Before: Judge Coral Shaw

Registry: New York

Registrar: Hafida Lahiouel

MORSY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George Irving

Counsel for Respondent:
Andreas Ruckriegel, UNFPA

Introduction

1. The Applicant contests the non-renewal of his appointment with the United Nations Population Fund ("UNFPA") beyond 31 October 2007. The decision not to renew his contract was made on the grounds of his performance. The Applicant requests the Dispute Tribunal to grant equitable relief and monetary compensation.

2. In addition to the non-renewal, the Applicant contests three administrative decisions made during the course of his employment. These decisions are:

a. the decision of 8 December 2006 to remove some of the Applicant's functions from him and modify his reporting arrangements;

b. the decision of 14 February 2007 to initiate and carry out a fact-finding management review in relation to his performance;

c. the decision of 11 April 2007 to place him on special leave with full pay ("SLWFP").

Issues

3. The issues for consideration in this case are:

a. Whether the Applicant's claims are receivable;

b. Whether the Respondent complied with the applicable policies on performance management and evaluation with respect to the Applicant;

c. Whether the decision to remove some of the Applicant's functions and change his reporting arrangements was lawful;

d. Whether the initiation of the fact-finding management review was lawful;

e. Whether the placement of the Applicant on SLWFP was lawful;

f. Whether the non-renewal of the Applicant's contract was lawful.

Facts

4. The Tribunal held an oral hearing on 14–16 February 2012. The Applicant and his three witnesses gave evidence by telephone as did two witnesses called by the Respondent. An agreed chronology of facts and an extensive bundle of documents were also tendered. The following facts derive from these records and sources of evidence.

5. In the course of the events leading to the non-renewal of his contract, the Applicant made multiple requests for administrative review and appeals to the Joint Appeals Board ("JAB"). They are referred to chronologically as part of the following narrative.

6. On 20 September 2005, the Applicant transferred from the United Nations Economic and Social Commission for Western Asia ("ESCWA") to the UNFPA as the Director of the Division for Arab States, Europe and Central Asia ("DASECA" or "Division"), at the D-2 level. At that time, the Applicant had 30 years of professional work experience and had been invited to apply by Ms. Thoraya Obaid, then UNFPA Executive Director. His immediate reporting officer at UNFPA was Mr. Kunio Waki, Deputy Director.

7. The Applicant holds two nationalities (Egypt and the United States) and had been employed by ESCWA as a United States citizen. Before he took up his post with UNFPA, Ms. Obaid requested him to be employed as a national of Egypt. The Applicant testified that he reluctantly agreed in spite of his concerns about the political implications of this for him personally.

8. He told the Tribunal that he had every expectation that he would remain at UNFPA until his retirement and therefore did not hold his position at ESCWA.

The Applicant also said that when he began his work at UNFPA, the Division was severely dysfunctional and he worked to create a sense of unity, which was not easy.

9. Initially, the Applicant was warmly welcomed by Ms. Obaid and received positive comments from her. In February 2006, he approached Mr. Waki regarding his performance evaluation. However, no formal Performance and Appraisal Development ("PAD") process was initiated and Mr. Waki did not discuss the Applicant's work plan or performance goals then or at any stage during his employment.

10. Ms. Obaid told the Tribunal that, in January or February 2006, she had some conversations with the Applicant about his work and offered to coach and support him. She was concerned that he did not appear to be strategically involved with the regional office, engage with Member States about matters such as the Millennium Development Goals, lead in policy areas, or contribute to discussions with the other Regional Directors.

11. Mr. Sean Hand, the former Director of the Division of Human Resources ("DHR"), UNFPA, said that he may have discussed with the Applicant the views of some staff members about him and may have suggested that he could improve in some areas. The Applicant said that he had the most conversations with Ms. Obaid when he first began and he had no performance meetings with Mr. Hand. He only met with him to discuss filling staff vacancies. He denied receiving or refusing offers of coaching.

12. The Tribunal finds that Ms. Obaid became concerned about the Applicant's performance in the first half of 2006. While some discussions took place, these were undocumented and the Applicant did not receive any formal performance management assistance or a performance improvement plan.

13. In May 2006, Ms. Obaid wrote to the Executive Committee, which comprised of senior staff and Directors of UNFPA, asking them to complete the outstanding PAD reports in two weeks.

14. The Applicant neither initiated his PAD nor was it enforced by Mr. Waki. He reported regularly to Ms. Obaid and completed many mission reports, but did not receive any feedback on these. All missions he went on were approved by Ms. Obaid.

15. The Applicant said he first became aware of tensions with Ms. Obaid in May 2006, when she again raised the issue of his nationality in the context of a proposed regionalisation of the UNFPA Administration. Ms. Obaid told him that it would be inappropriate for the Applicant, as a Regional Director, to lead a regional office "out of his own country". She wanted to identify an appropriate division for him at Headquarters so he did not find himself in conflict of interest and pressures from the Government of Egypt. There is no evidence that this plan was implemented.

16. Between 24 and 27 November 2006, a DASECA regional planning meeting was held in Sofia, Bulgaria. As a Regional Director, the Applicant was among those responsible for leading the meeting. Ms. Obaid also attended and told the Tribunal that she observed with concern the way the Applicant conducted it. She spoke to several staff members from the Division, some of whom approached her in private. They complained about the Applicant's management style. Ms. Obaid held a staff meeting, which the Applicant did not attend.

