



**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Hafida Lahiouel

DAS

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Jorge Ballesterro, UNICEF

## **Introduction**

1. The Applicant contests the decision to end her employment with the United Nations Children's Fund ("UNICEF").

2. The Applicant submits, *inter alia*, that the Administration's reliance on her performance evaluation reports ("PERs") in ending her employment was improper as she had been "subjected to workplace harassment and abuse of authority and [her] PERs [were] intentionally precipitated in a concocted and illegal manner". The Applicant also submits that the Administration failed to follow proper procedures in managing her performance and to properly address her complaints of harassment and abuse of authority against her supervisors. She states that she suffered "ignominious loss and damage" as well as "tremendous agony and harassment" as a result of the loss of her employment. She seeks compensation in the sum of 24 lakh rupees (or 2,400,000 rupees, or approximately USD44,000 at current rate), or other relief as deemed fit by the Tribunal.

3. The Respondent submits, *inter alia*, that the Administration's decision to end the Applicant's employment was a legitimate exercise of its discretionary power in line with the best interest of the Organization and the Applicant's properly documented poor performance, which was not rebutted by her. The Respondent submits that, although the Applicant received a notice of termination, this was due to an administrative error on the part of the UNICEF India Country Office, from which error the Applicant in fact benefited with a one-month notice, which the Respondent was not obliged to provide following expiry of her fixed-term contract.

4. By Order No. 118 (NY/2012), the Tribunal directed the parties to attempt to resolve the matter informally, failing which they were to, *inter alia*, file a joint submission stating whether they agreed to the case being decided on the papers and whether they wished to file any further submissions. The parties were unable to come to an amicable settlement despite a further extension of time, and subsequently

indicated that no further submissions were required and that the case should be adjudicated on the papers.

## **Facts**

### *Commencement and ending of employment*

5. The Applicant was employed by UNICEF since 2004. In December 2007, she was offered a one-year fixed-term appointment as a Secretary, at the GS-4 level, in the Kolkata Field Office of UNICEF. She accepted this offer on or about 31 December 2007.

6. UNICEF ended the Applicant's employment effective 31 July 2010. Although the Respondent maintains that this was a case of non-renewal based on poor performance, the decision to end the Applicant's contract was presented and processed as a termination. The India Country Office sent it to the Central Review Body ("CRB") for review, as required under UNICEF procedures for termination. On 7 June 2010, the CRB unanimously stated:

The CRB thoroughly reviewed the recommendation and all the relevant documents. The CRB acknowledged that the staff member was given ample opportunities including change of Supervisors and Sections so that she can improve her attitude and performance. It was evident from the last two PERs as well as other performance related documentation that despite having all best efforts and support by the Field Office, the staff member did not make any attempt to improve her performance. Given all the considerations and based on the documents which corroborate her consistent non-performance, the CRB unanimously agreed to terminate the [fixed-term] contract of [the Applicant] with immediate effect.

7. On 14 June 2010, the Applicant filed with the Executive Director and the Office of Internal Audit, UNICEF, a complaint of harassment and abuse of authority against her supervisors. She requested, *inter alia*, that the entire case "be adjudged in the proper light", that the PERs for 2008–2009 and January–June 2010 be revoked or quashed, and that she be compensated.

8. On 28 June 2010, the Applicant was informed by letter signed by the Officer-in-Charge, India Country Office, that the Country Representative had approved the recommendation of the CRB to terminate her appointment based on unsatisfactory performance for the period of “2007 to 2010”. Accordingly, the Applicant was informed that her appointment would be terminated effective 31 July 2010. The letter stated:

We regret to inform you that the Representative has approved the recommendation of the Central Review Body that your appointment should be terminated. This decision has been taken after an extensive review of your performance which has been consistently unsatisfactory, as documented in your PERs from 2007 to 2010, as well as other supporting documents including attendance reports and performance improvement plan. In order to give you one month’s notice period, as required, your current contract will be extended up to 31 July 2010 after which you will separate from the organization. In connection please find, attached, the administrative details relating to your entitlements, formalities and actions in respect of your separation from service.

9. On 30 June 2010, the Applicant sent an email to the Office of Internal Audit, UNICEF, and addressed to the Executive Director, asking for cancellation or rescission of the decision to terminate her contract.

10. On 16 August 2010, the Chief of the Policy and Administrative Law Section, Division of Human Resources, UNICEF, sent the Applicant a letter, requesting “clarifications as to [her] specific allegations and requests”. The letter referred to the Applicant’s emails of 14 June and 30 June 2010. The Applicant was asked to “clarify the scope and grounds of [her requests]”. The letter further sought to “clarify” to the Applicant that hers was a case of non-renewal and not termination.

