

Dear Ajay,

Could you please review the comments made by Crédit Agricole on the attached ISDA letter and liaise with the Legal Counsel with a view to finalise the letter. We wanted CA to reconsider some of their comments based on the explanations we gave, but they do not seem to agree on the way forward proposed.

Thank you and best regards.

38. Regarding the competencies and the performance level required, the Respondent argues Mr. Sud was made aware of them as they were reflected in the Job Profile that he had accepted as part of his offer of appointment. The competencies were again discussed with Mr. Sud upon finalizing his performance plan, which was on 30 November 2018.

39. Even though the signing of ISDA agreements is not specifically mentioned in the performance plan, the Respondent notes the first objective in the performance plan refers to the primary responsibility of Mr. Sud, that is to support FOD/Treasury on matters relating to negotiations and contracts. Hence, concluding ISDA agreements is subsumed under that objective.

40. Further, the Respondent notes the conclusion of ISDA agreements was also recorded in the PES assessment of January 2019, which stated, in relevant part: “Ajay has assisted with reviewing and negotiating ISDA agreements with BNPP, CA-CIB, SocGen, Citibank and Rabobank which are expected to be completed in 2019.”

41. The Respondent made other submissions that included e-mails to other staff members including Mr. Sud, talking about the priorities of the Office of General Counsel, including the priority to move forward on ISDA negotiations.

42. In addition to being informed of the objectives to conclude ISDA agreements, the Respondent submits Mr. Sud was given a fair opportunity to meet the required standard. In that regard, the JAB was correct to find that the concerns on the appellant’s shortcomings were brought to him at the January PES meeting, then they were reiterated in another e-mail from the Deputy General Counsel, before finally being raised again at the formal mid-point review in May 2019. Because he did not show significant improvements, the termination of his contract in June 2019 was justified.

43. It is the Respondent’s contention that following the communication of the written mid-point review dated 17 May 2019, the staff member had sufficient time, resources and guidance to work towards avoiding termination on 27 June 2019.

44. In conclusion, the Respondent submits that Mr. Sud has not discharged his burden of proof and that this Tribunal should dismiss his appeal in its entirety and deny his request for damages.

Considerations

Preliminary matter

45. Before embarking on the merits of this case, the Appeals Tribunal finds it necessary to first consider the issue of its own jurisdiction under Article 2(10) of the Appeals Tribunal Statute (Statute). This is because it is essential to distinguish the present case with other cases, where this issue has been raised *sua sponte* by the Tribunal.

46. Article 2(10) of the Statute states that a “special agreement may only be concluded if the agency, organization or entity *utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law*”.⁴ Based on the facts before us and after a thorough review of the applicable law, the JAB appears to be that neutral first instance process.

47. In *Spinardi*,⁵ we noted that a neutral first instance process must be established to decide disputes, and the head of an agency or organization whose decision is under appeal cannot be part of that first instance process. Further, as restated in *Fogarty*,⁶ for the UNAT to conduct its function as an appellate tribunal, the impugned decisions must emanate from a neutral first instance process.

48. In the present case, IFAD has made internal changes to satisfy the requirements of Article 2(10) of our Statute. Indeed, the Human Resources Policy (IFAD’s highest-ranking instrument on staff relations) was amended in May 2019 to reflect that UNAT has jurisdiction over appeals. Section 16 of the Human Resources Policy on Grievance Resolution provides:

... It is of primary concern to IFAD that all staff and consultants should be treated fairly and equitably. Occasions may arise when staff or consultants feel that they have not received treatment or obtained the satisfaction expected either from IFAD, their supervisor or a colleague. In such situations, it is important that staff or consultants have the opportunity to voice their dissatisfaction and to seek redress. Grievance and disciplinary procedures shall be developed.

... Should a matter affecting an individual not be resolved as a result of representation under this procedure, staff may refer the matter for final determination to the United Nations Appeals Tribunal (UNAT).

⁴ Article 2(10) of the Statute (emphasis added).

⁵ *Spinardi v. Secretary-General of the International Maritime Organization*, Judgment No. 2019-UNAT-957, para. 26.

⁶ *Margaret Mary Fogarty, Robert Sheffer, Monia Spinardi, Astrid Dispert & Minglee Hoe v. Secretary-General of the International Maritime Organization*, Judgment No. 2021-UNAT-1148, paras. 7 and 10.