17. Ms. Obaid recorded her observations and the comments made to her by staff members about the Applicant in a note. She did not share the note with him, but, after making it, told him that she had received negative and critical complaints about him. Ms. Obaid told the Tribunal that she attended other UNFPA regional meetings and that the DASECA meeting compared unfavourably with those. In particular, she noted the sense of fear and isolation of the DASECA staff compared with the collegial and comfortable atmosphere of the staff in other regional divisions. She was

also concerned about reports of the Applicant's use of funds without proper documentation.

18. In view of these concerns and the need to protect staff and operations until a proper investigation could take place, Ms. Obaid decided, as a preliminary measure, to change the Applicant's reporting arrangements and functions. In an email to him of 8 December 2006, she advised him that, "[i]n the light of serious management issues" brought to her attention, and "pending the outcome of a management review of DASECA", all decisions and relevant transactions under the Financial Regulations and Rules, as well as all actions or decisions of a sensitive political nature and all administrative decisions relating to the staff serving under the Applicant's authority would require her prior written approval or, in her absence, approval of one of the Deputy Executive Directors, UNFPA. Following that email, a number of related decisions were taken, which affected the Applicant's functions.

19. The Applicant testified that, before this, he was never advised by UNFPA of any serious concerns about how he managed his Division. He was shocked and immediately wrote to Ms. Obaid, requesting a meeting. He did not get a reply for approximately seven weeks, when Ms. Obaid agreed to meet with him on 30 January 2007.

Mannet review

20. Sometime in the fall of 2006, Ms. Obaid commissioned Ms. Heidi MacLean of the Mannet Consulting Services ("Mannet"), a consultancy firm, to interview DACESA staff members about the Applicant. Mannet had been engaged by UNFPA since at least mid-2006 as external management consultants to support, counsel, and coach senior UNFPA officers in their management skills.

21. Ms. MacLean prepared a note based on her review, which included both positive and critical observations on his leadership of the Division and his style. For example, the note stated:

> Those interviewed present a very different picture of your management style—a few are happy with your management of the division; many of your colleagues, on the other hand, while recognizing your strengths, have serious concerns about the way in which you are leading the division.

22. She met with the Applicant on 12 December 2006 and shared her findings with him. The Applicant told Ms. MacLean that he needed to know who had said the negative things about him and why, so that he could address and fix the issues. The Applicant testified that when he asked her what would happen next, she said that he was in trouble. The Mannet note was issued and given to him on the same day.

23. On 18 December 2006, the Applicant met with the Director of UNFPA Division of Oversight, who informed him that he was aware of the developments and that an audit was underway. No evidence has been provided to the Tribunal regarding the outcome of this audit. Ms. Obaid could not recall if any audit of the Division was done at the time and said she would not necessarily be aware of it as audits were conducted by an independent office.

24. Mr. Waki, who was due to retire in early 2007, wrote to the Applicant and others under his supervision on 23 January 2007, reminding them that they needed to complete their PAD reports for 2006 before he left.

25. Ms. Obaid met with the Applicant on 30 January 2007. They gave differing accounts to the Tribunal of what was said. The Applicant said that he wanted to discuss the problems and how to address them, but Ms. Obaid was not interested in discussion and was only interested in terminating his contract as soon as possible. He claimed that at that meeting she gave him a verbal ultimatum that, if he did not resign, he would be investigated and his contract terminated. Ms. Obaid told the Tribunal that she was trying to reach a consensus with him on the action to be taken.

She told him that he could take SLWFP to give him the opportunity to look for another position or transfer, or she could initiate an investigation that could lead to his termination.

26. The Applicant did not respond to these choices. In a follow-up email to him, dated 2 February 2007, Ms. Obaid set out her position:

> I had told you in our meeting on Tuesday 30 January [2007] that I will be away next week and that is why I wanted to meet with you today, Friday[,] to agree on action to be taken: either we follow the established procedures for 3 months with SLWFP and then separation/transfer or UNFPA starts the investigation process leading to the termination of your contract.

27. She required the Applicant to meet with Mr. Hand on 5 February 2007 to agree on action to be taken, otherwise Mr. Hand would start the procedure of hiring an "investigator" on 6 February 2007.

28. Ms. Obaid explained to the Tribunal that what she meant in that email was that under the separation policy of UNFPA she could not terminate him but she could have an investigation, one outcome of which could be termination. She wanted to reach an agreement with the Applicant about what would happen next.

29. The Tribunal finds, based on the email of 2 February 2007, that it is highly probable that, by that date, Ms. Obaid had decided to take whatever steps were necessary to end the Applicant's appointment with UNFPA based on her belief that his performance was unsatisfactory.

30. From this time until his employment came to an end, the Applicant made three requests for administrative review and three appeals to the Joint Appeals Board ("JAB") for suspension of action. He told the Tribunal that by then he knew he had a problem with his employment but did not accept that he was involved in any wrongdoing. He began to apply for other positions in the first half of 2007.

Applicant's first request for administrative review

31. On 6 February 2007, the Applicant requested administrative review of the decision of 8 December 2006 to deprive him "of the responsibilities and duties for which [he] was recruited". In this request, the Applicant also questioned the propriety of Ms. Obaid's decision, stated in her email of 2 February 2007, to initiate the procedures to place him on SLWFP. This request was rejected by Ms. Obaid.

Applicant's first appeal to the JAB for suspension of action

32. On 9 February 2007, the Applicant filed an appeal for suspension of action of that decision with the JAB.

33. On 14 February 2007, in response to the Applicant's appeal, Mr. Hand stated that "UNFPA ha[d] not placed [the Applicant] on SLWFP, nor … intend[ed] to do so", "without prejudice to the right of UNFPA to place [the Applicant] on suspension pending investigation" in the future.