11. By email of 5 October 2011, the Administrative Law Specialist, Policy and Administrative Law Section, Division of Human Resources, UNICEF, informed the Applicant that the Office of Internal Audit, UNICEF, had considered her allegations of harassment and abuse of authority “and, having found no grounds to

proceed, the case was closed in June 2010”, of which the Applicant was allegedly informed by email dated 7 July 2010. He further stated that since the basis of the Applicant’s complaint “was precisely the alleged harassment and abuse of authority, which has been found unsubstantiated, in principle, [her] case as a whole is closed”. He added that the Applicant would receive “a final decision on this matter within the next few days”.

12. By letter dated 11 October 2010, the Deputy Executive Director informed the Applicant that her email of 30 June 2010 as well as her other “concerns” and “submissions” regarding harassment and abuse of authority had been treated as a request for management evaluation. The letter stated that, although originally the decision was presented as a termination of her contract (letter of 28 June 2010), the administrative decision made was not to renew her fixed-term contract after its expiration. The letter stated that her contract was extended up to 31 July 2010 “to give [her] one month notice, even though there was no need to do that, since [her] fixed-term contract ... expire[d] automatically, without prior notice”. The letter further stated that “the decision not to renew [her] contract—however painful to [the Applicant]—can only be considered as a sound managerial decision, made with the best interest of the Organization in mind”.

#### *Performance evaluations*

13. Below is a summary of the Applicant’s PERs for the period of 2008, 2009, and 2010—the two-and-a-half years immediately preceding the cessation of her employment.

#### Performance evaluation for 2008

14. In the Applicant’s PER for the period 1 January to 31 December 2008, which she signed on 26 March 2009, her supervisors rated her performance with respect to the values and competencies of “technical knowledge”, “planning [and quality of work]”, “team work”, and “communication” as “2 (met most expectations, however,

there is room for improvement)". However, with respect to "drive for results (quantity of work)" the Applicant received the rating of "1 (met few expectations)".

15. The PER for 2008 included both negative and positive comments regarding the Applicant's performance, with which the Applicant agreed "to some extent". She commented that although this was her first year in her new unit, she "put a lot of effort into picking up new assignment".

16. The PER for 2008 also included comments of the Applicant's second reporting officer (State Chief, UNICEF West Bengal), who identified some areas for improvement in the Applicant's performance. The second reporting officer also added a hand-written comment, stating that "the one year's extension of [the Applicant's contract] will give her the opportunity to improve her competencies for the job[.] However, if during this contract extension (April 2009–March 2010) she does not improve her performance, her contract will be terminated accordingly".

Performance evaluation for 2009 (January to March 2009)

17. In 2009, the Applicant first received a three-month extension from January to March 2009, and then another extension until the end of 2009. Accordingly, for the first three months, a separate PER was prepared. In this PER, signed by the Applicant on 8 March 2009, she received the same ratings as in 2008, except for a higher score for "team work" ("3 (fully met expectations)").

18. In part 7 of the PER for January–March 2009, the Applicant's second reporting officer noted that the Applicant "ha[d] improved in her ability to deliver and given more time she could fully accomplish the tasks assigned to her".

Performance evaluation for 2009 (April to December 2009)

19. On 31 March 2009, the Applicant was offered a nine-month extension of her fixed-term appointment, starting on 1 April 2009 and expiring on 31 December 2009.

20. Prior to the finalization of the PER for April to December 2009, the Applicant and her supervisors prepared a mid-year performance evaluation report. It was signed by the Applicant and her supervisors on 3 September 2009. Whilst containing some criticisms, it also stated that there was a “noteworthy improvement from the past”, “significant improvement in filing of Office Chrono programme”, and that “[a]ll logistic support was very well done”.

21. The Applicant’s PER for the period of April to December 2009 was finalized approximately three months after the mid-year review. In fact, it was prepared and signed by the Applicant and her supervisors twice—on 7 December and 8 December 2009.

22. In the first version of the PER, signed by the Applicant on 7 December 2009, her supervisors rated her performance for each of the values and competencies—“technical knowledge”; “planning [and quality of work]”; “drive for results (quantity of work)”; “team work”; “communication”—with the rating of “2 (met most expectations, however, there is room for improvement)”. The Applicant’s first reporting officer (her immediate supervisor) acknowledged that she had made efforts to improve her performance, but noted that “she need[ed] to improve her core competencies essential for secretarial assistance”. The first reporting officer also commented that “her performance related discussions were frequent and documented every quarter”. The second reporting officer stated that she “fully agree[d] with the supervisor’s comments and ratings” and that the Applicant, “in her 5 years of being a UNICEF staff member, has improved minimally in her performance and does not meet the expectations of an Operations Assistant (her current post)”.

23. The Applicant stated in her comments in part 6 of the first version of her PER for April–December 2009 that she agreed with the ratings and assessment only “to some extent”. She included detailed comments disagreeing with the assessment of her performance with respect to different competencies. She stated that “[i]n the current reporting period, [she] performed ‘better than [her] best’”. The Applicant

further stated that she was not provided with clear feedback and instructions from her supervisors during the reporting period. She stated that she “was denied the opportunity to improve her performance in the smart approach, in absence of any substantial guidelines or measurable quantitative performance evaluation tool”.