49. Further, the HRIP, as amended in July 2020, states in relevant part:⁷

9.8.1. Mandate of the JAB

(i) The JAB is an internal dispute resolution mechanism established to receive and consider Appeals against administrative and disciplinary decisions taken in regard to staff *and to make a decision* in respect of such Appeals. In making its decision, the JAB will:

(a) receive facts from both parties;

(b) request relevant and appropriate information and inform both parties on information obtained;

(c) assess the facts and compose a summary thereof;

(d) establish if, in its opinion, there is evidence that the impugned decision was taken without authority or breach of a rule or procedure or rest on a mistake of fact of law, or overlooks some material fact, or is tainted with misuse of authority, or if an obviously wrong conclusion has been drawn from the evidence;

(e) make observations relevant to the case;

(f) come to a conclusion based on an assessment of the facts and IFAD's Rules, Policies and Procedures such as the provisions of the Human Resources Policy, the Staff Rules, the Human Resources Implementing Procedures and, in the absence of a specific provision or ambiguity, on broad principles of the UN Common System, where applicable, and, where appropriate and generally recognized principles of international administrative law, as may be applicable to the case; and

(g) *Produce a record and a written decision that includes:*

- factual determinations, substantiated on evidence produced by the parties and/or obtained by the JAB;

- legal determinations;

- reasoning behind the decision.

...

9.16. JAB DECISION

(i) Normally within one hundred and twenty (120) days from the filing of the last proceeding, *the decision on the Appeal will be taken by the JAB* and will be communicated in writing to the parties, together with a copy of the procedures' written record.

(ii) The deliberations of the JAB shall be confidential.

⁷ Emphasis added.

(iii) The JAB decision will be considered as constituting a record of the proceedings in the Appeal. The decision shall be drafted in English by the Chairperson of the JAB and shall include a summary of the facts and matter, analysis of the Appeal, the applicable legal and procedural determinations and the reasoning behind the JAB's decision.

(iv) The JAB shall make efforts to reach the decision in a unanimous manner. If consensus cannot be reached, the Chairperson shall make the decision on behalf of the JAB and include the dissenting views in the Report.

(v) The Secretary of the JAB will notify the parties of the decision.

9.17. UNITED NATIONS APPEALS TRIBUNAL (UNAT)

(i) Both parties have the right to appeal to the UNAT, under the procedures prescribed in its Statute and Rules, against the decision taken by the JAB.

(ii) In addition, in matters related to the UNJSPF, Appeals before the UNAT shall be processed under the procedures prescribed in the Administrative Rules of the UNJSPF.

50. The Fund implemented changes in Sections 9.8.1 and 9.16 of the HRIP in the July 2020 version and substituted the term "recommendation" for "decision" by the JAB. It also provided that the JAB was no longer required to issue a "Report and recommendations to the President" but was instead required to provide a "record and a written decision" which includes factual determinations substantiated on evidence produced by the parties or obtained by the JAB in addition to providing the legal determinations and the reasoning behind the JAB decision.

51. The JAB thus no longer provides only advice or mere recommendations to the IFAD President but rather final decisions, as required by Article 2(10) of the Statute. Its constitution appears to be correct, even though, as will be discussed further in the present Judgment, the JAB Decision in this case lacks detail and depth, did not consider all relevant matters and cannot therefore be deemed correct.

52. The Appeals Tribunal has found that, despite the flaws in the decision of the JAB, all the facts are on the record and there is no need to remand the case for additional findings of fact. This case is thus ready to be heard at the appellate level.

Additional evidence

53. Prior to engaging on the merits of the case, the Appeals Tribunal must determine whether Annex 13 to the Appeal Brief should be admitted and considered on appeal. According to Article 2(5) of the Statute, additional evidence at the appellate level can only be admitted in

exceptional circumstances and where the Appeals Tribunal determines that the facts are likely to be established with documentary evidence, including written testimony. Further, the Appeals Tribunal may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings. The evidence in question shall not include evidence that was known to either party and should have been presented at the level of the first instance tribunal.

54. Annex 13 consists of an Additional Statement from the appellant, which was not part of the record before the JAB. It was not assessed in the first instance, and the Respondent was not afforded the opportunity to respond to it, which is essential in an adversarial system. Moreover, the Additional Statement consists of rebuttals of the Respondent's claims, which are not necessary for this Tribunal to be able to decide this case. There is hence no exceptional circumstance permitting the filing of this additional evidence, which would generally need a motion to be introduced.