34. On the same day, Mr. Hand also sent an email to all staff of DASECA informing them of the decision of the Executive Director of 8 December 2006 to "modify reporting arrangements of the Directorate of DASECA".

35. In February 2007, the Applicant's participation in the global Regional Directors' meeting was not approved. In February–March 2007, his name was removed from the distribution list for UNFPA's Executive Committee and the Security Management Group.

Decision to initiate and carry out a fact-finding management review

36. In March 2007, Ms. Obaid engaged an outside management consultant, Mr. Dieter Goethel, to carry out a fact-finding management review to establish the facts relating to the Applicant's management style and performance.

Applicant's second request for administrative review

37. On 14 March 2007, the Applicant requested an administrative review of the decisions to "deprive [him] of the responsibilities and duties for which [he] was recruited", and the decision about "the [management review] procedure, that is currently being undertaken by UNFPA to terminate his appointment because it is procedurally flawed and in violation of [his] rights". His request was rejected by the Executive Director.

Fact-finding management review

38. Mr. Goethel conducted his review primarily by interviewing the staff members of the Division. He said he critically assessed all the evidence against four measurements derived from the Applicant's job description: leadership in substantive matters, advocacy, managerial leadership, and managerial integrity.

39. The Applicant was given the opportunity to participate by reviewing the material gathered and giving his input before the report was finalised, but he did not accept this opportunity in spite of Mr. Goethel's attempts to set up meetings. The Applicant submits that he declined to participate in the process as he felt that it was improper and in violation of his right to a standard PAD evaluation.

40. Mr. Goethel issued his report ("Consultant Report") on 11 April 2007, which said, in part:

> 80. The Consultant would like to emphasize that he has not carried out an investigation into allegations of misconduct but that his assignment has been a fact-establishment exercise concerning [the Applicant's] performance as a manager, in accordance with UNFPA's Separation Policy. The report resembles a 360º assessment which is customary in UNFPA's PAD system.
>
> 81. Without prejudging the conclusions the reader of this report might draw, the Consultant is of the view that [the Applicant's] performance as Director, DASECA, has not been in accordance with the requirements laid down in the job description of his post as

> amplified in UNFPA's Competency Framework. The picture which emerges from the report is that of a senior manager who does not seem to be committed to UNFPA and does not have an understanding of the organization's substantive work, and whose management practices are wanting. Instead, he seems to be allured to power, prestige, privileges and perks which he believes to belong to the Director of DASECA.

41. The Consultant Report also referred to several financial issues, under the heading "Managerial integrity". The issues included "travel anomalies" and "use of hospitality funds". Under cross-examination, Mr. Goethel said that his conclusions about financial matters were based on what he had been told during the interviews he conducted. He had not seen any financial or audit records of the Division.

42. Mr. Hand sent the Applicant a copy of the Consultant Report on 11 April 2007. The accompanying letter stated that the Executive Director had decided to place the Applicant on SLWFP effective immediately and, should the Applicant wish to enter UNFPA premises during his special leave, he would have to make prior arrangements through Mr. Hand's office. The letter gave the Applicant five calendar days to provide his comments regarding the Report to the Executive Director before "a final determination concerning the matters addressed in the [R]eport" was made. Ms. Obaid told the Tribunal that the reason for imposing the SLWFP before receiving the Applicant's response was to protect the staff.

First suspension of action report by the JAB

43. On or about 27 April 2007, the JAB issued Report No. 1875 concerning the Applicant's suspension of action appeal of 9 February 2007, as well as the issues raised in the Applicant's requests for administrative review, namely the decisions to change his responsibilities and reporting arrangements and to initiate the procedure "to terminate his appointment". Although the JAB made several references to the placement of the Applicant on SLWFP, it did not consider whether that decision should be suspended.

44. The JAB unanimously recommended that the contested decision—i.e., the decision to initiate the procedure "to terminate his appointment"—be suspended "until a full-fledged investigation by OIOS [Office of Internal Oversight Service] or another appropriate investigative body is completed and a decision thereon is taken". The JAB did not include any recommendations concerning the Applicant's PAD process, but criticised the apparent lack of compliance with the PAD procedures by the UNFPA.

45. On 1 May 2007, the requested suspension of action was granted by the Secretary-General until the due process procedures provided for under the UNFPA Policies and Procedures Manual ("UNFPA Manual" or "Manual") were fully complied with, which included completing the Applicant's outstanding PAD reports and any rebuttal. The deadline of 31 August 2007 was set to complete these processes.

Applicant's response to the Consultant Report

46. The Applicant sent a comprehensive 31-page response to the issues raised in the Consultant Report to Ms. Obaid on 2 May 2007, commenting on each part of the Report. Apart from Ms. Obaid's oral evidence that she did not find his explanations convincing, there is no evidence that these comments were considered by the Secretary-General before taking the next steps against the Applicant.

Applicant's PAD review for 2006

47. On 8 May 2007, Mr. Hand sent an email to Mr. Waki and the Applicant, requesting them to "go through ALL of the performance appraisal steps for 2006" (emphasis in original), stating that the "first step would be for [the Applicant] to access the PAD, draft a performance plan for 2006 for himself and identify feedback sources". It is plain from this email that none of these mandatory steps had been taken by the Applicant or management before that date.