24. On 8 December 2009, the Applicant and her supervisors had a meeting, as a result of which a second version of the PER was produced. The Applicant alleges in her application that “in a closed-door meeting with her supervisors” she was “grilled and forced to delete all [her] comments from the PER [for April to December 2009]”. She alleges that she was told to “destroy [her] copy of the PER and made to prepare and sign a new PER on 8 December 2009”. The Applicant’s version of the events is corroborated by her email to the Deputy Director of Operations, UNICEF, of 21 December 2009, discussed below, and has not been denied or rebutted by the Respondent.

25. In the second version of the PER for April–December 2009, signed on 8 December 2009, the ratings given for all competencies remained the same (rating of “2 (met most expectations, however, there is room for improvement)”). However, the Applicant’s comments disagreeing with her supervisors were removed.

#### Applicant’s complaint of 21 December 2009

26. On 21 December 2009, the Applicant sent an email to the Deputy Director of Operations, UNICEF, stating that after she had submitted her signed PER on 7 December 2009, she was asked to return the signed copy and then had a meeting with her supervisors on 8 December 2009, in which they asked her to make changes to her PER as they felt that she “exaggerated her performance” and “took [credit for a] bigger share of the team performance” than she apparently deserved. She stated that “despite being assured ... that [her] performance would be evaluated on a quarterly basis, in practice, [she] was evaluated only once during September 2009

prior to this final PER, where [she] had received encouraging and assertive feedback from her supervisors”. The Applicant also described the distress that she suffered:

After about 2 hours of discussions with them I was made to delete and/modify the issues raised by me in the submitted PER, that ultimately resulted in the destruction of my PER. The entire process was extremely stressful, harassing and unethical.

27. The Applicant requested in her email of 21 December 2009 the Deputy Director of Operations to “look into the matter with appropriate consideration and take proper/necessary action so that [her] prolonged association with UNICEF is retained and continued”.

28. The Deputy Director of Operations replied on 25 January 2010, stating that a review of her claims was initiated; that his office was working with the management in the Kolkata Office to ensure that she was provided with a performance improvement plan related to the extension of her contract for six months, starting January 2010; and that he was working to ensure that her performance was evaluated and forwarded to his office by 25 May 2010. He stated that he “personally reviewed [her] file and [is] concerned with the documented poor performance which is not related to [her] ‘leaves’ but which has been reflected in [her] performance since as far back as 2007”. The Deputy Director noted that those performance evaluations were completed by three different supervisors. He concluded by stating:

I must therefore insist that your performance over the remaining months be up to a satisfactory level. All staff in UNICEF are expected to perform their functions in a satisfactory manner and any consistent failure will be treated in accordance with the rules and regulations of the organization.

29. On 1 January 2010, the Applicant was offered a six-month extension of her fixed-term appointment, now with the functional title of Administrative Assistant, starting on 1 January 2010 and expiring on 30 June 2010.

Performance improvement plan for January to June 2010

30. A performance improvement plan was prepared and agreed with the Applicant following a meeting in late January 2010. The improvement plan stated that, in order to “place a performance improvement plan with measurable indicators, the following is suggested for assessment *in the third week of each month* so that reports can be *finalized by the month end*” (emphasis added). The areas of assessment included attendance, focus on quality, and various work tasks.

Improvement plan evaluations for January to June 2010

31. On 29 April 2010, the Applicant sent another complaint to the Chief of Human Resources, UNICEF, India Country Office. The Applicant stated that, “[to] date, there [was] not meeting to update, analyze and evaluate [her] performance so far in the current reporting period”. She stated that she was “awaiting [her] ‘performance feedback’ from both [her] first supervisor and second supervisor”. The Applicant stated that she was “under ‘scanner’ and ha[d] been given a contract from January–June 2010” and was “expected to give 100% towards [her] job, which [she was] delivering”. She described several instances of what she considered to be “workplace harassment” and stated that she was experiencing “agony and grueling experience”. She added, “If this continuity of eventful harassment (both mental and ethical) is not put to an end, then I am afraid it is becoming extremely challenging to put in my best efforts and continue to be motivated towards the small but important contribution I make towards the esteem[ed] organization”.

32. On 3 May 2010, two working days after her email of 29 April 2010, the Applicant was provided, for the first time in 2010 according to her, with monthly performance improvement evaluations containing critical comments. She alleges—and this has not been rebutted by the Respondent—that no discussions were held with her prior to the issuance of the performance improvement evaluations. She further alleges that the performance improvement evaluations were provided to her

in hard copy and not by email to conceal her supervisors' failure to issue them in line with the requirements of the performance improvement plan (i.e., with assessments "in the third week of each month so that reports can be finalized by the month end").