55. When considering the merits of the case, the Appeals Tribunal will not consider this piece of evidence.

Merits

56. The issue here is whether the JAB erred when it found that the decision to terminate Mr. Sud's appointment due to unsatisfactory performance during the probationary period was lawful.

57. The JAB Decision in the present case comprises ten pages but is quite limited in its legal analysis. Half (five pages) contained factual background while two further pages were filled with the abstract of the parties' submissions. The following page under the heading "Legal Analysis and Decision by the Joint Appeals Board" merely recited the general legal framework, and the last page advised IFAD on future recruitment procedures based on its failures in the present case. There are two paragraphs which briefly relate to the case at hand, yet they are too succinct and general. They are the following:⁸

... The JAB finds that in the present case, the Appellant's appointment was terminated in accordance with these rules and procedures and based on the opinion of the appropriate authorities, unsatisfactory performance during probation.

⁸ JAB Decision, paras. 32 and 34.

...

... From the file it appears that the Appellant did not meet, according to the opinion of the competent authorities, from his early times with the Fund, the expectations invested in him.

58. In the JAB Decision, the Board did not engage in a critical analysis of the facts and did not apply the law to these facts in order to ascertain whether the exercise of authority was lawful. There was no assessment of the factual allegations mentioned in the letter of termination. There was no confrontation of arguments, and there was no explanation as to why the JAB preferred to adopt the Respondent's arguments over Mr. Sud's. Put simply, the JAB Decision is arbitrary and does not comply with the minimum requirements of a judicial decision for it fails to provide a reasoned analysis, which is what ultimately legitimates any judicial opinion.

59. The Appeals Tribunal has thus undertaken a full review of the facts and has reached the conclusion that the JAB erred on a question of fact, resulting in a manifestly unreasonable decision when it held that the appointment was terminated in accordance with the applicable legal framework.

The applicable legal framework

60. Pursuant to Section 2.20 of the HRIP, newly appointed staff members are subject to a probationary period. The rule states in relevant part:⁹

(i) All fixed-term and indefinite staff appointments are subject to an *initial probationary period*.

(ii) The length of probationary periods are set out in Staff Rule 2.5 (a) and shall be stated in the letter of appointment for fixed-term and indefinite appointments. Possible extension of the probationary period is governed by Staff Rule 2.5 (d).

(iii) The appointment of the staff member *may be terminated during or at the expiration of the probation period*. The staff member shall be notified in accordance with Staff Rule 2.5. The staff member may also resign at any time by giving one month's notice.

⁹ Section 2.20 of the HRIP (emphasis added). The Human Resources Policy is the highest-ranking instrument in the hierarchy of Human Resources documents at IFAD. This is followed by the HRIP, which as the title suggests sets out procedures to implement the Human Resources Policy. Lower in the hierarchy of Human Resources documents is IFAD's Staff Rules.

61. Section 2.20.1 of the HRIP, on the other hand, establishes the procedure for assessing satisfactory performance before confirmation of the appointment. In relevant part, it states:¹⁰

Confirmation of the appointment is dependent upon satisfactory performance and conduct.

(i) The probationary period is based on *a performance plan prepared as soon as possible but in any case no later than three weeks* after the staff member has taken up his/her appointment. The performance plan shall be prepared by the supervisor in consultation with HRD [Human Resources Division] and discussed with the staff member and shall include the objectives, competencies and performance level required. The supervisor shall provide the staff member concerned with continuous and constructive feedback during the probation period.

(ii) Review during probation: At the *mid-point of the probationary period*, the immediate supervisor compiles a written assessment, and shares and discusses it with the staff member, who may record his or her observations in the assessment. The assessment, including any observations by the staff member, is forwarded to HRD for inclusion in the staff member's HR File, with a copy to the staff member. *Any changes to the performance plan are recorded.*

(iii) Final review: *Two months before the end of the probationary period*, the supervisor completes the final review and the Division Director/unit head, makes his recommendation on confirmation of the appointment, extension of the probationary period, or termination of appointment.

(iv) The final review is shared and discussed with the staff member, who may include his or her observations.

62. Staff Rule 2.5 further provides:¹¹

(a) *The probationary period required to confirm the appointment of staff members shall not exceed 12 months.* In exceptional circumstances, the probationary period may be extended for up to a maximum of 6 months.

(b) During the probationary period, the staff member's appointment may be terminated at any time by giving one month notice. Similarly, the staff member may, at any time, resign by giving one month's notice.