48. On 18 July 2007, Mr. Waki sent the Applicant a draft appraisal of his performance in 2006. Mr. Waki's draft assessment of various indicators included "partially achieved", "fully achieved", "developing proficiency", and "fully proficient".

49. The PAD evaluation for 2006 was finalised by the Applicant on 1 August 2007 and by Mr. Waki on 2 August 2007. The overall ratings of the Applicant's performance were as follows: his work plan outputs and developmental outputs were "partially achieved"; his core competencies were rated as "developing proficiency"; and his functional competencies were rated as "fully proficient".

50. On 6 August 2007, the Applicant was informed by the Officer-in-Charge, DHR, that his fixed-term appointment would expire automatically on 18 September 2007 and that UNFPA would not offer him a new appointment. The letter further stated that he would remain on SLWFP in view of the upcoming expiration of his contract and to "provide [him] with time to make any necessary arrangements".

51. On 10 August 2007, the Applicant wrote to Mr. Waki expressing his surprise at the "major" changes resulting in lowered appraisal ratings made on 2 August 2007, which were different from the initial ratings sent on 18 July 2007. Mr. Waki replied on the same day, advising the Applicant to rebut any specific comments.

52. The Applicant filed a rebuttal of his PAD evaluation on 26 August 2007, however, the Rebuttal Panel considered his request to lack certain information. The Applicant submitted an updated rebuttal on 20 September 2007.

53. The 2007 PAD report for the Applicant was not completed as the PAD process for that year had been launched at a time when the Applicant was already on SLWFP.

Review by the Management Review Group

54. In addition to filing a rebuttal, in or around August 2007, the Applicant also requested a separate review of his PAD evaluation by the Management Review Group, which consisted of the Executive Director, two Deputy Executive Directors, and the Director, DHR. The Management Review Group met on 7 September 2007 and made its comments on the PAD report on 11 September 2007. It found that the Applicant failed to meet the competency requirements for his post and did not make sufficient efforts to improve.

Applicant's third request for administrative review

55. On 17 August 2007, the Applicant requested an administrative review of the decisions of 6 August 2007 not to renew his contract beyond 19 September 2007 and to continue his SLWFP status.

Applicant's second appeal to the JAB for suspension of action

56. On 4 September 2007, the Applicant submitted to the JAB an appeal for a suspension of action of the decisions identified in his request for administrative review of 17 August 2007.

Second suspension of action report by the JAB

57. The JAB issued Report No. 1921 on or about 13 September 2007. It found that the Applicant's appeal for suspension of action of the decision to continue his SLWFP was not receivable as it merely reiterated and clarified a previous decision. It recommended the continuation of the suspension of the decision not to renew the Applicant's contract until 31 October 2007 to give the parties a final opportunity to demonstrate their good faith in the 2006 and 2007 PAD exercises. The JAB expressed its disappointment with "the lack of good faith by both parties" and observed that "the senior officials of UNFPA, including [the Applicant,] had used the PAD procedure, not for the purpose that it was designed for, but … to gain advantage over

each other on the issue of [the Applicant's] contractual situation". The JAB recommended that the conclusion of the 2006 and 2007 PAD procedures be "supervised" by a third party.

58. On 19 September 2007, the Secretary-General agreed to continue the suspension of the decision until 31 October 2007.

Applicant's complaint of abuse of authority and harassment

59. On 24 October 2007, the Applicant requested the Office of Internal Oversight Services to investigate his complaint of abuse of authority, harassment, mismanagement and waste of resources by the Executive Director and the Director, DHR. There is no evidence that this complaint was ever investigated.

Rebuttal of the 2006 PAD report

60. The Rebuttal Panel interviewed 16 witnesses before issuing a report on the Applicant's PAD evaluation for 2006. In its report of 30 October 2007, the Panel made the following findings:

> a. There were abundant examples that corroborated the ratings. There was a strong consensus that the final ratings given by the supervisor in all areas were substantiated and correct. The Panel therefore concurred with the supervisor's PAD ratings in all areas;
>
> b. There were significant irregularities in the Applicant's performance appraisal process: the PAD report was done *post facto*, thus defeating the purpose for which it was primarily intended and hampering online feedback; there was a risk that external factors could have influenced the ratings, thus decreasing their objectivity; work plan outputs and one competency rating were revised downwards by the supervisor after discussions with the staff

member had been completed—although this was within the prerogative of the supervisor, it compromised transparency;

c. The Applicant was not notified of poor performance until the end of 2006 and not given the opportunity to improve.

Applicant's third appeal to the JAB for suspension of action

61. On 25 October 2007, the Applicant submitted an appeal to the JAB for a suspension of action of the decision not to renew his contract beyond 31 October 2007, pending the investigation by the Office of Internal Oversight Service of his complaint filed on 24 October 2007.

Third suspension of action report by the JAB

62. On 31 October 2007, the JAB issued Report No. 1936, recommending that the Applicant's appeal be rejected.

Final communication regarding the Applicant's separation

63. On 31 October 2007, the Secretary-General rejected the Applicant's appeal for suspension of action of the decision to separate him from service on 31 October 2007. The Applicant was separated on the same day. Ms. Obaid told the Tribunal that his appointment was not renewed because he was not fulfilling the competencies of a Regional Director at the D-2 level.

Applicant's fourth appeal to the JAB

64. The Applicant subsequently appealed to the JAB against the decisions to modify his reporting arrangements, to carry out a review of his performance by an external consultant, to place him on SLWFP, and to end his employment.