33. On 3 and 4 May 2010, after receiving the performance improvement evaluations, the Applicant sent two emails to the Deputy Director of Operations and Chief, Human Resources, India Country Office. The Applicant stated that this was "the very first [performance improvement evaluations] for the current period ... and no discussion/evaluation happened prior to this throughout [her] current reporting period", although the performance improvement plan for January–June 2010 provided that such evaluations were supposed to be done each month. The Applicant stated that "none of the things mentioned in the [performance evaluation]" were correct and that it came "as a complete shock" to her. She stated that "she was absolutely unaware by whom and when" these performance improvement evaluations were prepared, particularly since one of her supervisors was away from the office. She stated that she was "upset and distressed (specially remembering the incidence during final PER 2009 which [she] shared ... earlier [i.e., by email of 21 December 2009]) to again go through the same gruelling session with [her second reporting officer]". The Applicant stated in her email of 3 May 2010, "I really do not want to go through the same kind of harassment once again. Please help". In her email of 4 May 2010, she stated. "I am lost and [am] unable to handle this kind of situation. Please I need your guidance".

34. There is no record on file regarding any response to the Applicant's emails of 29 April and 3–4 May 2010. The Applicant however received an email on 27 May 2010 from the Chief of Human Resources, India Country Office, which is discussed further below.

Final performance evaluation for June to January 2010

35. The Applicant's PER for January to June 2010 was finalized in late May 2010. In the final PER, the Applicant's supervisors rated her performance with respect to "technical knowledge"; "planning [and quality of work]"; "drive for results (quantity of work)" as "1 (met few expectations)". With respect to "team work" and "communication", she received "2 (met most expectations, however, there is room for improvement)". The Applicant's first reporting officer added critical comments regarding the Applicant's performance, including that she "still required additional support and orientation" and that "some of the core competencies such as technical knowledge, planning and setting standards and self-monitoring remained a concern". The first reporting officer commented that the Applicant "was given enough opportunity to perform and deliver the assigned tasks, however, over the years it has been observed/recorded that [the Applicant] could not perform to the desired expectations".

36. In part 7 of the PER, the second reporting officer expressed her agreement with the first reporting officer's ratings and comments. She added that the Applicant's "ratings have been consistent under five different supervisors since ... 2007". The second reporting officer stated:

Contrary to [the Applicant's] contention that no discussion took place during the reporting period, performance discussions including coaching and feedback by supervisors took place on 27 [January 2010] and 26 [February 2010]. On 29 [March 2010] Operations Officer discussed with [the Applicant] and, as agreed, daily monitoring has continued thereafter. April's evaluation was ready for discussion on 23 [April 2010] but meeting was postponed due to [the Applicant's] expressed reluctance to discuss without the presence of one supervisor who was away on emergency leave. Discussion took place on 3 [May 2010]. The final PER discussion was held on 20 [May 2010].

I observe that [the Applicant] has difficulty to accept feedback on her performance. Each performance discussion becomes a long drawn-out

argument between her and whoever is the supervisor. I have personally witnessed such interactions.

37. The Applicant marked in part 6 of the PER that she did not agree with the ratings and assessment of her performance. She stated that the performance evaluation process was not properly followed and that “no discussion/evaluation took place through my current reporting period despite clear guidance from the Deputy Director”. The Applicant further stated that her supervisors failed to provide her with monthly performance improvement evaluations, as was required by the performance improvement plan. She stated that the monthly performance improvement evaluations were provided to her only in early May 2010, in hard copy and not by email, to “conceal the actual dates” when they were issued. She added that, in her final PER for 2010, “[b]iased, concocted and non-measurable statements were made [by her supervisors] which [she] completely disagree[d] with”.

Applicant’s attempt to launch a formal rebuttal of the PER for 2010

38. The Applicant’s PER contained part 8.2, which stated that staff members have a right to rebut the PER “only for the reasons listed in administrative instruction CF/AI/1994-002, paragraph 2.38”. This provision of CF/AI/1994-002 apparently sets out the grounds on which the PER can be rebutted (the Respondent did not provide a copy of the administrative instruction to the Tribunal).

39. Prior to the signing of her PER for 2010, the Applicant sent an email on 26 May 2010 to the Deputy Director of Operations as well as the Chief, Human Resources, India Country Office, with the subject line “Request for relevant Administrative instruction for formal rebuttal”. The Applicant stated in her email, “I would like to go to formal rebuttal, but before I sign, I wanted to understand CF/AI/1994-002, paragraph 2.38 (as mentioned in the PER)”. She stated that she could not locate the administrative instruction on the Intranet (UNICEF’s internal system) and requested that it be shared and explained to her.