(c) Any staff member who holds a position and whose appointment is confirmed at the end of the probationary period, shall remain at the same step he/she was initially placed.

¹⁰ Section 2.20.1 of the HRIP (emphasis added).

¹¹ Emphasis added.

(d) The extension of a probationary period requires the consent of the staff member concerned. If the staff member does not consent to such extension, his/her appointment shall be terminated and the *notice* period shall be deemed to run as of the date of notification of the proposal.

(e) *If it is envisaged to terminate the appointment of a staff member during, or at the end of his/her probationary period, the staff member should first be given the chance to meet the level of performance required.* The notice period shall run as of the date of notification of the termination.

(f) If the Fund has decided to terminate the appointment and that decision has not been communicated to the staff member concerned on expiry of the probationary period, the appointment shall be deemed to have been confirmed on the understanding that the Fund will notify the staff member of the decision to terminate at the earliest opportunity.

63. In addition, the Probationary Form Upon Appointment requires that the performance plan be filled out immediately after appointment. Section I of the form states: “Performance plan (for the probationary period) to be filled in no later than three weeks after the staff member’s appointment. The performance plan should be prepared by the supervisor in consultation with HRD and discussed with the staff member. The plan should include the objectives, competencies and the performance level required.”

The circumstances of the case

64. In the present case, IFAD did not provide Mr. Sud with a performance plan within the specified timeframe. While a performance plan should be prepared as soon as possible, and no later than three weeks after the commencement of the probation period pursuant to Section 2.20.1 of the HRIP, in the case of Mr. Sud, his performance plan was not finalized until three months later, on 30 November 2018. Since Mr. Sud started his three-year FTA with a 12-month probation period on 1 September 2018, a delay of three months is extremely significant, as it accounts for a quarter of the probation period during which Mr. Sud was not fully aware of the “objectives, competencies and performance level required” as prescribed by Section 2.20.1 of the HRIP.

65. Additionally, the 12-month probation period was ultimately shortened to 10 months, due to the decision to place Mr. Sud on SLWFP, a reduction which represented 16.67 percent of the period. In total, Mr. Sud only worked for seven months under the umbrella of the performance plan, that is only 58 percent of the time allocated to him as probation period, not

to mention the fact that he also took some sick leave during that time. The effective remaining time was too little for the Respondent to comply with his duties to give Mr. Sud “the chance to meet the level of performance required”, as stipulated under Staff Rule 2.5 (e). At the same time, this reduced timeframe surely had a negative impact Mr. Sud’s ability to meet the level of performance required.

66. Of further relevance is that, even though the Respondent claims to have informed Mr. Sud about the competencies and performance level required separately in the Job Profile, these were not stipulated in the Performance Plan, as is formally required. By the same token, the Respondent contends that the e-mails to Mr. Sud (transcribed in his submissions above in this Judgment) informed him of his performance plan and the objectives of his post. However, the e-mails, apart from being on some occasions sent to all staff members and thus not relating to Mr. Sud’s particular situation, only prove that certain individual tasks were required of him.

67. The first e-mail dated 10 September 2018 concerns the provision of further “EMIR documentation” on a particular issue of the Respondent’s interest. The second e-mail dated 12 September 2018 relates to the review of some comments made by a company with a view to finalizing a letter. The third e-mail dated 3 October 2018 instructs Mr. Sud to work together with his supervisor in streamlining the process of receiving funds from the private sector. These are all informal requests for routine tasks, which do not serve as substitute for the actual performance plan.

68. When it was ultimately finalized, Mr. Sud’s performance plan included nine objectives. They were:¹²

1. Primary responsibility to generally to support FOD/Treasury on matters relating to treasury operations, market borrowing, negotiations and contracts with rating agencies, investment transactions, and other matters, such as Investment management contracts, over-the-counter or exchange-traded derivatives and other funding and financial transactions, as well as other work for the Institutional Unit, under the supervision of the Unit Head, Deputy General Counsel and General Counsel; Expected date of completion: Ongoing

2. Assist and support in (i) processing the amendments to the Basic Documents of IFAD, to facilitate the Fund's engagement with the private sector; and (ii) in developing the

¹² Emphasis added.

Fund's strategy for engagement with the private sector; *Expected date of completion: May 2019.*

3. Advise and assist FOD/Treasury with the process of obtaining credit rating(s) for the Fund, including negotiating relevant documentation In this regard with the rating agencies; *Expected date of completion: Year-end 2020 or later*, depending on when the final credit rating is received from the last of the rating agencies requested to provide one.