65. On 9 February 2009, the JAB issued Report No. 2042, finding the Applicant's appeal receivable, but recommending rejecting his appeal as it found that the

Secretary-General acted within the limits of his discretion in taking the contested decisions. The Secretary-General thereafter decided "to take no further action" in this case.

66. Following an extension of time granted by the Dispute Tribunal (see *Morsy* UNDT/2009/036), the Applicant filed the present application.

Applicant's submissions

67. The Applicant's principal contentions may be summarised as follows:

a. The contested decisions were unlawful. The Applicant's separation from service was the culmination of a pattern of discriminatory treatment. The decision not to renew his appointment was merely a delayed implementation of the previous decision to terminate him. The Respondent violated the Applicant's rights of due process. The resulting decisions were tainted;

b. The Applicant was deprived of a regular PAD process. Despite frequently reporting on his activities, the Applicant was not provided with proper supervision and guidance. It is not unusual for a first report to identify areas for further development. Even after the rebuttal, the PAD report did not provide justification for the actions taken;

c. The Applicant had a reasonable expectation of completing his career with UNFPA. The Respondent has damaged the Applicant's career and this case has had damaging impact on his health and his family's well-being.

Respondent's submissions

68. The Respondent's principal contentions may be summarised as follows:

a. The Applicant's fixed-term appointment expired automatically and without prior notice. There was no expectation of renewal;

b. The Applicant's claims about the alleged decision of 2 February 2007 to "terminate" his appointment and regarding his nationality are not receivable;

c. The preliminary modification of the Applicant's reporting arrangements was in response to "a flood of complaints by staff members of the Division", including with regard to the Applicant's management style, which were received during the regional meeting in Bulgaria. Staff regulation 1.2(c) authorised the Executive Director to change the Applicant's reporting arrangements;

d. The fact-finding exercise in relation to the Applicant's performance was proper. It assisted management in establishing the relevant facts. The exercise was carried out with full compliance with due process requirements;

e. The decision to place the Applicant on SLWFP was lawful given the "extremely serious information" contained in the Consultant Report;

f. The Applicant was provided with guidance by the Executive Director, but demonstrated limited interest in learning the operations of UNFPA and departed from the performance standards expected of him. His performance as a manager was seriously deficient and it was the Administration's right and duty to enforce accountability for seriously poor performance and it was reasonable, in this case, to do so;

g. The Applicant's rights were fully observed with respect to the 2006 PAD process. The findings of the Rebuttal Panel were "balanced and well-reasoned".

Scope of the case and issues of receivability

69. At a case management hearing held on 3 November 2011, recorded in Order No. 262 (NY/2011) of 4 November 2011, the parties agreed that the principal

issue in this case is the decision not to renew the Applicant's contract. The Applicant's position was that this is a due process case, focusing on whether the decisions and procedures made in the course of the Applicant's employment were in accord with his due process rights.

70. The Tribunal finds that as the Applicant filed administrative review requests for each of the contested decisions identified at paras. 1 and 2 above, these claims are receivable.

71. The Applicant also raised during the hearing an additional claim regarding the Executive Director's request for him to change his nationality. This claim was not previously contested by him as a separate administrative decision and is thus not receivable.

72. In his written closing submission, filed on the last day of the hearing, the Applicant included in his list of contested administrative decisions the alleged irregularities in conducting his PAD evaluation. The Tribunal notes that the Applicant did not challenge this as a separate administrative decision at any point prior to the filing of the closing submission. However, as each of the contested decisions were based on concerns relating to the Applicant performance, the PAD evaluation process directly relates to each of those decisions, and will be considered in that context.

Consideration

Introduction

73. The reason given for removing the Applicant from some of his functions and changing his reporting arrangements, placing him on SLWFP, initiating a fact-finding management review, and not renewing his contract was the Executive Director's dissatisfaction with his performance as a manager.

74. Where an adverse decision affecting a staff member's contractual situation is made based on the staff member's performance, the Tribunal's role is to assess whether the Administration complied with the relevant procedures (*Jennings* UNDT/2010/213, *Eldam* UNDT/2010/133, *Berger* UNDT/2011/134). The United Nations Appeals Tribunal stated in *Ahmed* 2011-UNAT-153 that poor performance may be the basis for the non-renewal of a contract, but "where a decision of non-renewal does not follow the fair procedure or is based on improper grounds, the Tribunal may intervene".

75. The evaluation of the performance of a staff member should be done according to the applicable policies and procedures. When the regular process is not available for good reasons, it may be appropriate, in exceptional cases, to adopt an assessment process alternative to the standard PAD procedure. However, to be fair, any alternative performance assessment must afford the staff member the same due process protections as the PAD process and should not differ from the standard PAD process in any significant respect. If this were not the case, the standard and enforceable processes would be rendered nugatory. As a minimum, any alternative assessment method should be objective, take into account the views of the staff member who is being assessed and give the staff member the right of an independent and objective rebuttal.

UNFPA performance evaluation and management

76. The UNFPA Manual sets out practical and detailed directions for the management of performance issues of UNFPA staff members. Although such a manual does not necessarily have the legal authority vested in properly promulgated administrative issuances (*Villamoran* UNDT/2011/126), it sets standards of procedures that are expected to be met by both management and staff members, unless it is contrary to an instrument of higher authority.