40. The Chief of the Human Resources, India Country Office, replied to the Applicant on 27 May 2010. Instead of providing her with a copy of the requested administrative instruction to enable the Applicant to exercise her right of rebuttal, the Chief stated that she should “proceed with signing the current PER to acknowledge that [she] received it”. The Chief of the Human Resources also commented on the substance of the Applicant’s complaint of harassment. Specifically, the email stated:

Both [the Deputy Director of Operations] and I have reviewed your correspondence. It is regrettable that I have not travelled to Kolkata yet, so that these issues could be discussed face to face with you and all your supervisors together. Notwithstanding, we are very concerned that you have not copied the Chief of Field Office in your “confidential” correspondence. There are two sides to every story and your claims of harassment cannot be substantiated. It is our understanding that your performance, as documented in prior and consecutive PERs has continued to be unsatisfactory. You have now shared with us the last page of your current PER and which once again indicates low performance and confirms with dates that performance discussions with your supervisors did take place during the reporting period. Each of your PERs has been assessed by a variety of supervisors independently.

On this basis, our advice is that you proceed with signing the current PER to acknowledge that you have received it (part 8.1).

41. The Applicant replied on 27 May 2010, stating, “I will follow your advi[ce] and hand over the signed PER”. She signed her PER for the period 1 January 2010 to 30 June 2010 on the same day.

## **Consideration**

### *Scope of the case*

42. In her application before the Tribunal, the Applicant defined the contested decision as that communicated to her by letter of 11 October 2010 from the Deputy Executive Director. That letter referred to the Applicant’s email of 30 June 2010, as

well as her “previous filing of a harassment complaint against [her] supervisors”. The letter of 11 October 2010 further stated that UNICEF had determined that “undertaking a management evaluation [was] the best way to properly address [the Applicant’s] concerns”. Therefore, the Applicant’s complaints and communications regarding the termination of her contract and harassment and abuse of authority were accepted by UNICEF as a properly filed request for management evaluation.

43. Accordingly, the Tribunal finds that the issues before it include the lawfulness of the ending of the Applicant’s contract and the propriety of UNICEF’s actions with respect to her complaint of abuse of authority and harassment.

*Was the Applicant’s contract terminated or not renewed?*

44. The Applicant’s fixed-term contract was expiring on 30 June 2010. The Respondent claims that due to an administrative error, instead of not renewing her contract, India Country Office proceeded with its termination on the grounds of poor performance. This they subsequently sought to reverse.

45. The ending of a contract based on poor performance may be dealt with in different ways depending on the culpability of the staff member. One may view poor performance as fault-based or even as misconduct where an employee may be culpable, or as incapacity due to other reasons over which a staff member may have little control. (Notably, in this case the CRB stated on 7 June 2010 that the Applicant “did not make *any* attempt to improve her performance” (emphasis added).) As the Tribunal stated in *Goodwin* UNDT/2011/104, issues of capacity may stem from poor or unsatisfactory work performance, or from ill health or injury. Unsatisfactory or poor work performance arising from misconduct (like habitual or wilful neglect of duties), and that caused by circumstances beyond a worker’s control (like technological change, illness, incompetence due to lack of skill or training,

unsuitability or incompatibility), are treated differently since the culpability of the staff member is different. The former may be a disciplinary issue whilst the latter may require evaluation and remedial treatment including counseling, retraining and a reasonable opportunity to improve before any action is finally taken. If the poor work performance is attributable to misconduct—for example dereliction of duty or wilful negligence—the staff member may then be subject to disciplinary measures, including termination, depending on the severity or degree of misconduct (see also former United Nations Administrative Tribunal Judgment No. 926, *Al Ansari* (1999)).

46. Non-renewal and termination are two distinct procedures resulting in different implications and consequences for the affected staff member, including consequences relating to future employment. Once UNICEF put into effect, applied, and completed the termination procedures, including obtaining a CRB recommendation for termination, it was inappropriate and impermissible to attempt to reverse the course of action *ex post facto*, after the Applicant had left UNICEF (also see *Eggesfield* UNDT/2013/006 for a related discussion on the doctrine of estoppel).

47. It is clear from the written record that, on referral from the India Country Office, the CRB made a unanimous recommendation to terminate the Applicant's fixed-term contract on 7 June 2010 "with immediate effect". It is also clear that this recommendation was approved in the termination letter dated 28 June 2010, which specifically stated that the Applicant's contract was terminated based on her PERs for the period of "2007 to 2010". The letter also set out her terminal entitlements. The Respondent's suggestion that the Applicant benefited from the magnanimous gesture of one month's notice cannot be sustained. Indeed, sec. 10.5 of CF/AI/2010-001 (Administrative instruction on separation from service), dated 10 March 2010, stipulates that "[i]n case of termination for unsatisfactory performance, staff will be

given notice according to the letter of appointment, or paid salary in lieu of serving the notice period, at the discretion of the Executive Director”.