4. Support the General Counsel/head of the Institutional Unit, as necessary, on matters relating to attendance at Audit Committee meetings; *Expected date of completion: Ongoing*

5. Along with the General Counsel, represent the Legal Division as needed at meetings of the Investment and Finance Advisory Committee (FISCO); *Expected date of completion: Ongoing*

6. Assist in knowledge management as coordinator of legal training for lawyers in the Legal division; *Expected date of completion: Ongoing*

7. Review and revise the Fund's template of the ISDA 2002 Master Agreement Schedule; *Expected date of completion: Year-end 2019*

8. Act as the IFAD representative at the ISDA IFI working group; *Expected date of completion: Ongoing*

9. Act as the IFAD representative at the group of IFI finance counsels; *Expected date of completion: Ongoing*

69. Among the nine objectives listed above, only three items had completion dates, notably, Item No. 2 with an expected completion date of May 2019; Item No. 3 with an expected completion date of year-end 2020; and Item No. 7 with an expected completion date of year-end 2019. The remaining objectives had completion dates described as "Ongoing". Of significant importance is the fact that these deadlines were general in nature and there was nothing in the Performance Plan that would suggest the need to have the ISDA Agreements signed by a certain specific date.

70. Additionally, there were ten organizational competencies attached to Mr. Sud's post, and this information was included in the Generic Job Profile, which was provided to Mr. Sud with his offer of appointment. The competencies included: (i) Strategic thinking and organizational development; (ii) Demonstrating leadership; (iii) Learning, sharing knowledge and innovating; (iv) Focusing on clients; (v) Problem solving and decision making; (vi) Managing time, resources and information; (vii) Teamwork; (viii) Communicating and

negotiating; (ix) Building relationships and partnerships, and (x) Managing performance and developing staff.

71. The decision to terminate Mr. Sud's appointment was transmitted by letter dated 26 June 2019, whereby the Director, HRD, officially communicated to the staff member that, effective from 28 August 2019, his appointment would be terminated due to unsatisfactory performance during the probationary period. The letter is quite detailed and stated, *inter alia*:

[D]uring the initial meeting held in January, two behavioural competencies requiring improvement were identified and discussed at length: strategic thinking and organizational development; and managing time, resources and information. You were provided with information as to why these competencies required improvement, highlighting the need to be proactive in moving forward with urgent work matters, to demonstrate teamwork and to keep your supervisor properly briefed on crucial and time-sensitive work matters. Furthermore, during the meeting, you were also informed of the need to have at least two ISDA agreements signed as soon as possible and how your supervisor needed to have clarity on how the negotiations were evolving, this matter being linked with the objective of having the primary responsibility to support FOD/Treasury on matters relating to treasury operations, market borrowing, negotiations and contracts with rating agencies, investment transactions, and other matters.

In the meeting held in May 2019, your performance was discussed once again and you were informed that the two identified behavioural competencies still required to be further developed and that the expectation was to see significant improvement prior to the end of the probationary period. You were reminded of the importance of taking a more proactive approach in reaching out to clients in order to seek clearer priorities for your work and ensuring that matters were moving along in accordance with such priorities. Reference was made once again to the need for having at least two ISDA agreements signed and the need to keep your supervisor informed. You were also informed that a third behavioural competency had been identified as requiring improvement: building relationships and partnerships. This was particularly relevant as your full and unequivocal support for your new direct supervisor was required.

...

Unfortunately, despite the efforts made during the probationary period to bring your performance (objectives and competencies) to the level required to this position, including informing you at a very early stage of areas needing improvement, regular verbal and written feedback and coaching, and the outreach and support of two different supervisors as well as the Deputy General Counsel, your performance, attitude and behavior have not demonstrated any significant improvement. All this has been

recorded in the Probationary Form and the recommendation made at the end of your probationary period has been to terminate your appointment.