77. The Applicant's appointment was not terminated, but rather his contract was not renewed upon its expiration on the grounds of his performance.[1] Although sec. 10 of the UNFPA Manual deals primarily with termination of appointments, it articulates UNFPA's procedures for performance management and evaluation, and, with respect to these procedures, the Tribunal finds that sec. 10 applied to the Applicant's situation at the time of the events. Both parties relied on the UNFPA Manual with respect to performance management, both at the time of the events and in their submissions before the Tribunal, and the Tribunal accepts that the Manual was the primary source of procedures and standards on these matters for UNFPA management and staff.

78. The Manual acknowledges that a staff member's performance may be low or deteriorate to the point that it is considered unsatisfactory, with the effect of placing the continued service of the staff member in question (see sec. 10.3.1 of the Manual). In recognition of this, the Manual allows for a fixed-term contract to be terminated under former staff regulation 9.1(b) or be allowed to expire.

79. Section 10.3.4 of the Manual states that "[t]ermination or non-renewal of appointment for reason of unsatisfactory performance is a mechanism that requires guidance from DHR" and directs managers to "contact DHR early if faced with the deterioration of a staff member's performance". The Manual also sets out "measures a supervisor can take in the interim and parallel to the performance appraisal mechanism" (sec. 10.3.5). The relevant procedures for performance management and assessment are, in summary, as follows.

80. The PAD process is the "principal tool" for reporting and documenting unsatisfactory performance in UNFPA (sec. 10.3.6). Supervisors must use this system to record poor, substandard or deteriorating performance and to bring it to the attention of the staff member "in order to permit the staff member to improve his/her

[1] Termination within the meaning of the Staff Regulations is a separation from service initiated by the Secretary-General (former staff rule 109.1(b)). However, separation as a result of the expiration of a fixed-term appointment is not regarded as termination (former staff rule 109.7(b)).

performance" (sec. 10.3.6). Mid-year review is part of the PAD process, and it is the responsibility of supervisors to identify performance deficits in the mid-year review process (sec. 10.3.8). Following receipt of poor performance ratings, a formal performance improvement plan is required (sec. 10.3.8). Staff members are also entitled to the opportunity to rebut their performance evaluations.

81. Failure or refusal to participate in the PAD process by a staff member does not enable management to circumvent the processes contained in the UNFPA Manual. In cases of a staff member's refusal to participate in the PAD process, her or his supervisor "retains the right and the obligation" to render a written appraisal of the staff member through the PAD process (sec. 10.3.10).

82. In addition to the PAD process, sec. 10.3.13 of the Manual allows a supervisor, when confronted either with one act or a period of sub-standard or deteriorating professional performance, to consider taking appropriate steps, listed in the Manual, in order to put the relevant staff member on notice that a lack of meaningful improvement might result in the termination of her or his appointment and to assist the staff member in improving her or his performance. Section 10.3.14 requires the supervisor to keep records and evidence of poor performance and of her or his interventions and make them available to the Director, DHR, as and when required.

83. Where a staff member exhibits performance that is "categorically below" the standard expected from her or him to the extent that it is "exceptionally egregious or severe", sec. 10.3.11 provides that it is not necessary to provide the staff member with what is termed "the privilege of an opportunity for improvement". According to sec. 10.3.11, in such cases a determination by the Executive Director that the staff member's service is "unsatisfactory" may be justified "immediately". This may result in the termination of the staff member's appointment for reason of unsatisfactory performance (sec. 10.3.4).

Evaluation of the Applicant's performance

84. The documents submitted to the Tribunal indicate that, at the relevant time, annual performance evaluation cycles at UNFPA commenced in April of each year and ended in March of the following year. If this is the case, given that the Applicant joined UNFPA in September 2005, the performance review cycle for 2006 should have commenced in April 2006 and ended in March 2007.

85. Neither the Applicant's direct supervisor nor the Executive Director took steps to formally manage his performance in terms of the UNFPA Manual and PAD rules until July 2007, several months after the PAD review for 2006 was supposed to be completed.

86. In view of the Executive Director's concerns about the Applicant's performance in the first half of 2006, and because no PAD process had been initiated, she had the right and obligation, pursuant to sec. 10.3.10, to ensure that the Applicant's direct supervisor rendered a written evaluation of the Applicant to give both him and his supervisors the opportunity to address performance deficiencies early and to improve his performance. She sent some directive emails to this effect, but these were not followed-up on in a timely manner by her or the Applicant's direct supervisor.

87. The ratings in the Applicant's 2006 PAD report confirmed by the Rebuttal Panel, suggest that, with the appropriate mentoring and performance management afforded by the processes set out in the Manual, there was a possibility that the Applicant's performance could have improved. The Applicant asked Ms. MacLean for advice on how to improve and wanted to discuss this with the Executive Director, but was not given any meaningful opportunity, as envisaged by sec. 10.3.13, to do so. It is a reasonable inference that he was open to change if he had been offered assistance.

88. As a general rule, management has the primary responsibility for ensuring compliance with performance evaluation procedures. The Respondent failed to ensure that the mandatory procedures were followed in the interests of both the Organization and the Applicant at any time in 2006. This was, in fact, accepted by the Secretary-General when he agreed to suspend action on the non-renewal in order to complete the PAD process.

89. The UNFPA's failure was not for want of resources. It had utilized Mannet's services to provide coaching and mentoring for senior staff members, including the Executive Director. Contrary to the Respondent's submissions, there was no evidence that the Applicant had received such mentoring or that it had been insisted on by UNFPA in spite of the shortfalls in his performance.