48. The Tribunal therefore finds that the Applicant’s contract was terminated on the grounds of alleged unsatisfactory performance.

*The Applicant’s PER for January–June 2010*

49. The Applicant’s PER for January to June 2010 stated in part 8.2 that staff members have a right to rebut the PER “only for the reasons listed in Administrative Instruction CF/AI/1994-002, paragraph 2.38”.

50. By email of 26 May 2010, the Applicant requested a copy of CF/AI/1994-002 in order to understand the rules concerning the right of rebuttal, as referred to in her PER. She stated in her email that she could not locate the instruction on the Intranet. She also requested that the instruction be explained to her. Her requests were reasonable and clearly indicated that their purpose was to enable her to rebut the PER.

51. In response, on 27 May 2010, the Chief of Human Resources, UNICEF, after giving her views on the assessment of the Applicant’s performance by her supervisors, stated that “there are two sides to every story” and made a finding that “[the Applicant’s] claims of harassment cannot be substantiated”. The Chief clearly had no capacity to make this determination. The Chief then simply instructed the Applicant to “proceed with signing the current PER to acknowledge that [she] received it”.

52. The Applicant was clearly not in possession of the relevant administrative instruction, and there is no evidence before the Tribunal that she was provided with it upon her request (see also the Tribunal’s general observation at para. 78 below regarding the availability of UNICEF’s administrative issuances). The Tribunal finds that the Chief’s response to the Applicant’s email was misguided, particularly in

view of several complaints that the Applicant sent to the Chief of Human Resources and to the Deputy Director of Operations. The Tribunal finds that the Applicant's interpretation of the Chief's email as "necessarily implying that there neither should be nor could be any rebuttal" (see para. 19 of her application) was reasonable. By withholding a copy of the administrative instruction, which apparently sets out the grounds for rebuttal; by failing to explain the administrative instruction to the Applicant despite her explicit request; by making findings on the Applicant's performance and harassment claims; and by instructing the Applicant to sign the PER as it was, the Chief effectively dissuaded the Applicant from pursuing formal rebuttal and substantiating her claims of harassment.

53. The Tribunal finds that, even if a copy of the administrative instruction were subsequently provided to the Applicant, the tone and content of the Chief's email were such that the only reasonable conclusion that the Applicant could have reached is that any rebuttal would be futile and that management's view of her performance was made up and was not subject to change regardless of any rebuttals.

54. The Tribunal finds that an effective rebuttal mechanism is an integral part of the performance evaluation process (*Jennings* UNDT/2010/213, affirmed in *Jennings* 2011-UNAT-184). In this case, the Applicant was not provided with meaningful access to an effective rebuttal mechanism with respect to the PER for 2010. As a result, the Tribunal finds that it cannot place reliance on the Applicant's PER for 2010.

55. Whilst the Respondent places particular emphasis on the Applicant's failure to rebut her PER for 2010, the Respondent did not address this email exchange between the Applicant and the Chief of Human Resources in his reply or subsequent submissions. The Tribunal finds that it was particularly important for UNICEF to comply with the PER procedures for the period of January to June 2010. The Tribunal notes, firstly, that the Deputy Director stated in his letter of 25 January 2010 that he "must ... insist that [the Applicant's] performance over the

remaining months be up to a satisfactory level”, and, secondly, that the actual termination decision referred to the Applicant’s performance in the period of “2007 to 2010”.

56. The Tribunal finds that, as a result of the Applicant being effectively deprived of a meaningful opportunity to rebut her PER for 2010, the Tribunal cannot place any reliance on it.

*Was the reason correct as a matter of law and was it correctly based on facts?*

57. The principal administrative instruction governing the termination of the Applicant’s fixed-term contract is CF/AI/2010-001, of which sec. 10 provides as follows:

## **Section 10**

### **Termination of appointment for unsatisfactory performance**

10.1 The principal tool for assessing performance is the paper-based Performance Evaluation Report (PER), or the new electronic Performance Appraisal System (e-PAS). Managers must use the PER/e-PAS to record unsatisfactory performance, and to bring it to the attention of the staff member in a timely manner, in order to offer the staff member an opportunity to improve his or her performance.

10.2 The performance of a staff member is considered unsatisfactory for the purposes of this instruction if he or she receives,

- (a) in cases where the paper-based PER is used,
  - (i) half or more PER ratings of “1” (“met few expectations”) in a given reporting cycle; or
  - (ii) half or more PER ratings below “3” (“fully met expectations”) over two consecutive reporting cycles[.]

58. The Tribunal will therefore consider whether UNICEF acted in compliance with its rules and procedures, including those in sec. 10 of CF/AI/2010-001, when terminating the Applicant’s employment.

59. Reasons for ending a fixed-term contract must be justified by the facts (*Gauthier* UNDT/2013/039). Although the Tribunal is not to substitute the Applicant's supervisors' appraisal of her performance, the question before the Tribunal is whether the documents before it properly corroborate the reason provided by UNICEF for the ending of her contract.