72. The Appeals Tribunal has long held that the duty to justify a decision is essential for the tribunals to exercise their judicial review of administrative decisions, assessing whether they are arbitrary, capricious, or unlawful.¹³ Although this obligation might not stem from any Staff Regulation or Rule, it derives from the public law principle which confers upon the tribunals the inherent power to review the validity of such administrative decisions, the functioning of the system of administration of justice and the principle of accountability of managers.¹⁴

73. It is therefore good practice for the Organization as a whole to provide general guidance for its managers that a well-written statement of reasons, albeit sometimes succinct depending on the circumstance, is fundamental for the correct identification of the matters, concerns and reasoning process of the decision-maker as well as for the accurate implementation of decisions, which will more likely reflect the decision maker's intent. At the same time, this practice of justifying decisions provides better explanation for those adversely affected by these decisions, perhaps even facilitating their acceptance and hence diminishing instances of disputes. What is more, when a justification is given by the Administration for the exercising of its discretion, it must be supported by the facts.¹⁵ In short, there is a threefold purpose for providing reasons for decisions, namely, intelligibility (enabling both implementation and acceptance), accountability and reviewability.

74. As established, the reason given by the Respondent to justify the decision to terminate Mr. Sud's appointment was his poor performance. According to the Respondent, the areas in which his performance was not fully satisfactory, as derived from the meeting on 17 January 2019, were: (i) strategic thinking and organizational development; (ii) managing time, resources and information; and, as derived from the meeting on 3 May 2019, the same two areas plus a third one: (iii) building relationships and partnerships. However, the evidence in the record does not support the Respondent's claims.

¹³ *Bantan Nugroho v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1042, para. 39.

¹⁴ *Ibid.*

¹⁵ *Islam v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-115, para. 29.

75. In the written assessment following the meeting held on 17 January 2019, Mr. Sud's supervisor recorded on 6 February 2019:¹⁶

Ajay Sud joined LEG in September 2018. During the period from September to December 2018, Ajay was assigned with handling Treasury related matters. Given his prior expertise and excellent legal knowledge on the subject, Ajay was able to take on these matters effectively. *Ajay has assisted with reviewing and negotiating ISDA agreements with BNPP, CA-CIB, SocGen, Citibank and Rabobank which are expected to be completed in 2019.* Furthermore, Ajay assisted TRE in the negotiations of the ICBC Trading Account Agreement relating to the SSTC facility with China which is expected to be completed in 2019. He was also key in drafting the amendments to the AEI and related financial policies and preparing a document for EB approval. He worked on knowledge management matters, including engaging PLI and PLC, and on IFAD's possible membership of ISDA in anticipation of the launch of IFAD market borrowing initiative.

As an experienced lawyer, Ajay is capable of handling his work with very little assistance from his supervisor. He is accurate and detail-oriented and he can be counted on to complete assignments thoroughly. Ajay was quick to build a good relationship across departments. He is thoughtful and courteous towards others.

There are two competencies that Ajay could improve on during 2019:

Ajay should be more proactive in reaching out to his clients in order to seek clearer priorities for his work and ensuring that matters are moving along in accordance with such priorities. Moreover, Ajay could benefit from being more strategic and less academic when handling assignments, by focusing on finding solutions and looking at the "big picture" on how to best address various matters.

Ajay is a very valuable addition to the Institutional Unit. It is a pleasure working with him.

76. The overall feedback from the first meeting appears to be unmistakably positive. Notably, there are only two general completion dates that are stated in the above evaluation, which relate to reviewing and negotiating agreements with ICBC Trading Account Agreement and ISDA agreements. The completion dates are stated in vague terms stating only the year 2019, without a specific month or date. Moreover, the January PES meeting was not part of the formal review system.

¹⁶ Emphasis added.

77. The areas for improvement regarding the two competencies are also mentioned in broad terms (proactivity in reaching out to clients and strategy when handling assignments), without a specific deadline, and they also appear to be somewhat general in nature. Most importantly, they do not appear to be determinants for the continuation of Mr. Sud's appointment. In this regard, the supervisor even concluded by saying that Mr. Sud was a valuable addition to her team, and it had been a pleasure working with him.

78. The mid-probation review meeting was held at the beginning of May with the written evaluation finalized on 20 May 2019, which was some 40 days before the decision was made to terminate Mr. Sud's appointment on 26 June 2019. This constrained the timeframe within which Mr. Sud was expected to remedy any identified underperformance, following the mid-probation meeting. As a result, he was effectively deprived of any meaningful opportunity to elevate his performance to the expected level. That in and of itself was unreasonable on the part of the Administration.