90. The Tribunal finds that the Respondent failed to meet its obligations for assessing and managing the performance of the Applicant. The Respondent did not fully and fairly raise the Applicant's performance issues at the time they were first noted and the Applicant was not given any meaningful opportunity to improve his performance as required by the UNFPA Manual.

Change of functions and reporting arrangements

91. Staff regulation 1.2(c) states that staff members are subject to the authority of the Secretary-General and to the assignment by him or her to any of the activities or offices of the United Nations. This broad discretion is, however, not unfettered and must not be arbitrary or tainted by improper motives. It is subject to the requirements of due process.

92. The Tribunal finds that the Applicant's core responsibilities and functions were affected by the changes made by the Executive Director to his functional and reporting arrangements. These changes significantly and adversely altered his working conditions and level of responsibility.

93. There is no reason to doubt that the Executive Director was concerned about the Applicant's performance based on her observations and discussions with the staff of the Division at the regional planning meeting in Bulgaria. Information regarding lack of proper accounting practices may, in ordinary circumstances, have given her sufficient reason to decide to alter the Applicant's functions and reporting arrangements. However, in the absence of an audit or any PAD evaluation process, this decision should have been strictly interim until the requirements of due process were met.

94. There were three significant flaws in the decision to alter the Applicant's reporting arrangements and remove some of his functions. First, the Applicant was neither given notice of the changes nor an opportunity to comment on them. He was therefore denied due process before this significant and adverse decision was made. Second, although the Executive Director stated in her email of 8 December 2006 that her decision was "pending the outcome of a management review of DASECA", there is no evidence that this decision was revisited after the Mannet review, which identified some positive feedback about the Applicant, was completed several days later, on 12 December 2006. Third, although the Applicant was informed of the outcome of the Mannet review, he was not provided with a meaningful opportunity to respond to or rebut the negative feedback that it contained.

95. The Tribunal finds that, although the decision to change the Applicant's reporting arrangements and functions was based on an assessment of his performance, that performance had not been evaluated by any process that met the standard of an objectively verifiable process comparable to the PAD process as required by the UNFPA Manual.

96. The Tribunal finds that the decisions to remove some of the Applicant's core responsibilities and functions from him and change his reporting arrangements without notice and to maintain these changes without conducting an objectively verifiable evaluation of his performance as a manager were unlawful.

Decision to initiate and carry out a fact-finding management review

97. The decision to initiate and carry out a fact-finding management review, which resulted in the Consultant Report, was an attempt by the Executive Director to establish the facts regarding the Applicant's management style and performance.

98. The Tribunal finds that, although there is no evidence that the Executive Director's request for a fact-finding management review was ill-motivated or that Mr. Goethel was not qualified or conducted himself inappropriately, the fact-finding management review did not meet the standards of an objectively verifiable performance evaluation process with the due process safeguards of the PAD procedure.

99. It lacked the essential elements of a standard performance evaluation process envisaged by UNFPA's own rules, including evaluation against an agreed work plan and a formal rebuttal stage. It had elements of an adversarial process, with facts being gathered from a number of witnesses before inviting the Applicant to give his explanations.

100. Had UNFPA followed the standard PAD procedures in a timely manner, there would have been no need to initiate any *ad hoc* fact-finding management review.

101. The Tribunal finds that the decision to initiate and carry out a fact-finding management review, instead of the PAD evaluation, and to use the results of that review to justify decisions adverse to the Applicant, without the procedures and protections of a proper PAD process, was unlawful.

Placement on SLWFP

102. Placement of staff members on special leave on full pay was authorised by former staff rule 105.2, which provided for special leave either at the request of the staff member or, in exceptional cases, at the Secretary-General's initiative, if the Secretary-General considered such leave to be in the interest of the Organisation.

103. The negative findings in the Consultant Report about the Applicant's performance and management style were the reasons for placing the Applicant on SLWFP. The term of the special leave was not specified, but in fact it lasted until the Applicant's contract ended on 31 October 2007. He was therefore on SLWFP for over six months.

104. As the Applicant declined to provide comments or participate in the fact-finding management review because of his valid concerns about the process, the Consultant Report was inevitably one-sided. However, before any steps were taken in reliance on the findings of the Consultant Report, it was important to ensure that the reasons on which the decision was based were properly established. The Applicant was asked and provided a detailed response to the Report, as was requested by the Respondent on 11 April 2007, but SLWFP was imposed without waiting for his response. This was in breach of his due process right to have his explanations fully considered before the adverse decision was made.

105. The Tribunal finds that the decision to place the Applicant on SLWFP for reasons of his performance, without a fair and objectively verifiable evaluation of his performance as a manager, was unlawful.

Non-renewal of contract beyond 31 October 2007

106. The final decision not to renew the Applicant's contract was made the day after the Rebuttal Panel issued its report on 30 October 2007. Although the Tribunal finds that this decision was effectively an affirmation of the decision that had been made by the Executive Director on 2 February 2007, it was made following the PAD process, including a rebuttal.

107. This means that the reason for the non-renewal decision was verified through an independent process, pursuant to the recommendations of the JAB and the decisions of the Secretary-General, and was properly documented through the Rebuttal Panel's report. The Rebuttal Panel carried out what appears to have been an

objective assessment and interviewed a number of relevant witnesses. Although it found that the PAD process had irregularities, it nevertheless concluded that the assessments of the Applicant's performance were correct. The procedural flaws identified by the Panel were insufficient to negate the entire final performance assessment. Based on the extensive examination by the Rebuttal Panel, the ratings given to the Applicant by his supervisors were confirmed.