60. As a result of the Tribunal's findings that the PER for 2010 cannot be relied upon, the criteria under sec. 10.2(a)(i) of CF/AI/2010-001, requiring the Applicant to have "half or more PER ratings of "1" ("met few expectations") in a *given* reporting cycle" (emphasis added), is not satisfied. The "given reporting cycle" at the time of the decision was that of January to June 2010. The PER for 2010 was clearly taken into account when the decision was made to end the Applicant's employment: for example, the letter of 28 June 2010 stated that the decision was "taken after an extensive review of [her] performance which has been consistently unsatisfactory, as documented in your PERs from 2007 to 2010".

61. The Tribunal also finds that the alternative condition for termination under sec. 10.2 of CF/AI/2010-001 was also not satisfied. Section sec. 10.2(a)(ii) of CF/AI/2010-001 requires as a condition of termination that the staff member have "half or more PER ratings below '3' ('fully met expectations') over two consecutive reporting cycles". The Tribunal finds that, given that the PER for 2010 was relied on in arriving at the contested decision, the two most recent PERs to be counted were the PERs for 2009 and 2010. As no reliance can be placed on the PER for 2010, the requirement of sec. 10.2(a)(ii) CF/AI/2010-001 was not satisfied.

62. Therefore, the Tribunal finds that the termination of the Applicant's contract on the basis of poor performance was unlawful. It should be noted that even if the Applicant's contract had not been renewed on grounds of "unsatisfactory performance" rather than terminated, the Respondent could not have justified the Applicant's non-renewal premised on a PER that she was effectively not able to rebut. Therefore, the outcome of the case would have been the same as the standard

for “unsatisfactory performance” in UNICEF is the same with respect to both non-renewal and termination of contracts (see *Gauthier*, para. 30).

*Handling of the Applicant’s complain of abuse of authority and harassment*

63. By email of 5 October 2011, the Administrative Law Specialist, Policy and Administrative Law Section, Division of Human Resources, UNICEF, informed the Applicant that the Office of Internal Audit, UNICEF, found her allegations of harassment and abuse of authority unsubstantiated and closed the case “in June 2010”.

64. The Applicant’s complaint of harassment and abuse of authority was filed on 14 June 2010, and her complaint against termination on 30 June 2010, yet the harassment case was “closed in June 2010”. No information has been provided to the Tribunal regarding any steps undertaken to carry out the investigation referred to in the email of 5 October 2010, which, if it took place, was apparently carried out and concluded in a matter of days if not hours. No investigation reports were provided to the Tribunal, and indeed it is not even contended that there are any in existence. The Applicant was apparently not interviewed by any investigative panel.

65. UNICEF’s failure to properly address the Applicant’s complaints of harassment and abuse of authority are of particular concern in view of the numerous and well-articulated complaints sent by her in December 2009, April 2010, and May 2010 to the Deputy Director of Operations and Chief, Human Resources, India Country Office. There is no evidence that any proper steps were taken to address her complaints and allegations despite their serious nature and specific information provided. UNICEF failed to afford the Applicant’s complaints proper and timeous consideration.

66. Furthermore, the letter of 16 August 2010, signed by the Chief of the Policy and Administrative Law Section, Division of Human Resources, UNICEF, referred to the Applicant’s emails of 14 and 30 June 2010, and requested, in order to

“expedite the handling of her case”, “clarifications as to [her] specific allegations and requests” and “the scope and grounds of her request”. It is unclear, in view of the letter of 16 August 2010, how UNICEF could have possibly finished any proper investigation “in June 2010”, before even clarifying the nature, scope, and grounds for the Applicant’s allegations and claims. The Tribunal can only conclude that no proper investigation took place.

67. In any event, the Tribunal finds that, in the particular circumstances of this case, no effective investigation could have been carried out in the absence of an effective rebuttal process with regard to the PER for 2010. From the documents available in this case, including the email of the Chief of Human Resources, it appears that the Applicant’s complaint as well as her version of the events were brushed aside as not warranting serious consideration or even a formal rebuttal procedure.

### *Relief*

#### Unlawful termination and loss of chance of further employment

68. The Applicant’s employment was terminated unlawfully, for which she is entitled to proper compensation. The Tribunal finds that, given the fixed-term nature of the Applicant’s contract, the short-term renewals given to her previously, and her supervisors’ views regarding the Applicant’s performance, it would be speculative for the Tribunal to attempt to estimate the duration of the Applicant’s prospective employment if not for the unlawful termination. However, the Tribunal finds, on the examination of the records before it, that, if not for the unlawful termination and the lack of compliance with the established procedures, the prospect of further employment, even if limited in time, was not negligible and warrants appropriate compensation. In view of the circumstances of this case, the Tribunal finds that the amount of USD10,000 is the appropriate compensation under this head of relief.