79. On 17 May 2019, the supervisor provided a detailed assessment to Mr. Sud. In relevant part, she wrote:¹⁷

Two performance review meetings were conducted with Ajay, one in January 2019 and a second one on May 2019. During his first performance meeting, two specific competencies were identified as requiring improvement: strategic thinking and organizational development; and managing time, resources and Information. A written assessment was provided and the intention was *to rediscuss the best way to improve on the competencies listed above at mid-point probationary period*. Due to Ajay being on medical leave, the mid-point probationary period meeting had to be postponed and it took place on the 3 May 2019.

During the second meeting, it was explained to Ajay that the purpose of a probationary period is to allow for the employer to assess the suitability of an employee for the role they were appointed. At the end of the probationary period a decision is made as to whether or not to confirm the appointment.

Confirmation is dependent upon satisfactory performance and conduct.

Ajay was reminded that when he first started working at IFAD a performance plan was prepared which included the objectives, competencies and performance level required for his position *with the expectation is that he will fulfil all of these by the end of his probation period*.

¹⁷ Emphasis added.

...

Ajay was reminded that in the January 2019 meeting that there were two specific competencies that we identified as requiring improvement: strategic thinking and organizational development; and managing time, resources and information. *Ajay was told that at the [mid-probation] period, these competencies still need to be further developed and that the expectation was to see significant improvement on these prior to the probation period ending.*

...

Another important aspect that was discussed, were the changes that are going to happen soon with Ajay's unit. As explained, we are in the process of completing the hiring of a new P4 that will be Ajay's new supervisor. *However, it has come to our attention that Ajay might have reservations about the candidate that was made an offer for the position.* Ajay was informed that it is very important to us that we count with his full support during this transition and that Ajay will support his new supervisor appropriately, given that technical competencies are just as important as behaviour competencies.

Given these concerns, *a third competency was added to the list of competencies that require further development: Building relationships and partnerships.*

In this regard, it was stressed the importance of building and maintaining effective working relationships, in which employees are expected to make a conscious effort to establish and build rapport with others. These are to be mutually effective relationships that emphasize openness, trust and mutual respect with the goal of fully collaborating with others, specially their direct supervisor.

It was made very clear to Ajay that this is an issue of extreme importance and that can severely affect the successful evaluation of his performance during the probation period and he needed to address this immediately, at the risk that it may lead to him not being confirmed at the end of his probation period.

...

Lastly, Ajay was informed that at least two additional performance feedback sessions during the rest of the probationary period are expected to be undertaken.

80. Once again, there was a failure to explain clearly how the competencies of “strategic thinking and organizational development” and “managing time, resources and information” and eventually a third, “building relationships and partnerships” were not demonstrated. The assessment was too *general* and did not justify Mr. Sud’s shortcomings in terms of a possible negative practical impact on his work. Incidentally, the Appeals Tribunal notes that Mr. Sud’s response to these comments seems to not have been considered neither by the Administration before taking the contested decision nor by the JAB.

81. There are, however, two *specific* aspects which were mentioned in the written assessment of the meetings, namely the interest in the ISDA agreements (mentioned in both meetings held in January and May 2019) and the need to support the new direct supervisor (mentioned for the first time in the meeting held in May). Neither of these specific aspects had been mentioned in the Performance Plan in relation to the competencies described in the job profile. The need for the signing of the agreements “as soon as possible” only officially emerged during the mid-point review, that is on 3 May 2019, where he was informed that at least two additional performance feedback sessions during the rest of the probationary period would take place.

82. Despite the expectation of further assessment beyond the mid-point review, Mr. Sud’s appointment was terminated, and he was immediately placed on SLWFP until the termination date. It is not clear why such a decision, which was communicated by the letter of 26 June 2019, resulted in the decision to place him on SLWFP for the period of 28 June to 28 August 2019. The same letter also indicated that Mr. Sud was no longer welcome on the premises where he previously worked and instructed him with the following: “you must refrain from performing any activities on behalf of the Fund. To that end, your e-mail address will not be kept alive, and you are kindly requested to return all IFAD property, including mobile and laptop, and to remove your personal belongings.”