108. It is not the role of the Tribunal to substitute its assessment of a staff member's performance for that of the Secretary-General. Unless that assessment is manifestly unreasonable or so impugned by irregularity, the Tribunal will not interfere.

109. On the evidence before it, the Tribunal finds no reason to interfere with the ultimate assessment of the Applicant's performance. The final performance ratings, as affirmed by the Rebuttal Panel, permitted the Secretary-General to reasonably exercise his discretion not renew the Applicant's appointment beyond 31 October 2007.

110. The Tribunal therefore finds that the decision not to renew the Applicant's fixed-term contract beyond its expiration date of 31 October 2007 was lawful.

Remedies

111. The Applicant gave evidence about the effects that the violation of his rights had on his emotional state, his health and his reputation, as well as about the harm to his future career prospects.

112. Given that the non-renewal of the Applicant's contract was justified on the basis of the final PAD evaluation as affirmed by the Rebuttal Panel, the Tribunal finds that the decision not to renew his contract did not cause him direct monetary loss or any unjustified or unfair loss of chance of continued employment or harm to future career prospects. He also remained on full pay throughout the process up to the

end of his contract and therefore suffered no pecuniary harm arising from the other decisions reviewed in this Judgment.

113. In view of the circumstances of this case, the appropriate relief is monetary compensation for the effects on the Applicant of the established violations of his rights. The Applicant gave evidence of the detrimental effects the contested decisions had on him. Although much of the Applicant's evidence related to the effect of the non-renewal, the Tribunal finds, on the evidence given, that some of the negative effects were caused by the decisions to change his functions and reporting arrangements, to carry out a fact-finding management review instead of the PAD evaluation, and to place the Applicant on SLWFP. The Applicant first suffered the stress and humiliation caused by the abrupt and flawed change to his reporting arrangements and removal of his functions as a senior manager and then was placed on SLWFP for over six months on the basis of a report on his performance that was not in compliance with the standards of a PAD process. He was also deprived of the possibility of improving his performance.

114. Compensation awarded by the Dispute Tribunal for similar breaches of procedure and resultant non-pecuniary harm has ranged, generally, between one and four months' net base salary, depending on the circumstances of the case (*Eldam* UNDT/2010/133, *Applicant* UNDT/2010/211, *Fradin de Bellabre* UNDT/2011/080).

115. The following factors are relevant in assessing the appropriate amount of compensation in this case:

a. The Applicant was subjected to adverse decisions that were tainted by the absence of any formal PAD process or verifiable performance evaluation at the time they were taken;

b. The period when he was negatively affected by these adverse decisions lasted for approximately 11 months, from 8 December 2006 to 30 October 2007.

116. In view of the long period of time that has elapsed since the events in this claim, as well as the non-pecuniary nature of harm, the compensation awarded to the Applicant will be expressed as a lump sum representing approximately two to three months' salary at the D-2 level. The Tribunal sets that sum at USD25,000.

Observation

117. Section 10.3.11 of the UNFPA Manual was not relied on by the Administration in making the decision not to renew the Applicant's contract beyond 31 October 2007. However, the Tribunal wishes to make an obiter observation about that section.

118. Contrary to the wording of sec. 10.3.11, staff members have access to the formal steps in the PAD processes not as a *privilege* but as a *right*. This includes prompt identification of performance issues and the establishment of an improvement plan, when needed.

119. On the face of it, a factual finding of an "exceptionally egregious or severe" performance should only be properly made under the UNFPA legal framework once the PAD process is finalised, including an improvement plan.

120. It is of concern to the Tribunal that, as presently drafted, sec. 10.3.11 appears to be contrary to the established performance management and evaluation scheme. It also appears to condone and foster non-compliance with the established PAD procedures and to allow management to make determinations of "exceptionally egregious or severe" performance, which may possibly result in termination, without a fair and properly documented basis.

Conclusions

121. The Tribunal finds that:

a. The Respondent failed to meet its obligations for assessing and managing the performance of the Applicant. The Respondent did not fully and fairly raise the performance issues at the time they were first noted and the Applicant was not given any meaningful opportunity to improve his performance as required by the UNFPA Manual;

b. The decisions to remove some of the Applicant's core responsibilities and functions from him and change his reporting arrangements without notice and to maintain these changes without conducting an objectively verifiable evaluation of his performance as a manager were unlawful;

c. The decision to initiate and carry out a fact-finding management review, instead of the PAD evaluation, and to use the results of that review to justify decisions adverse to the Applicant, without the procedures and protections of a proper PAD process, was unlawful;

d. The decision to place the Applicant on SLWFP for reasons of his performance, without a fair and objectively verifiable evaluation of his performance as a manager, was unlawful;

e. The decision not to renew the Applicant's fixed-term contract beyond its expiration date of 31 October 2007 was lawful.

122. The Tribunal finds, on the evidence before it, that the unlawful decisions in this case did not amount to a pattern of discriminatory treatment against the Applicant. These decisions were a hasty response to concerns about the Applicant's performance issues that were not addressed when they should have been in accordance with the applicable procedures.

Order

123. The Tribunal awards the Applicant USD25,000 as compensation for the breach of his rights and the resultant harm.

124. This amount is to be paid within 60 days from the date the Judgment becomes executable, during which period interest at the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(*Signed*)

Judge Coral Shaw

Dated this 30th day of March 2012

Entered in the Register on this 30th day of March 2012

(*Signed*)

Hafida Lahiouel, Registrar, New York