69. The Tribunal further finds that the one-month notice given to the Applicant need not be taken into account in setting the amount of compensation, as this was her lawful entitlement under the applicable administrative instruction.

#### Emotional distress

70. As the United Nations Appeals Tribunal stated in *Antaki* 2010-UNAT-095, not every violation will necessarily lead to an award of compensation; compensation may only be awarded if it has been established that the staff member actually suffered harm.

71. The Tribunal finds that contemporaneous records, including the Applicant's emails, demonstrate that she was distressed by the unlawful termination and the stigma attached to it, as well as by UNICEF's failure to properly address her complaints and requests. The Respondent in his reply did not seek to introduce evidence in rebuttal of the Applicant's claims of emotional distress. The Tribunal further finds that the treatment such as that which the Applicant was subjected to caused her distress and anxiety.

72. The Tribunal finds that the Applicant shall be compensated in the amount of USD10,000 for the emotional distress caused by the Administration's actions with respect to her unlawful termination and failure to properly consider and investigate her complaint of harassment and abuse of authority. As this compensation concerns non-pecuniary harm, the Tribunal finds it appropriate to express the award as a lump sum rather than in net base salary (*Applicant* UNDT/2010/148, *Santos* UNDT/2013/038).

#### Other relief

73. It is unclear whether any termination benefits and entitlements were withheld from the Applicant as a result of the Administration's subsequent decision to treat the termination of her contract as non-renewal. The Tribunal will make appropriate

orders, below, to ensure that any termination benefits that the Applicant was entitled to but did not receive are paid to her. As these outstanding benefits and entitlements, if any, would have been made available to the Applicant in August 2010, it follows that they should be subject to retroactive interest, which shall be ordered in accordance with the established case law (see *Warren* 2010-UNAT-059, *Fayek* UNDT/2010/194).

74. In view of the findings above, the Applicant's PER for the period of January to June 2010 is rescinded and shall be removed from her personnel records.

### **Observations**

#### *Delegation of authority*

75. Although this was not raised by the parties, it is unclear whether the author of the decision to terminate the Applicant's contract, communicated on 28 June 2010, had the proper delegated authority to make that decision. The letter dated 28 June 2010 was authored by the Officer-in-Charge, India Country Office, and referred to the Country Representative's approval of the recommendation of the CRB to terminate the Applicant's appointment based on unsatisfactory performance. However, sec. 8.2 of CF/AI/2010-001 specifically provides that "[t]he sole authority to terminate the appointment of any staff member rests with the Executive Director, who, providing reasons for the action, may exercise this authority in accordance with the terms of a staff member's appointment". There are no contemporaneous records in this case demonstrating that, at the time, the contested decision was made by a decision-maker with the proper delegation of authority.

76. Further, even if the authority to terminate was delegated by the Executive Director to the Country Representative, it is unclear whether the Country Representative actually made the contested decision. Although the letter of 28 June 2010, signed by the Officer-in-Charge, India Country Office, stated that

“the [Country] Representative ha[d] approved the recommendation of the [CRB]”, there is no actual termination decision on file signed by the Country Representative. The letter of 28 June 2010 is not in itself sufficient to demonstrate that the decision was in fact made by the Country Representative (see, e.g., *D’Hooge* UNDT/2010/044, para. 61).

77. However, in view of the findings above, the Tribunal did not deem it necessary to reach a determinative conclusion on the issue of delegation of authority.

#### *Availability of UNICEF’s administrative issuances*

78. The Tribunal notes that UNICEF’s administrative issuances do not appear to be publicly or easily available. While the reasons for this are unclear, if indeed this observation is valid, it may be an issue that the Administration may wish to address.

#### **Conclusion**

79. The Tribunal finds that the Applicant’s fixed-term contract was terminated on the grounds of alleged unsatisfactory performance for the period of “2007 to 2010”. The Tribunal further finds that the PER for 2010 cannot be lawfully relied upon to justify the finding of unsatisfactory performance as the Applicant had no opportunity of a meaningful rebuttal. Therefore, the termination of the Applicant’s contract on the basis of poor performance was unlawful. The Tribunal also finds that no proper investigation was carried out regarding the Applicant’s claims of harassment and abuse of authority.

#### **Orders**

80. The Applicant’s PER for 2010 is rescinded and shall be removed from her personnel files.

81. The Applicant shall be paid USD20,000, which sum 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 this 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.

82. The Applicant shall be paid any remaining termination benefits and entitlements, plus interest at the applicable US Prime Rate from 1 August 2010 until the date of payment. If payment is not made within 60 days of the date this Judgment becomes executable, an additional five per cent shall be added to the US Prime Rate until the date of payment.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 14<sup>th</sup> day of March 2013

Entered in the Register on this 14<sup>th</sup> day of March 2013

*(Signed)*

Hafida Lahiouel, Registrar, New York