83. Such abrupt and harsh instructions to leave on short notice could have been interpreted as a disguised disciplinary measure and should have been supported by adequate justification and substantiated with evidence. Nothing on the record can explain the decision not to allow him to work for the rest of the probationary period. This is not a case of gross misconduct but that of an alleged poor performance, which does not usually give rise to such harsh measures. Moreover, the sudden decision communicated by the letter of 26 June 2019, a little more than one month after the written assessment of the mid-point review was issued on 17 May 2019, prevented Mr. Sud from continuing his work and possibly eventually demonstrating his competence with the completion of the ISDA agreements. Furthermore, the fact that Mr. Sud was placed on SLWFP somewhat contradicts the Respondent’s claim regarding the need to have the ISDA agreements signed. The Respondent should have explicitly conveyed this need much earlier, if not in Mr. Sud’s Performance Plan, then in his January PES evaluation meeting. Instead, it is worth repeating that the first time it was made explicit that an ISDA

agreement needed to be signed was at the mid-point review (communicated in writing on 17 May 2019), and Mr. Sud's appointment was terminated on 26 June 2019.

84. The Respondent therefore did not notify Mr. Sud of his shortcomings in sufficient time or of the consequences of failing to remedy them. Also, IFAD did not establish explicit measures to enable Mr. Sud to understand and satisfy the Fund's requirements nor did it provide evidence that it gave him sufficient time, opportunity and support to meet the requirements of the post, as prescribed by Staff Rule 2.5 (e). Finally, contrary to its claim, IFAD did not properly evaluate Mr. Sud's performance at a final review, with a chance for rebuttal, as "Section III – Final Review" of the Probationary Form Upon Appointment remained blank.

85. In light of the foregoing, the Appeals Tribunal finds that while the JAB was correct that *de jure* the Administration is vested with the authority to terminate the appointment of Mr. Sud during his probationary period, it erred when it found that the contested decision was lawful, because the facts of this case show that this authority was exercised incorrectly and unreasonably. As this Appeals Tribunal has consistently held:¹⁸

In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

86. Finally, the Respondent refers to the jurisprudence in *Sarwar* to contend that not all formal requirements applicable to probation are of such importance that failure to comply with them would necessarily give rise to rescission of a termination decision.¹⁹ The precedent is,

¹⁸ *Sanwidi v. Secretary-General of the United Nations*, 2010-UNAT-084, para. 42. See also *Mahasin Alquza v. Secretary-General of the United Nations*, 2020-UNAT-1065, para. 31; *Abusondous v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, 2018-UNAT-812, para. 12.

¹⁹ *Sarwar* Judgment, *op. cit.*

however, not sufficiently similar to the present case. In *Sarwar*, the staff member was granted an additional eight months after his probation to improve his performance, whereas in this case, Mr. Sud's appointment was not extended and was in fact reduced by two months before the end of his probation period.

87. Having found that the decision to terminate Mr. Sud's appointment is unlawful and that the JAB erred in fact in its approach to the case, the Appeals Tribunal reverses the JAB Decision and rescinds the contested IFAD decision. In compliance with Article 9(1)(a) of its Statute, the Appeals Tribunal sets the compensation *in lieu* to an amount equivalent to two years' net base salary, plus interest until payment. This amount takes into consideration the three-year FTA, which was unlawfully terminated as well as the circumstances of the case.

88. Mr. Sud's claim for compensation for moral harm in relation to breach of contract, reputational damage and delays suffered during the process is rejected. The Appeals Tribunal jurisprudence requires evidence of the harm,²⁰ which was not provided by Mr. Sud.

89. Lastly, Mr. Sud requests that the Appeals Tribunal make an award in legal costs to the amount of GBP 7,500 arguing that unlike United Nations staff, IFAD does not subscribe to, and its staff members have no recourse to, OSLA. According to Article 9(2) of the Statute: "Where the Appeals Tribunal determines that a party has manifestly abused the appeals process, it may award costs against that party." Although this Judgment has acknowledged that the decision to terminate Mr. Sud's appointment was unlawful, there is no evidence of abuse of the appeals process, and for this reason, this claim must be dismissed.

²⁰ *Harris v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-896, para. 61.

Judgment

90. Mr. Sud's appeal is granted, and the JAB Decision is reversed. The decision to terminate Mr. Sud's appointment with IFAD is rescinded. As an alternative to rescission, the Fund may elect to pay compensation *in lieu* to an amount equivalent to two years' net base salary. Interest will accrue on the total sum from the date of this Judgment at the current US Prime rate until payment. If the total sum is not paid within the 60-day period, an additional five percent shall be added to the US Prime Rate until the date of payment.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)

Judge Halfeld, Presiding
Juiz de Fora, Brazil

(Signed)

Judge Sandhu
Vancouver, Canada

(Signed)

Judge Knierim
Hamburg, Germany

Entered in the Register on this 6th day of May 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar