



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/059

Judgment No.: UNDT/2014/128

Date: 30 October 2014

Original: English

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**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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JUDGMENT

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## **Introduction**

1. The Applicant joined the United Nations Office for Project Services (“UNOPS”) in February 2009. In September 2009, she was transferred to the Jerusalem Operations Centre (“JMOC”) as its Interim Director. Effective 1 February 2010, she was selected as the substantive Director of JMOC at the P5 level and given a one year fixed-term appointment.

2. Following a six-month extension of her contract in January 2011, she was separated from service on 13 July 2011. She filed her first Application before the Tribunal on 26 September 2011 against the shortened six month contract which she had been given following the expiry of her one-year fixed-term contract.

3. She then filed a second Application on 19 December 2011 challenging the upholding of her performance appraisal by the UNOPS rebuttal panel. Also on 20 December 2011, the Applicant filed a third Application against the decision not to renew her fixed term contract and to place her on special leave.

4. On 9 February 2012, by an order of the Tribunal the Applicant filed a comprehensive Application incorporating all the claims in her three Applications and the remedies sought.

5. The Respondent filed his Reply to the comprehensive Application on 1 March 2012 stating that all the impugned decisions made by UNOPS with respect to the Applicant were correct and praying the Tribunal to dismiss all the claims and the entire Application.

## **Facts**

6. The Applicant joined UNOPS at the P5 level on 25 February 2009 as Head of Programme of the Iraq Operations Centre (“IQOC”) based in Amman, Jordan.

7. JMOC was an Operations Centre located in Jerusalem functioning under the supervision of the Europe and Middle East Office (“EMO”) whose offices were based in Copenhagen, Denmark. JMOC operated in Israel and was subject to

the Israeli requirements in terms of visa and movement passes although the primary beneficiary of the projects it implemented was the Palestinian Authority.

8. In September 2009 and with the imminent departure of the then Director of JMOC, the Applicant was directed to transfer to JMOC on an emergency basis to act as its interim Director.

9. She accepted the transfer and took up her position as interim Director in JMOC on 1 October 2009.

10. Some of her responsibilities as the interim Director of JMOC included: (a) being a member of the United Nations Country Team (“UNCT”) for the Occupied Palestinian Authority (“oPt”); (b) serving as a member of the security management team; (c) responsibility for implementing and overseeing UNOPS projects; and (d) the management of about 80 staff members located in Jerusalem, Ramallah and Jericho.

11. The Applicant briefly met the outgoing Director of JMOC who told her that the targets imposed for JMOC were unrealistic and that the administrative budget provided from the EMO was insufficient. He also complained of problems with seeking assistance from the EMO and of poor treatment.

12. It was well known and accepted by the EMO that the working conditions in the Jerusalem office made it a difficult duty station.

13. The office that the Applicant inherited was in both physical and operational disarray. There was a large number of unread emails in the outgoing Director’s official computer as well as a back-log of approvals for the payment of salaries and certain files were missing.

14. On an operational level, the physical premises that JMOC occupied did not meet the Minimum Operating Security Standards (“MORSS”) and were not environmentally safe while also being located in a volatile neighbourhood. There were insufficient funds to pay for overheads due to miscalculation of project budgets; and there was no new business in the pipeline for the future.

15. The Applicant set about her duties, cleared the backlog of approvals and formed a team comprised of a cross-section of JMOC staff members to deliberate on the way forward for the Centre. She sought to rebuild donor relationships and engaged with UNDSS to tackle the security issues.

16. She informed SC who was the EMO Regional Director about her efforts and on 11 October 2009, 25 October 2009 and 21 December 2009, while still an interim director, sent detailed memoranda to him in which she documented the state of affairs at JMOC and proposed recommendations for improvement on some of the issues identified.

17. The JMOC team set up by the Applicant decided to initiate a strategic audit in order to find a way forward for the office. The Regional office endorsed this initiative and a strategic audit team was constituted in JMOC. It prepared a report dated 10 November 2009. When on 13 November 2009 the Regional Director visited JMOC, he was presented with this report orally and in writing. In the presence of JMOC senior and middle level managers and JP the IQOC Director, he approved the recommendations made by the strategic audit team.

18. The approval included the relocation of JMOC to new MORSS-compliant premises. The Applicant found new premises that were acceptable to UNDSS and approved by the Corporate Procurement Committee and also obtained legal and financial approval in this regard. The EMO sent the Regional Human Resources Specialist to Jerusalem to aid in the restructuring and relocation process.

19. Following a competitive selection process, the Applicant was reassigned on a one-year fixed-term contract effective 1 February 2010 at the P5 level as the substantive Director of JMOC.

20. SC left the EMO in mid-July 2010 and his deputy, AM, took over as acting Regional Director.

21. Between 18 and 21 July 2010, the UNOPS Deputy Executive Director, VV, visited JMOC. A written report on the work and state of JMOC was prepared for him on that occasion by the Applicant and her team.<sup>1</sup>

22. On 6 September 2010, the Applicant wrote to AM asking whether her contract would be extended to enable her make some tax-related decisions as demanded by her accountant.

23. AM replied the same day stating that the Applicant was seen in the EMO Regional office as an able Director and that he had no reason to believe that her contract would not be extended through 2011.

24. On 4 October 2010, FS assumed duties in Copenhagen as the new EMO Regional Director. She met with the Applicant for the first time during a team video conference later that month.

25. An official audit was conducted in late 2010 requiring the mobilization of the entire JMOC office and the provision of a large amount of detailed information. On 15 October 2010, the Applicant sent the required response on behalf of JMOC to the Internal Audit and Investigations Group (IAIG). On 8 November, she orally briefed the auditors in Jerusalem.

26. As at the beginning of November 2010, no action had been taken on the Applicant's Performance Review and Assessment (PRA) and it remained at stage one. On 5 November 2010, she sent an email to AM and FS seeking advice as to whom she should indicate as her supervisor as well as on how to set her objectives for the purposes of preparing her PRA. She also wanted to know whether there were any general objectives and percentages for Directors of Operations Centres.

27. In his response of the same day, AM told the Applicant that FS was her supervisor and that it was not always easy to come up with measurable objectives. He advised that she come up with objectives relevant to her targets and business plan and finalize these with FS' input.

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<sup>1</sup> UNOPS (Jerusalem Operations Center) Strategic overview 18-21 July 2010.

28. The Applicant drafted her objectives but received no input from FS at that time.

29. AM had written to the Applicant on 24 November 2010 on the subject of targets for 2011. He stated that the targets and administrative budget allocation for the Region had been reduced and that JMOC had been allocated USD100,000. He then requested that JMOC prepare and submit by 30 November a budget narrative as well as budget details based on the USD100,000 allocation.<sup>2</sup>

30. The Applicant sent an administrative budget proposal to AM on 30 November 2010 that was higher than the sum indicated stating that the budget proposal was prepared based on the need to comply with minimum legal and ethical standards and that only four core categories of costs had been included.<sup>3</sup>

31. She pointed out that Security/MORSS compliance took up about half of the said budget and suggested that the Regional Office see to the creation of a source of funding for Security compliance for their offices located in conflict zones as had been done by some other United Nations Agencies.<sup>4</sup>

32. AM replied the Applicant on the same day and asked her to resend the budget based on the USD100,000 allocation made to her office. The Applicant responded seeking guidance on what could be eliminated from the four categories of costs on which JMOC had based the budget preparation.<sup>5</sup>

33. The new Regional Director, FS, who was copied on these emails also replied on the same day stating that although there was need to strengthen the office capacity and its security, it was impossible to meet those needs and demanded that the Applicant submit a budget for USD100,000 as she had been instructed.<sup>6</sup>

34. While submitting a revised administrative budget for JMOC on 1 December 2010, the Applicant pointed out in the accompanying email that she

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<sup>2</sup> JMOC Administrative Budget Narrative-Annex 50 (b) of the Application.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

was doing so with objections and that she would not accept management responsibility where she was being put in a position in which she could not comply with rules, regulations, legal agreements, ethical standards and targets.<sup>7</sup>

35. FS was unhappy with the Applicant's response and stated as much in an email dated 2 December 2010.

36. On 3 December, the Applicant asked FS about the renewal of her contract pointing out there was little time left to renew her Israeli Ministry of Foreign Affairs card (yellow card), her UNLP and Israeli visa if she was extended.

37. She got a reply on 6 December 2010 from FS telling her that what AM told her about her contract extension in September still stood and that they would talk when she visited JMOC the following week and finalize things during that visit.

38. FS and AM visited Jerusalem on 13-16 December 2010. During this visit they met with various Israeli Ministers, the United Nations Resident Coordinator and held an all-staff meeting.

39. On 16 December which was the last day of the visit and while a reception for JMOC's donors and partners at a restaurant in Ramallah was taking place, FS and AM asked the Applicant to sit with them a short distance away from others in the restaurant. FS then told the Applicant that negative reports had been received regarding the Applicant's management style and that she was brusque, curt and elusive. She also told the Applicant that her reputation at the EMO was seen to be tough, bordering on negative, and then asked her to comment.

40. The Applicant described her management style as democratic and suggested that any negative reports were perhaps the handiwork of disgruntled staff members who were not happy with their end of year evaluations which had just been completed at JMOC.

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<sup>7</sup> Ibid.

41. FS and AM also told her that some staff members felt that she was committed, hard-working and smart and advised her to spend more time greeting staff members in the mornings.

42. When the Applicant asked about completing her PRA, FS replied that she had no information about the PRA system or process.

43. Upon returning to Copenhagen, FS sent an email on 21 December 2010 to the Applicant highlighting challenges that she felt the Applicant was facing in her management of JMOC. These included the working methods of the JMOC senior-management-team, the Applicant's programme and people management and the Applicant's communication channels and style.

44. She asked that the Applicant write back showing how she intended to address the said issues. In the same communication, she informed the Applicant that she had recommended that her contract be renewed for six months to see how the issues raised would be resolved before she would consider a further extension.

45. The Applicant responded to FS on 28 December 2010 addressing the issues raised and also identified what she felt were discrepancies. She stated that FS' email did not fully reflect the discussion that took place on 16 December.

46. She also pointed out that a six-month contract extension would not be in JMOC's interest due to the negative impact it would have on stability, employee morale as well as business organisation. She noted that Israeli regulations require at least a year's contract for the issuance of a yellow card which would enable her to effectively manage field operations.

47. FS expressed disappointment in a 4 January 2011 reply that the Applicant did not see the positive feedback in her email of 21 December and had only concentrated on issues to be resolved. She refused to discuss the Applicant's response and asked to be sent a step by step plan to address the issues she had raised.

48. The Applicant responded the next day offering suggestions as to how she could possibly address the issues that FS raised and asking for feedback on any other possible actions that she could take.

49. After the visit of FS and AM in December 2010, some JMOC staff members sent a petition in support of the Applicant without the Applicant's knowledge to the EMO. The letter stated that the complaints against the Applicant did not reflect the view of the majority in JMOC.

50. The petition praised her fairness and objectivity in decision making, her efforts in promoting gender equality, her support and empowerment of local staff, her two-way communication skill as well as her high level of professionalism, dedication and efficiency especially in tackling the problems faced by JMOC in the previous year.

51. On 31 December 2010, the Applicant's yellow card expired.

52. On 4 January 2011, FS wrote to the Applicant removing her authority to deal with HR matters in JMOC and informing her that these would be handled by the Regional HR adviser with support/guidance from the corporate HR team.

53. On 17 January 2011, the Applicant received an email informing that her fixed-term contract had been extended for six months until 31 July 2011.

54. FS visited JMOC again from 24-25 January 2011 accompanied by the Global Human Resources Director of UNOPS who will be referred to here as PMP. He briefed all personnel of JMOC on various human-resource related matters before conducting one-on-one sessions with various staff; asking that the Applicant not be informed who he and FS were meeting with.

55. During this visit, the Applicant raised the matter of her PRA again with FS who told her that she had insufficient information on the matter having received no hand-over notes from the former EMO Director, SC. The Applicant offered to provide input from other members of the UNCT as well as the Resident Coordinator and donors and partners that worked with JMOC at the time. FS refused stating that the Applicant could not provide input from outsiders.

56. The Applicant provided a performance assessment filled by the United Nations Deputy Special Coordinator/Resident Humanitarian Coordinator for the oPt. She also submitted assessments from the Senior Project Manager, United Nations Register of Damage and the Programme Manager, United Nations Mine Action Service. These two were both heads of agencies which shared office premises with JMOC.

57. On 28 February 2011 while the Applicant was still in Israel, her UNLP expired.

58. The Applicant's 2010 PRA was initiated on 8 March 2011 and the objectives that she had created previously were then accepted by FS who also instructed the Applicant to indicate that the mid-year review was not conducted due to the absence of a Regional Director at the EMO at the relevant time.

59. On 11 March 2011, FS entered ratings on the Applicant's performance and partial comments. These ratings were then deleted on 23 March and on 24 March she conducted an end of year performance review discussion with the Applicant via tele-conference with AM and PMP in attendance and participating. The discussion included reference to complaints made against the Applicant as well as events that had occurred in 2011 and the Applicant's follow-up action following the email exchange that started on 21 December 2010.

60. The Applicant's PRA and evaluation were finalised on 1 April 2011 and she was given an overall rating of 'partially met expectations'.

61. FS and PMP visited JMOC again on 8 April 2011 having given the Applicant two days' notice. During the course of two meetings held on the same day, they discussed her management of two JMOC staff members who had performance issues and a performance improvement plan (PIP) said to have been put in place for the Applicant.

62. During the discussions, it was suggested to the Applicant that she had harassed and retaliated against a staff member who had complained about her. She

was also told that her email to the DED about certain communications between her and her supervisor meant that she bit the hand that fed her.

63. The Applicant received an email from PMP on 26 April 2011 attaching a letter from the UNOPS Executive Director dated 19 April 2011. The letter informed the Applicant that her fixed-term contract would not be renewed once it expired on 31 July 2011 and that she was being placed on special leave with full pay with effect from 1 May 2011 due to lack of improvement in her management style in spite of a PIP put in place for her.

64. She was further instructed by PMP not to answer any questions from JMOC personnel and not to offer any farewell notification to UNCT colleagues, donors or external partners.

65. The Applicant submitted a request for the rebuttal of her 2010 PRA to PMP on 1 May 2011. She challenged her overall performance rating and the individual ratings she received on each of her four objectives as well as the ratings in six competencies.

66. After its constitution, a UNOPS Rebuttal Panel scheduled an interview with the Applicant on 28 June 2011. During the said interview, the panel did not allow the Applicant to call any witness in support of her rebuttal. The panel also interviewed six other people including PMP, FS, AM, the Financial Management Officer in the Regional Office and two staff members of JMOC.

67. On 29 July 2011, the Applicant received PMP's email informing her that the Rebuttal Panel had decided to uphold her PRA rating of "partially met expectations".

68. The Applicant's six-month contract expired on 31 July 2011 and she was separated from UNOPS.

69. The Applicant filed three Applications with the United Nations Dispute Tribunal. The first was on 26 September 2011 in which she contested the decision to give her a shortened six-month fixed-term contract; the second on 19 December 2011 contesting the rebuttal panel's decision to uphold her overall performance

evaluation; and another Application on 20 December 2011 challenging the decision not to renew her fixed-term contract and to place her on special leave.

70. Following a receivability challenge by the Respondent, the Tribunal issued Judgment No. UNDT/2013/004. In that judgment, the Tribunal decided that of the three Applications challenged by the Respondent, only the decision on the shortened contract period and the decision to uphold the Applicant's PRA rating by the rebuttal panel were receivable.

### **Applicant's case**

71. The Applicant's case as deduced from her pleadings and oral testimony is summarized below.

72. The Respondent acted unfairly and contrary to the express promises of UNOPS Managers in giving the Applicant a shortened six-month contract. This action was based on the unfounded allegations of disgruntled staff members and a personal dislike of the Applicant.

73. The Respondent also failed to follow its own rules and regulations both in the completion of the Applicant's PRA as well as in the course of the rebuttal process. There were numerous due process irregularities and the eventual outcomes of both processes were manifestly unreasonable. The Applicant had consistently performed well as the Director of JMOC, stabilising an office in crisis as well as rebuilding relationships with both donors and partners.

74. Specifically, a promise had been made by the Respondent to extend the Applicant's contract for a further one year period. The Applicant was given an assurance in September 2010 by AM, the then acting EMO Regional Director that her contract would be extended through 2011 and he expressly knew that she intended to rely upon that promise.

75. When FS joined the Organization in October 2010 as EMO Regional Director, and with her yellow card due to expire, the Applicant again sought confirmation of the extension of her contract. FS confirmed the assurance she had previously received from AM, knowing that the Applicant would rely on it.

76. Before recommending a shortened contract extension, there was no effort on the part of the Respondent to manage the Applicant's performance in 2010. The Applicant's supervisors largely left her to fend for herself in a new position in an extremely difficult duty station with an inadequately funded and previously mismanaged office.

77. In December 2010, the Applicant specifically requested her supervisor to complete her PRA, which FS declined to do. Yet a mere nine days later FS recommended a shortened contract extension which was accepted by UNOPS Executive Director contrary to AI/HRPG/2010/02<sup>8</sup> which purports to guarantee a consistent and transparent process for staff contract renewals.

78. The Respondent relied on the email of FS dated 21 December 2010 to support the decision to give the Applicant a shortened contract. The email did not accurately summarise the purported debriefing with the Applicant held on 16 December 2010 which took place in a public restaurant in the presence of the majority of the Applicant's staff and guests.

79. Additionally, even if the meeting of 16 December could be termed a mission debriefing, the Applicant's supervisor recommended a shortened contract prior to and without considering any response by the Applicant. The efforts made by the Applicant to resolve the challenges highlighted in FS' email were not taken seriously and in fact were discounted out of hand.

80. The Respondent makes reference to the Applicant's lack of improvement notwithstanding a performance improvement plan that was allegedly put in place at the end of 2010. The Applicant was under no impression that these exchanges with FS starting on 21 December constituted a performance improvement plan. The normal procedures of the United Nations require such an improvement plan to be prepared by a supervisor and specifically agreed upon in writing with the staff member. No such procedure was followed or even suggested to the Applicant.

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<sup>8</sup> UNOPS Administrative Instruction on Contract Renewal for Staff 2010.

81. A singular email from FS on 21 December 2010 unsupported by any evidence, concrete facts, behavioural examples or input from concerned stakeholders did not amount to a performance improvement plan, did not afford due process nor did it comply with UNOPS own regulations.

82. The actions of the Respondent in extending her contract for six months adversely affected the Applicant's ability to carry out her duties as JMOC Director. She was unable to renew her expired yellow card as a one year contract is a pre-requisite for its issuance by the Israeli Ministry of Foreign Affairs. Without it, the Applicant was forced to curtail her trips between the JMOC offices in Jerusalem its offices outside Jerusalem and its project sites in the oPt.

83. It also limited her ability to build and maintain business acquisition responsibilities with those donors and partners who were only present in the oPt. The six-month extension also affected the morale of the JMOC office, reducing the Applicant's perceived authority.

84. There were numerous due process irregularities and flaws in the PRA process which the Respondent failed to adequately address. The Respondent failed to follow his own procedures for assessing the Applicant's performance as set down in the Guidelines for Performance Results and Assessment ("PRA Guidelines") issued in January 2010.

85. The Respondent's argument that the PRA Guidelines are not mandatory is not supported by the PRA Guidelines themselves or any other document and in fact nowhere within the said guidelines is it stated that its provisions are optional. Moreover, at the relevant time, there were no alternative instruments governing the PRA process.

86. In the process of reviewing her performance, the Applicant's supervisors failed to manage her performance or to engage in any meaningful discussion on her objectives, development plan, mid-year review or performance in general. There was no adherence to the deadlines set out in the PRA Guidelines or any effort made to discuss and/or take into account the opinion of the Applicant as

regards her ratings. Ultimately the PRA process was lacking in both substance and transparency.

87. Throughout 2010 there was no discussion or comment on the Applicant's individual performance objectives as required by the PRA Guidelines and her supervisors had insufficient knowledge upon which to evaluate her performance objectively. By FS' own admission, having received no hand-over notes from SC, she had insufficient basis upon which to evaluate the Applicant's performance. It was particularly unreasonable and inappropriate for the Applicant to be assigned a poor performance rating given her supervisors' failure to discuss and approve her objectives at any time in 2010.

88. The Applicant had limited and infrequent engagement with all of the three supervisors she had within the reporting cycle. Throughout the year, she had only had five one-on-one conversations; three of those occurring in December 2010 and one of those three in a public restaurant in full view of JMOC staff and stakeholders. In addition to this state of affairs and in violation of the PRA Guidelines, the Applicant received no coaching, counselling, mentoring or training relevant to her position as Director of JMOC.

89. The Respondent attributes the absence of a mid-year review of the Applicant in 2010 to there being no Regional Director when this stage of the PRA process became due and that it was not a mandatory requirement at the time. It is submitted that both positions are incorrect.

90. Firstly, at the relevant time AM was functioning as acting Regional Director and had the necessary authority to conduct the Applicant's mid-year review. Secondly, PMP's email of 10 August reminding supervisors and staff to complete their mid-year reviews contradicts any conclusion that a mid-year review is optional in nature.

91. In any case, if the mid-year review was in fact optional, then the only reason a competent supervisor would choose not to do one would be because the Applicant's performance was positive and on-track and therefore her performance did not necessitate a review.

92. The Applicant's supervisor FS further refused to consider outside inputs to ensure objectivity during the PRA process. The PRA Guidelines clearly require a supervisor to take into account not only their own direct observation of the staff member but also feedback from others who have worked directly with the said staff member.

93. Her supervisors clearly acted unfairly and contrary to the PRA Guidelines in choosing to discount the input of either the Resident Coordinator or of members of the UNCT with whom the Applicant worked and interacted on a regular basis.

94. Her supervisors also failed to provide concrete behavioural examples, relating to her performance in 2010 to support the negative ratings she received. The PRA Guidelines clearly state that when a staff member's PRA rating is less than successful, it must be supported by specific behavioural examples.

95. UNOPS makes reference to the personal subjective observations of FS and PMP which for the most part occurred in 2011 and not 2010. Despite the large number of communications the Applicant would have sent in the course of her work, it is surprising that the Respondent was unable to produce specific examples which could lead a reasonable person to understand the rationality of FS and PMP's conclusions. This is especially shocking considering that a major criticism of the Applicant concerned her communication style.

96. In assessing her performance, the Applicant's supervisors failed to respect the temporal scope of the Applicant's 2010 PRA or to refrain from the "recency" effect. The scope of the PRA is the calendar year, in this case January to December 2010. It is clear from the evidence relied upon by the Respondent that her supervisors based their assessment of her on visits and interaction that took place largely in the early part of 2011. Her supervisor in fact co-mingled relevant performance on 2010 with irrelevant performance in 2011.

97. The PRA Guidelines also warns supervisors to avoid placing great reliance on recent events when conducting an assessment. The singular purported performance discussion with her supervisors took place on 16 December 2010, a

mere 15 days before the end of the calendar year. This discussion centred on unsubstantiated allegations of some JMOC staff members said to have been received in December 2010.

98. Undue weight was placed upon these allegations in giving the Applicant a less than favourable assessment. The PRA is a year-long assessment process and it is clear that her supervisor failed to consider her performance for the first nine to ten months of 2010.

99. The rebuttal process was also flawed and deprived the Applicant of due process protections. In addition to interviewing the Applicant, the Rebuttal Panel interviewed six other people but refused to allow the Applicant to put forward any witnesses on her behalf. The Panel failed to interview any staff members who worked closely with the Applicant and offered the Applicant no opportunity to respond to any of the statements proffered by the other interviewees as she was the first to be interviewed.

100. All but two of those interviewed were based in Copenhagen and had little or no interaction with the Applicant. Out of the two JMOC staff interviewed, one was unhappy about the state of his contract and the other worked out of the Jericho office where he managed a stand-alone project and was not actively engaged in office-wide operations.

101. Although the Applicant submitted key evidence to the Rebuttal Panel and despite assurances that it would come back to her, she received no response and no further feedback before being informed by PMP that her overall performance rating had been upheld. Beyond this, the Panel chose to discount relevant information including the letter of support from JMOC personnel as well as the anonymous survey conducted of the 20 members of staff whom the Applicant directly supervised.

102. Ultimately, the final conclusion of the Applicant's 2010 PRA is irrational. UNOPS clearly failed to follow its own rules and regulations and the fundamental principles of the United Nations. The Applicant performed well as JMOC director

especially in a new role without any support from her supervisors in one of the most difficult duty stations.

103. The Applicant prays the Tribunal to order the Respondent to compensate her for moral injury, emotional distress and the violation of her due process rights. The Applicant also prays the Tribunal to order that the rebuttal process be renewed and completed in full compliance of her due process rights.

### **Respondent's case**

104. The Respondent's case is summarized as follows.

105. The statements by AM and FS to the Applicant in regards to the renewal of her contract are not sufficient to constitute a reasonable expectation of a renewal of contract for one year. Notwithstanding any possible promise of an extension, the Applicant's poor performance justified the extension of her contract for only six months. In any event, no rule, regulation or policy of the Organisation precludes the Respondent from granting the Applicant a contract extension for less than one year.

106. The Applicant has relied heavily on the PRA Guidelines but these, as the name suggests, are not mandatory and are merely advisory provisions designed to provide advice to both supervisors and their supervisees in the course of the PRA process. The PRA process as well as the subsequent rebuttal, as regards the Applicant, were both carried out in a reasonable manner and did not violate any of the Applicant's due process rights.

107. The Applicant argued that the email of AM dated 6 September 2010 created an expectation for the renewal of her contract. On the plain understanding of the words contained therein, it is clear that AM was merely speculating on the UNOP's Executive Offices decision rather than making any commitment himself; which he would have no authority to make.

108. The communication was for the purpose of allowing the Applicant to make certain tax-related decisions and it would be unfair to allow the Applicant to rely upon these statements for non-tax related purposes.

109. Efficient or outstanding performance cannot create an expectancy of renewal so that any reference made by AM regarding the Applicant's performance as Director of JMOC is not relevant for the present purposes.

110. Thirdly, in order for a claim of legitimate expectation to succeed there must be more than mere verbal assertions, either a firm commitment or an express promise. AM's comments in the present case fall far short of this benchmark and are rather a qualified statement. In his 6 September 2010 email, AM was neither making an assertion nor a firm commitment.

111. The Applicant's reliance on the email of FS dated 6 December 2010 has no basis. FS made no reference to a one-year extension as with the email of AM, and nothing in this email constitutes a firm commitment to give the Applicant a one year extension to her contract.

112. Ultimately, even if the assumption were to be made that the Applicant was promised a one year contract extension, any such promise would have been contingent on the Applicant's continued satisfactory performance. Instead by December 2010, serious performance issues were identified which continued until the Applicant was placed on special leave. This created a reason for the Respondent not to renew the Applicant's contract notwithstanding any promise.

113. The Applicant in citing the provisions of UNOPS AI/HRPG/2010/02 failed to note that paragraph 5.3(iv) of the same provides that "in case no performance record is available to justify the requirement mentioned in (i) above, the contract shall not be renewed."

114. Following from this, the Respondent was entitled not to renew the Applicant's contract at all, *a fortiori* and as such was entitled to renew the Applicant's contract for six months rather than a year. The renewal of six months is not contrary to any rule or regulation of the Organisation and, whereas Staff Rule 4.13 does create a maximum duration for the extension of fixed-term contracts, it does not impose a minimum duration.

115. The Applicant bears the burden of proof to demonstrate that there was a manifest error in the PRA process and subsequent rebuttal. The Applicant employs the term “PRA rules”; however their actual title is ‘Guidelines for the Performance Results and Assessment - January 2010’.

116. UNOPS Organizational Directive No.1 (“UNOPS Legislative Framework”) provides that any ‘policies, instructions, procedures or business process maps intended to be mandatory and for general application must only be established by duly promulgated [Organizational Directives] or [Administrative Instructions].’ The PRA Guidelines fall under neither one of these descriptions and are in fact not mandatory. It is clear that they are merely intended to provide guidance allowing for flexibility in the PRA process.

117. It should be noted that UNOPS Organizational Directive No. 38 only came into effect after the Applicant’s performance had already been reviewed and as such has no application in the present case.

118. The Applicant has argued that in the absence of an official instruction from UNOPS regarding performance improvement plans, she is entitled to rely upon ST/AI/2010/5, the ‘Administrative Instruction on the Performance Management and Development System of the UN Secretariat’.

119. This is incorrect as section 4.2 of the UNOPS Legislative Framework clearly provides that United Nations Administrative Instructions only apply to UNOPS where it is stated as such within the administrative instruction. As ST/AI/2010/5 does not state that it shall be applicable to separately administered organs and programmes of the United Nations, it is not binding upon UNOPS.

120. This is in line with ST/SGB/2009/4 which provides at section 2.3 that “Administrative issuances shall not apply to the separately administered funds, organs and programmes of the United Nations, unless otherwise stated therein, or unless the separately administered funds, organs and programmes have expressly accepted their applicability.”

121. UNOPS, under the delegated authority of the Secretary-General, continues to bear the authority to create and follow its own human resources mechanisms. The only mandatory requirement applicable in the present case is section 1.3 of the United Nations Staff Rules and Regulations which provides that “Staff members shall be evaluated for their efficiency, competence and integrity through performance appraisal mechanisms that shall assess the staff member’s compliance with the standards set out in the Staff Regulations and the Staff Rules for purposes of accountability.”

122. Nothing in the Staff Rules prevents UNOPS from using a highly flexible system which contains recommended, and not mandatory, steps. The only binding requirement being that a staff member is assessed, which in the Applicant’s case was done.

123. Should it be found that the PRA Guidelines impose mandatory and not just recommended procedures to be followed, then it is submitted that any procedural irregularities may be equally attributed to the Applicant.

124. The Applicant had previously advised SC that she did not want him to do her PRA and beyond this she failed in her responsibility to edit her profile and change her supervisor both when AM became her supervisor and again when FS took over as Regional Director. It should also be noted that when the Applicant purported to request FS to complete her PRA on 13 December 2010, she was in fact asking that it be prepared and completed there and then which FS naturally declined to do.

125. The burden of proof lies with the Applicant to show that there was ‘manifest error’ in the PRA rebuttal process, this burden she has failed to discharge. It should be noted that the Applicant does not contest the accuracy or consistency of the findings of fact and analyses conducted by the rebuttal Panel nor does she allege that the Panel was biased against her.

126. For two of the Applicant’s objectives, ‘Net Revenue, Delivery and Project Management and Business Acquisition’, the amounts she achieved were lower than her set targets. These are clearly measureable objectives and as the Applicant

failed to meet them, it was reasonable for her to be given ratings of ‘Partially Met Expectations’ and ‘Fully Met Expectations’ respectively.

127. In regards to the Applicant’s objective of UNCT representation, the Rebuttal Panel was informed that JMOC relinquished the important lead role in the UNCT infrastructure sub-team during her tenure. The infrastructure was one of UNOPS’ focus areas and it was unnecessary to re-interview the Applicant on this point as the conclusions on her other PRA objectives meant a change in this objective would make no difference to her overall rating.

128. It was clear from the visits made to JMOC by FS, AM and PMP that it was a deeply divided office. When asked by the Rebuttal Panel to comment on this, the Applicant stated that she believed it to be only a few people who disagreed with her management style and/or ability. The Rebuttal Panel was entitled to draw its own conclusions based on the evidence before it and by requesting the Applicant’s comments on this matter fully respected all due process requirements.

129. In light of the above, it is established that the Respondent acted fairly and properly, taking into account all the relevant rules and regulations of the Organization, both in giving the Applicant a six month contract extension and during the PRA rating.

130. The rebuttal process was conducted fairly and did not violate any of the Applicant’s due process rights. The Rebuttal Panel properly assessed all relevant evidence before it and was properly entitled to uphold the Applicant’s PRA rating. The Respondent prays that this Application be rejected in its entirety.

### **Issues**

131. Having reviewed the case record, the Tribunal identifies and frames the following three principal questions for consideration:

- a. Did the Respondent promise or assure the Applicant that her contract would be renewed for another year through 2011? Did the said promise or assurance create an expectancy of renewal for one year?

b. Did UNOPS follow its own guidelines for Performance Review Assessment (PRA) of the Applicant in this case? Would failure to follow the guidelines be fatal to the Respondent's case?

c. Did the UNOPS Rebuttal Panel afford the Applicant due process and conduct a fair rebuttal process? Was the said rebuttal process flawed in any way?

### **Considerations**

*Did the Respondent promise or assure the Applicant that her contract would be renewed for another year through 2011? Did the said promise or assurance create an expectancy of renewal for one year?*

132. It was the Applicant's case that on at least two occasions, she was promised and assured by her supervisors that her contract would be extended for a further one year period through 2011.

133. The Respondent contended that at no point in time was any promise made to the Applicant that her contract would be extended for another year. He submitted that the statements of FS and AM did not constitute an express promise of the extension of the Applicant's contract or create a reasonable expectation of renewal of the said contract.

134. Annex 13 to the Application provides evidence of the first of these assurances given on 6 September 2010 when the Applicant in an email had asked AM, who at the time was the acting Regional Director, whether her contract with UNOPS would be extended through 2011. She told him she needed to know to enable her make some critical tax-related decisions. AM had replied on the same day assuring her that there were no plans to shut down JMOC and that she was seen as its able director and that he believed her contract would be extended through 2011.

135. AM's said email unequivocally conveyed the message that as long as the Executive Office of UNOPS was not minded to shut down JMOC, the Applicant's job was safe for the coming year.

136. In an email sent to both FS as the new Regional Director and AM on 5 November 2010, the Applicant discussed her 2010 PRA and asked that her contract be extended before the completion of the said PRA so that she could apply in time to extend her UNLP, visa and yellow card. Although AM responded the same day, he said nothing about her contract extension<sup>9</sup>.

137. Again on 3 December 2010, the Applicant emailed FS<sup>10</sup> regarding the delay in extending her contract. She told FS that in September AM had assured her that her contract would be extended. She wanted to know if FS thought differently.

138. On 6 December 2010, FS replied assuring her that she would recommend her extension and that AM's assurances on 6 September 2010 about her contract extension still stood. FS said in the same email that there was no need for the Applicant to think about winding down and urged her to relax.

139. In his closing address, the Respondent's Counsel submitted that the assurances of AM and FS were neither express nor implied promises. He continued that AM's assurances of contract renewal depended on the approval of the UNOPS administrative budget which he had no authority to approve.

140. It was also argued on behalf of the Respondent that FS had not made any commitments beyond those made by AM in September 2010. It was further submitted that the extension discussion with FS did not refer to a contract extension of one year but merely revolved around whether the Applicant should use her annual leave and leave UNOPS.

141. The Tribunal is not in any doubt that both AM and FS at different times in September and December 2010 assured the Applicant in writing that she did not need to entertain any fears concerning her contract extension. The contention that these assurances were neither express nor implied promises is simply untenable.

142. The argument that AM's assurances depended on budget approval is wholly irrelevant. UNOPS budget with regard to funding the post of the JMOC

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<sup>9</sup> Annex 15.

<sup>10</sup> Annex 16.

Director was never an issue at any time in this case. As her interim supervisor, AM was assuring the Applicant in his 6 September 2010 email that she was an able director, that UNOPS was unlikely to close down JMOC and that as such she would have a contract extension. JMOC was not closed down in 2011.

143. Interestingly, at the time AM gave these assurances, the Applicant had been JMOC's substantive Director for over eight months after serving in an interim capacity for about five months prior. The reassuring email was sent to the Applicant at a time when AM, as acting Regional Director, should have been conducting a mid-year review of her performance, bringing to her attention any perceived shortcomings and instituting a plan for her improvement, if necessary.

144. It is only right therefore to conclude that as at September 2010, the EMO Regional Office's position was that the Applicant was a good and able Director of JMOC and deserved an extension of her contract for another year.

145. It is also disingenuous for the Respondent to argue that FS' assurances on 6 December 2010 had nothing to do with a year's contract renewal for the Applicant but was only about whether the Applicant should use her annual leave and leave UNOPS.

146. It is manifestly clear that the Applicant was asking FS on 3 December 2010 whether she could get a year's extension of her contract because there was little time left to renew her UNLP in New York, extend her Israeli visa which was to expire at the end of that month and which would then enable her extend her yellow card expiring on the same date as her visa.

147. She had also always communicated that she needed at least a one year contract extension to be able to extend her yellow card in order to have access to all the areas in the oPt where UNOPS projects were situated. The Applicant pointed out that waiting for the proposed mission of FS in mid-December would be late with regards to renewing her documents if her contract was to be extended.

148. In responding that she intended to recommend a contract extension as AM had earlier assured and telling the Applicant that there had been a delay, that they

would have a talk to finalize things on the first day of her mission and that the Applicant should not think of winding down but instead be patient and relax; it cannot be reasonably argued that FS as EMO Regional Director and the Applicant's supervisor had made no commitment to the Applicant regarding an extension through 2011.

149. Unfortunately, the Respondent's Counsel's efforts at interpreting the entire communication on this issue seem to imply that both supervisors - AM and FS were engaged in doublespeak all through. This stance is wholly unnecessary as it is only proper that UNOPS takes responsibility for the assurances given and promises made by its managers.

150. In its judgment in *Kasmani*<sup>11</sup>, this Tribunal noted with approval the management evaluation decision that an expectancy of renewal existed because the applicant's supervisor had told him that his three-month General Temporary Assistance (GTA) contract would likely be renewed. Although the said supervisor had recommended renewal, Kasmani's contract was not renewed prompting his recourse to the Tribunal.

151. The Appeals Tribunal held in the case of *Ahmed*<sup>12</sup> :

If the Administration gives a staff member a legitimate expectancy of renewal of his or her fixed-term appointment, then that may be a good reason for the Tribunal to interfere with the non-renewal decision on the grounds of unfairness and unjust dealing with the staff member.<sup>13</sup>

152. In the case of *Igbinedion*<sup>14</sup>, the Appeals Tribunal also held that the renewal of appointment of a staff member on successive contracts does not in and of itself create an expectancy of renewal unless the Administration has made an express promise that gives the staff member an expectancy that his or her contract will be extended. Such a promise should be in writing.

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<sup>11</sup> UNDT/2012/049, p.29.

<sup>12</sup> UNAT-2011-153.

<sup>13</sup> *Ahmed*, para 46.

<sup>14</sup> UNAT-2014-411.

153. It was also held in the case of *Obdeijn*<sup>15</sup> that what constitutes a reasonable expectation will be a question of fact in each particular case.

154. It is absurd for the Respondent to argue that the promise made by AM could only be relied upon by the Applicant's accountant but not by the Applicant who would be a party to the extension of her contract. Her supervisors both knew that the Applicant would rely on these promises first for taxation purposes and later for considering whether to seek alternative employment for the near future on the conclusion of her tenure at JMOC.

155. It is irrelevant that the written assurances of a contract extension through 2011 were made to the Applicant when she raised the question with AM for the purposes of making tax-related decisions or when she asked FS because time was running out to renew her documents and to make plans for her future.

156. Judging from all the surrounding circumstances, an expectancy of renewal had been created by the written assurances of a contract extension through 2011 made to the Applicant who relied on these assurances by her supervisors.

***Did UNOPS follow its own guidelines for Performance Results and Assessment (PRA) of the Applicant in this case? Would failure to follow the guidelines be fatal to the Respondent's case?***

157. One of the main planks of the Applicant's case is that UNOPS managers failed to follow UNOPS own regulations and guidelines governing performance appraisals and the renewal of contracts of staff members. The Applicant argued that UNOPS failed to respect its own procedures in reviewing her performance which resulted in first granting her a shortened six month contract and ultimately in not renewing her contract. Instead the performance review carried out with respect to her work was arbitrary, capricious, unjust and unfair.

158. It was further argued for the Applicant that the guidelines use direct and mandatory language and do not contain recommended procedures or suggestions. The repeated failures of UNOPS managers to follow the PRA guidelines created

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<sup>15</sup> UNDT/2011/032.

procedural irregularities that deprived the Applicant of due process and were therefore unlawful.

159. The Applicant's Counsel in making submissions on this issue cited the judgment in *Onana*<sup>16</sup>, where the Tribunal held that it is a well-established principle that the Organization should strictly follow its own rules. Also cited was the case of *Nwuke*<sup>17</sup> in which it was adjudged that the failure of the Governance and Public Administration Division (GPAD) of the United Nations Economic Commission for Africa (UNECA) to follow the provisions of its hiring manual amounted to a procedural irregularity and was therefore unlawful.

160. In *Nogueira*<sup>18</sup>, which was also cited in support of the Applicant's case, it was held that the procedures spelt out in the Performance Appraisal System (PAS) were essential to ensure that the Organization complies with its own charter.

161. On his part, the Respondent's Counsel submitted that the arguments relating to the Respondent's breaches of the UNOPS PRA guidelines ought to be rejected because the said PRA guidelines are merely guidelines and not mandatory.

162. Counsel further sought to support his position with a pronouncement of UNAT in the *Tadonki* case<sup>19</sup>. He also referred to a statement in the UNDT judgment of *Charles*<sup>20</sup> where the judge pointed out that the recruiters' manual in that case sets out guidelines to hiring managers and is not a properly promulgated administrative issuance and also does not lay down mandatory requirements in respect of all components of the selection process.

163. With respect, the Tribunal must underscore the fact that the Respondent's Counsel's reference to the pronouncement of the Appeals Tribunal in paragraph 56 of its judgment in *Tadonki* was not only taken out of context but substantially a misinterpretation of the said judgment.

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<sup>16</sup> UNDT/2014/003.

<sup>17</sup> UNDT/2012/116.

<sup>18</sup> UNDT/2009/088.

<sup>19</sup> 2014-UNAT-400.

<sup>20</sup> UNDT/2013/142.

164. What that judgment was essentially saying was that any failure of the Administration to adhere to the applicable norms for evaluating a staff member's performance risks arbitrariness and further creates for itself the unnecessary burden of trying to show that its assessment was fair. In other words, *Tadonki* does not support the position that UNOPS PRA guidelines were not mandatory or that it could be disregarded in assessing UNOPS staff performance.

165. In the judgment in *Charles*, also cited on behalf of the Respondent, it was not decided that because the recruiters' manual was not a properly promulgated administrative issuance, it was irrelevant to the impugned selection process in that case.

166. Instead, the learned Judge pointed out that the said manual did not lay down mandatory requirements in respect of every single component of the selection process. That is to say that there were gaps and certain wordings of the said manual which did not make for a strict interpretation of some of its provisions.

167. In the present case, the relevant and applicable UNOPS Administrative Instruction concerning contract renewals of staff members<sup>21</sup> states that its purpose is to instruct and provide an overall approach to supervisors in making recommendations to renew the contracts of staff members.

168. The UNOPS document entitled "Guidelines for Performance Results and Assessment" (PRA) dated January 2010 defines what the PRA is, explains in great detail the PRA process and all the steps involved in completing a PRA by the staff member and manager. Before it goes on to describe all the steps involved in the PRA cycle, it states that "it is important that every individual knows what they are expected to do and achieve in terms of targets and results".

169. In spite of the existence of the UNOPS PRA guidelines explaining to its staff and managers alike how to conduct and complete the PRA, evidence before the Tribunal clearly shows that the Applicant's supervisors repeatedly disregarded UNOPS PRA guidelines while completing her PRA. These failures are amply set

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<sup>21</sup> AI/HRPG/2010/02.

out in the closing submissions made on behalf of the Applicant. The Tribunal will here examine the instances of non-compliance with the PRA guidelines as raised by the Applicant.

*(a) Failure to discuss and approve the Applicant's 2010 objectives as required at stage 1.*

170. The guidelines provide that stage 1 of the PRA takes place in January or February and is called the “objective/expected result setting phase.” The staff member enters his or her objectives after discussions with the supervisor with whom he/she has reached a common understanding of the position and tasks between them. The supervisor should guide and help the staff member to properly enter the objectives.

171. Next, the supervisor and the staff member set out the details of the development plan for the staff member for the year after relevant discussions and consultations. The staff member then enters the agreed development plan on the online PRA and the supervisor approves the completion of stage 1.

172. UNOPS Chief of Human Resources, PMP, admitted during his testimony that stage 1 of the PRA process is mandatory.

173. There is evidence that when the Applicant took up her duties as the substantive JMOC director on 1 February 2010, the Regional Director EMO, SC was her supervisor. There were no objectives set or development plan made for her as required by the PRA. This was the position until SC left that post in mid-July 2010 in spite of the fact that earlier that year, he had paid a visit to JMOC.

174. As at 5 November 2010 when the Applicant sent an email to both AM and FS asking whom she should indicate as her supervisor and what objectives she should enter for purposes of completing her 2010 PRA, nothing had been done in that direction.

175. While AM responded the same day advising the Applicant that FS was her supervisor and should work with her to complete her PRA, there is no evidence that the objectives created by the Applicant were approved in 2010.

176. The Respondent's Counsel contended in closing address that stage 1 of the PRA process was observed because the Applicant's PRA (although initiated at the end of the performance cycle) contained four objectives and each of these four objectives were known to the Applicant as at January 2010 when the evaluation period began to run.

177. He submitted that although the said objectives were not entered into the UNOPS PRA online system until the end of the reporting year due to the Applicant's inaction, there is no doubt that the Applicant knew by January 2010 what was expected of her and therefore could not have suffered any prejudice by the delay in entering these on the online system. Counsel also pointed to the fact that the Applicant had drafted the objectives which FS approved in December 2010.

178. He further submitted that in essence the Applicant's PRA had been approved outside the online system and that she had prevented progress on her online PRA for 2010 by not completing her 2009 online PRA until September 2010. He added that it is only the supervisee who can create a new PRA in the system.

179. The arguments of the Respondent's Counsel in this regard not only stand reason on its head but are unduly defensive and totally misleading. In defining the PRA system, UNOPS guidelines clearly state that it is the online performance management system used to assess all staff members in UNOPS holding contracts of six months or more.

180. How then could there exist a PRA for the Applicant outside of the online system? Would such a PRA exist in the different minds of the Applicant and her three supervisors? If that was the case, why was it necessary to hold an end of cycle PRA discussion and give the Applicant a written rating?

181. There is neither evidence nor basis to support the argument that the Applicant knew what was expected of her by January 2010 and therefore could not have suffered any prejudice by the delay in entering them on the online system. Annex 15 to the Application is an email dated 5 November 2010 from the

Applicant addressed to both AM and FS asking whom she should indicate as her supervisor on her online PRA and seeking information on the objectives she should enter.

182. In reply, AM did not tell her that she knew what to do already but rather told her that she should draft objectives relevant to her targets and business plan which were measurable in some ways and finalize with FS' input. He also forwarded a document to help her in the drafting of the said objectives. This was on 6 November 2010.

183. What the Respondent's Counsel refers to as a delay in complying with stage 1 of the PRA is in fact a complete failure to perform a core and essential managerial duty by SC, UNOPS former EMO Regional Director. In other words, UNOPS and its supervisors who do not see to the timely initiation of and continued use of the relevant performance assessment process as a performance monitoring tool of their supervisees, as intended by the Organization, must take responsibility for managerial incompetence.

184. This Tribunal finds and holds that the relevant UNOPS managers failed in their duty to see that proper objectives were set for the Applicant at stage 1 of the PRA process. This failure robbed the Applicant of much needed guidance and feedback in her work considering especially that it was her first year on the job and was consequently manifestly prejudicial to her.

*(b) Did UNOPS fail to conduct a mid-year evaluation as required at stage 2 of the PRA process? Was a PIP properly instituted for the Applicant during the performance cycle?*

185. A mid-year review is stage 2 of the PRA process. The PRA guidelines make it clear that the mid-year review provides a monitoring opportunity to keep track of targets. Any deviations found are then thoroughly discussed and immediate corrective actions taken to set them right on course.

186. The mid-year review takes place in August when the staff member and his or her supervisor should have a face-to-face discussion to review the status of the objectives earlier set, the development plan and any obstacles in achieving them.

187. It is also at this stage that the staff member and his or her supervisor summarize previous performance concerns and the extent of improvement where relevant. They also identify any changes in work priorities or expected results.

188. The mid-year review also provides opportunity for the supervisor who finds that the staff member needs to improve in certain areas to initiate a structured plan which would include more frequent feedback, development and coaching, including specific deliverables with a time-table. Such a structured plan for improvement is usually referred to as a PIP.

189. In August 2010 when the mid-year review was due, AM who was the interim director of EMO was also the Applicant's supervisor. The Applicant's un rebutted evidence is that he conducted no mid-year review for her, did not have any phone discussions with her and did not provide any guidance to her.

190. In spite of having sent a memorandum on 10 August 2010 to all UNOPS staff reminding them that it was time to initiate the mid-year review process and that it should be completed by the end of September, PMP who is UNOPS Global HR Director testified that the mid-year review is optional.

191. When cross-examined, he stated that although there was no official document that said so, the mid-year review in his view is not only optional but is the shared responsibility of a supervisor and the staff member for whom it is carried out. He stated also that while the first and third stages of the PRA process are mandatory, the second stage which is the mid-year review is optional and a supervisor can decide not to have it.

192. The HR Chief told the Tribunal that a mid-year review was made optional in UNOPS Organizational Directive 38 (OD38) which came into effect on 26 April 2011. The said OD38, although irrelevant for our purposes here, on close examination, does not contain such a provision. Instead, it provides that

performance concerns must be shared with the staff member as they arise and should not first be voiced at the final stage of the performance appraisal cycle as was done in this case.

193. It is the view of this Tribunal that the testimony of PMP, who is UNOPS Global HR Chief, on this score is unfortunate, unreliable and unacceptable. It was solely calculated to defend the incompetence of those UNOPS managers who functioned as the Applicant's supervisors during the reporting cycle.

194. Every stage of a performance review process for a staff member adds up to the final appraisal made. A mid-term evaluation within a performance cycle is a critical monitoring tool for the staff member's performance and provides a formal opportunity for holding performance discussions during the reporting year.

195. A mid-year review for the Applicant would have provided the perfect opportunity for instituting a PIP if her performance was found to be unsatisfactory. Instead, in September 2010 when AM was UNOPS acting Regional Director for EMO and should have reviewed the Applicant's performance, he gave her a clean bill of health in his email of 6 September in which he told her she was seen as an able director of JMOC.

196. PMP had also testified that a mid-year review could not be done in respect to the Applicant because her erstwhile supervisor SC had left UNOPS in mid-July 2010 whereas the mid-year review was to be done in August and his successor FS joined UNOPS only in October 2010.

197. The Tribunal was not told that the EMO UNOPS regional office ceased to function after SC left as its director. On the contrary, the evidence is that before FS came on board as its new director, AM was the interim director and in that capacity, had the duty to perform a mid-year performance review for the Applicant. This was not rebutted.

198. In answer to a question from the Tribunal, PMP claimed that FS conducted a mid-year review of the Applicant in December 2010 and thereafter presented her with a PIP for three months. The said PIP according to the witness was contained

in the 21 December email of FS to the Applicant following FS' visit to JMOC the previous week.

199. The Tribunal has reviewed the said email which FS sent to the Applicant. It is titled "Follow up to our debriefing on Thursday 16 December (Ramallah)" and addressed the following four issues, namely: (a) the Applicant's perceived dependency on IQOC; (b) complaints by some staffs of JMOC who were unhappy with her management style; (c) alleged disrespectful email exchanges of the Applicant with the Regional office; and (d) the absence of formal senior management meetings at JMOC.

200. The Applicant was asked to send a response showing what steps and mechanisms she would adopt in the next three months to address the four issues raised in the email.

201. The Applicant's response of 28 December 2010 setting out her plans for improvement evidently angered FS who found the said response "disappointing and almost offensive". She asked the Applicant to send another plan for improvement and warned her about "encouraging" JMOC staff to write petitions in her favour.

202. Before her recruitment at UNOPS, FS had worked in the United Nations system for many years<sup>22</sup>. Did her 21 December 2010 email to the Applicant constitute a mid-year review and a PIP as is known within the United Nations system? In this regard, it is necessary to examine legislation and issuances that govern performance review within the Organization.

203. ST/AI/2010/5 is an administrative instruction which applies to all staff members holding an appointment of at least one year in the United Nations Secretariat and deals with the performance management and development system. Its provisions are standards against which performance management in any United Nations entity can be addressed.

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<sup>22</sup> Annex 7, email of Ms. Serour to the Application dated 26 Oct. 2010.

204. In section 10, the administrative instruction provides that as soon as a performance shortcoming is identified during the performance cycle, the first reporting officer (FRO) in consultation with the second reporting officer (SRO) should proactively assist the staff member to remedy the shortcoming.

205. Remedial measures may include counselling, transfer to more suitable functions, additional training or the institution of a time-bound PIP which includes clear targets for improvement, provision for coaching and supervision by the FRO, and performance discussions which should be held regularly.

206. The United Nation's Office of Human Resources Management (OHRM) also provides a published documentary guide for staff members and managers in matters of performance management<sup>23</sup>. It directs that as soon as a performance shortcoming is identified, the supervisor should discuss it with the staff member and take steps to rectify it, sometimes by a PIP.

207. The PIP is designed to facilitate constructive discussion between a staff member and his or her supervisor and to clarify the work performance to be improved.<sup>24</sup>

208. The published OHRM guide includes a PIP form to be used by the supervisor in which: (a) the performance to be improved should be stated specifically citing examples; (b) level of work performance expected must be stated; (c) the support and resources to be provided to assist the staff member to be identified and specified; (d) supervisor should communicate a plan for providing feedback to the staff member by specifying meeting times, with whom and how often and the measurements for evaluating progress; (e) specify possible consequences if performance standards are not met.

209. In the same vein, Step 2.2 of the UNOPS PRA guidelines dealing with a supervisor's mid-year review comments states that "when a staff member's performance needs to improve in certain areas, a more structured plan is required,

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<sup>23</sup> Supporting Performance Management in the Organization: A guide for staff and managers, June 2009.

<sup>24</sup> Ibid.

which would include more frequent feedback, development, and coaching, as well as specific deliverables with a timetable.”

210. Reading these three documents together, it is clear that, a performance shortcoming must be detected as early as possible during the reporting year. A PIP instituted to improve performance must be properly structured and managed. The supervisor who has identified performance shortcomings will not only discuss with and seek the inputs of the staff member affected in order to produce a PIP but must remain in the driving seat by guiding and managing the process through monitoring, coaching and providing feedback.

211. A PIP is instituted and implemented at the discretion of the competent supervisor when it is necessary to help a staff member improve his or her performance. In the view of this Tribunal, FS’ email of 21 December is not a PIP as not only is it not titled as such but also falls far short of what a remedial plan and process for a performance improvement should be.

212. If indeed FS intended to institute a PIP for the Applicant as her supervisor, it was the wrong approach to email what she considered to be performance shortcomings of the Applicant and in the same email direct the Applicant from her armchair in Copenhagen to make a three-month step-by-step plan for her own performance improvement and email it back to her the supervisor.

213. While the said performance shortcomings were not specifically stated citing examples and no structured plan provided for improvement; nothing in the records shows that FS had contributed anything to the Applicant’s self-made action plan for improvement. Instead, she found the improvement plan which was entirely made by the Applicant to be “almost offensive”. Contrary to the requirement of any PIP process, there was no monitoring or feedback from FS.

*(c) Did UNOPS fail to engage with the Applicant for sufficient factual basis for the 2010 appraisal of her performance and to provide coaching, counselling and mentoring for her?*

214. The Applicant testified that while she worked in the difficult and far-off Jerusalem duty station, there was little engagement with her supervisors in Copenhagen. Throughout the reporting period of 2010, she had had only five one-on-one conversations with the three supervisors she had during that period and the last three conversations took place in December 2010. Her account was not rebutted by the Respondent.

215. It was her case that such limited and infrequent engagement with her supervisors was not sufficient to properly appraise her performance especially since none of these supervisors discussed or approved any objectives for her in 2010.

216. She also told the Tribunal that she did not receive any coaching, counselling or mentoring from her supervisors with respect to her position as JMOC Director.

217. It was argued on behalf of the Respondent that it is illogical to assume that the only way to measure performance is by one-on-one discussions. This lame argument clearly contradicts the PRA requirement for frequent interactions and discussions between supervisor and supervisee for goal-setting, monitoring and performance review throughout a reporting period.

218. With regard to the submission that the Applicant was not coached, counselled or mentored by her supervisors during the reporting period of 2010, the Respondent's Counsel argued in his closing address that the submission was wrong in law. According to him, the Appeals Tribunal had decided in the case of *Morsy*<sup>25</sup> that "staff members in high level positions... are expected to be able to quickly step into their positions and to provide quality leadership."

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<sup>25</sup> 2013-UNAT-298.

219. Counsel's argument in applying the above-quoted reasoning of UNAT in *Morsy*, implied that the Applicant, being a senior manager who had a red UNLP, supervised about 80 staff members plus the fact that the vacancy advertisement which led to her selection required that the successful candidate have the necessary capabilities, she could not expect to be coached, counselled or mentored. This Tribunal must observe that the statement in *Morsy* was completely taken out of context in the Respondent's submission and that that case is totally irrelevant to this Application.

220. He continued that with regard to the facts, the Applicant admitted that she was advised and mentored by JP who was an IQOC director and a senior UNOPS staff member. He submitted that JP was delegated that task by SC, the former EMO Regional Director and that the Applicant never asked the Regional office for counselling, coaching or mentoring.

221. The UNOPS PRA guidelines clearly state that the guidelines apply to all staff members and up to those on the D-2 level. The same document stipulates that during a performance year, "supervisors are expected to be fully engaged with people management, employing a suitable array of informal and formal approaches to assure that a staff member's performance and learning plans are on track." This array of approaches includes coaching, counselling and mentoring.

222. The other argument of counsel that JP of IQOC was delegated the task of coaching, counselling and mentoring the Applicant by SC her former supervisor and that this fulfilled the requirements for the Applicant's management by her supervisors is completely without merit.

223. While nothing in the Respondent's case laid claim to such a delegation to JP to supervise the Applicant in the reporting year of 2010, it is curious that Counsel in closing submissions would make such a submission when the Respondent has offered neither oral nor documentary evidence in that regard.

224. Moreover the Applicant's reliance on JP's advice was criticised by her last supervisor FS who addressed it as one of the Applicant's performance

shortcomings that needed improvement<sup>26</sup>. If indeed it is the Respondent's case that JP was so assigned, why were his views never sought in evaluating the Applicant's performance in 2010?

225. The Tribunal makes no hesitation in finding that there was not sufficient engagement between the Applicant and any of the three supervisors she had had in the 2010 reporting year as to provide a sufficient factual basis for her performance assessment. The Regional office did not avail her necessary round-the-year monitoring of her work in the 2010 performance cycle in order to provide coaching, counselling and mentoring or institute any remedial process required for an underperforming staff member.

*(d) Did UNOPS in producing the Applicant's PRA for 2010 co-mingle relevant performance for that year with irrelevant performance in 2011 and also entirely base aspects of the said PRA on events that took place in the last month of the reporting year?*

226. It is part of the Applicant's case that UNOPS failed to respect the temporal scope of her 2010 PRA and reviewed her performance for that year using matters that arose either outside the reporting year or at the end of it.

227. In this regard, it was submitted that PMP who was part of the PRA team for the Applicant first interacted with her when he visited JMOC in January 2011, then met her again in April and May 2011. It was additionally submitted that the fact of a confidential preliminary fact-finding which started in early 2011 was used in reviewing the Applicant's performance for 2010.

228. It was also submitted that FS cited a visit to JMOC in January 2011 to support her rating of the Applicant on personnel management. In the UNOPS management evaluation (ME) response, reference was made to a lack of improvement on the part of the Applicant notwithstanding "a performance improvement plan and discussions" and "a tense office environment due to a divided team" as rationale for the low rating for personnel management even though there was no PIP and no complaint of a divided team in 2010.

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<sup>26</sup> See Ms. Serour's 21 December 2010 email to the Applicant.

229. It was further submitted for the Applicant that UNOPS placed undue weight upon unsubstantiated allegations received in December 2010. The 2010 PRA was not a balanced appraisal of her performance throughout the year. The only performance-related discussion with her supervisors took place only 15 days before the end of the reporting year in a public restaurant in Ramallah. It did not include any discussion of the Applicant's performance in the beginning and middle of 2010 thus not taking into account the greater part of that year.

230. The Respondent did not appear to have answers to the submission that UNOPS' woeful appraisal of the Applicant for 2010 especially in the aspect of personnel management centred mainly on observations made and reports received in December 2010 and beyond. Counsel argued on behalf of the Respondent that the issue was so serious that it did not matter when the alleged events upon which the reports were based had occurred.

231. In his testimony, PMP sought to defend the poor ratings given to the Applicant for personnel management. He spoke of complaints he received about her management style from JMOC and stated that on his first visit in January 2011, he saw an extremely divided office.

232. The Tribunal finds that the Applicant's appraisal for 2010 especially on personnel management in which she was rated very poorly was entirely based on observations made by FS in late December 2010 and complaints received from some JMOC staffers in the same month for which a fact-finding was initiated in January 2011. Also taken into account were the observations of the duo of FS and PMP in January 2011. In her end of year review of the Applicant for 2010, FS referred to "observations during two missions (December 2010 and January 2011)".

233. On this score therefore, the Tribunal finds that UNOPS did not respect the temporal scope of the Applicant's PRA for 2010 and based her appraisal for personnel management entirely on observations made mostly outside of the reporting period. The Respondent also fell into the common "rater" error of employing the "recency" effect counselled against in the PRA guidelines.

234. It is clear and unequivocal from the foregoing that UNOPS Managers did not follow the provisions of UNOPS own PRA guidelines in reviewing the performance of the Applicant for the performance cycle of 2010. The argument that the said guidelines were optional and non-mandatory is entirely without merit in view of the jurisprudence of both the UNDT and UNAT. The failure of UNOPS to follow its own guidelines is indeed fatal to the Respondent's case.

***Did the Rebuttal Panel afford the Applicant due process and conduct a fair rebuttal process? Was the said rebuttal process flawed in any way?***

235. It was argued on behalf of the Applicant that the UNOPS Rebuttal Panel did not afford her due process. The reasons adduced in support of this submission include: (a) PMP's presence on the panel; (b) the failure to ensure compliance with the PRA guidelines; (c) failure to give the Applicant a fair opportunity to present witnesses and evidence in her favour or allow her a fair opportunity to respond to statements made against her; (d) discounting evidence in favour of the Applicant.

236. The Tribunal heard evidence from ZA who was a member of the UNOPS PRA rebuttal panel. He told the Tribunal that the panel sat in Copenhagen and considered many documents and interviewed the Applicant by phone. It also interviewed FS, PMP, AM, JT of the EMO in Copenhagen and two staff members from JMOC one of whom was on mission in Copenhagen at the time.

237. In his witness statement, ZA said that the panel saw that this was a case where the relationship between the Applicant and her supervisor FS had become very difficult. This observation made the panel focus on the appraisal criteria and not be distracted by the difficulties in the relationship.

238. While being cross-examined, the witness said that the panel members chose who to interview especially those that could give them independent views. In answer to another question, he said that PMP was an observer and was present throughout the sitting of the rebuttal panel but did not vote. He added that he did not remember the detailed involvement of PMP.

239. With regard to a question about non-compliance with the PRA guidelines in preparing the Applicant's performance review, ZA said the PRA guidelines were not a requirement and that the role of the panel was not to delve into details. He agreed that the panel report recorded that there were serious shortcomings in the way the PRA process was carried out but added that the concerns were only noted so that they could be avoided in the future.

240. Regarding the objective on personnel management and leadership, the witness said that based on everything they heard and saw the panellists believed that there was discontent in the office. He added that this was obvious because PMP as the HR Director would not visit a place twice if there was no discontent there. He continued that the intervention by headquarters showed there was no harmony in JMOC under the Applicant.

241. He said further that the panel knew there were even investigations based on complaints against the Applicant. This, according to the witness, meant that something was seriously wrong in the office because investigations are usually the last resort because before an investigation is commenced, there would have been mediation and other interventions.

242. When cross-examined as to whether the panel considered any behavioural examples of the Applicant on any of the competencies, the witness said he did not remember the panel considering any competency or any behavioural pattern of the Applicant.

243. In answer to a question from the Tribunal, the witness said that PMP did not influence the panel and that he could not recall him making any input to the proceedings.

244. The witness in answer to another question said that the Applicant told the panel that when she went to JMOC the projects were already in trouble. It was his testimony also that the decisions the Applicant made worsened the problems. ZA stated that this was so because the Applicant had rented a new office which was more expensive and embarked on restructuring against advice.

245. The Applicant was recalled to rebut ZA's testimony. With regard to the restructuring of JMOC under her leadership, the Applicant said that SC who was her supervisor and EMO Regional Director at the time approved the restructuring of JMOC in writing and the Regional office sent its HR personnel to Jerusalem to oversee the process. In that way, the EMO rather than the Applicant owned the process.

246. The Applicant added that the EMO also approved the move to new offices after lengthy discussions. The lease was not more expensive because upon moving to the new office premises in Jerusalem, JMOC had space for staff from its former Ramallah office and so stopped paying rent in Ramallah. JMOC also rented space to other United Nations agencies in promotion of UNOPS policy of 'one premises' and business development. Moreover the new office, unlike the old one, was MORSS compliant.

247. In examining the work of the rebuttal panel, it is in evidence that PMP who was part of the PRA team for the Applicant also sat on the rebuttal panel before which the same PRA ratings were challenged as an *ex officio* member ostensibly to guide and advise the panel.

248. In spite of the claims of ZA that PMP was a non-voting member; the Tribunal is not in any doubt that a clear conflict of interest situation existed. Interestingly, ZA in his testimony was quick to re-echo the view of PMP that the PRA guidelines were only optional and not necessarily to be followed in reviewing performance.

249. The Tribunal observed certain inaccuracies in the rebuttal panel report. For instance, with respect to the first stage of the Applicant's PRA, the panel stated at page 2 of its report: "objectives for 2010 finalized in September 2010." This is contrary to documentary evidence; specifically Annex 15 to the Application which clearly shows that as at 5 November 2010, the Applicant was still asking FS and AM how to go about setting her objectives.

250. The panel also mentioned in its report that PMP served as an observer during the PRA discussion of 24 March 2011 for the Applicant. However Annex

31 which is an unchallenged recording of that PRA discussion shows PMP asking questions of the Applicant.

251. The rebuttal panel found that in the 2010 reporting year the Applicant had three different supervisors and that there was a lack of performance-related feedback. It found that no objectives were set for the Applicant, no one-on-one interactions with her supervisors, no mid-year review and there were no hand-over notes with respect to her work by her former supervisor.

252. With regard to complaints against the Applicant in December 2010 and early 2011 on which the PRA rating on personnel management was largely based, the panel opined that it was right for the supervisor to take these into account because they were significant developments prior to the finalization of the PRA. In other words, the panel believed that the recency effect which the PRA guidelines cautioned against could be ignored in this instance.

253. The presence of PMP in any capacity on the rebuttal panel tainted the said panel and clearly created a conflict of interest situation for it. In that regard, it is not surprising that the rebuttal panel's report sought to trivialize the failure of UNOPS managers to comply with the PRA guidelines or properly monitor the Applicant's performance throughout the reporting year.

254. Of the six persons interviewed by the panel besides the Applicant, three were part of the PRA team that rated her. It was not shown how the panel's choice of those interviewed was independent or fair to the Applicant. The EMO regional Finance Officer who was interviewed by the panel had evidently complained about the tone of an email from the JMOC head of operations in June 2010.<sup>27</sup> Significantly, a staff member in JMOC who was interviewed was said to work in a project office outside JMOC premises, while another had problems with his contract.

255. It was clear from ZA's testimony that the panel concluded that the poor rating awarded to the Applicant for personnel management was proper because, according to him, if there was no discontent, PMP would not have visited JMOC

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<sup>27</sup> Applicant's annex 145 - response to Respondent's reply.

twice and investigations would not be initiated following complaints made against the Applicant.

256. This conclusion was arrived at by the panel in spite of the fact that it was unable to obtain any official confirmation or details of any such complaints, investigations or investigation reports. In fact, the evidence before the Tribunal is that there was no investigation instituted against the Applicant.

257. The panel upheld the “partially met expectations” rating awarded the Applicant for financial delivery and net revenue targets. It also noted that the Applicant listed “several seemingly valid circumstances for low project delivery in 2010” and claimed to have “turned around” JMOC’s financial situation that was near collapse in 2009 but that the financial figures in 2010 were bleak. The Applicant’s claims that in 2009 she inherited an office with financial and administrative problems and located in an unsafe neighbourhood were evidently irrelevant to the panel.

258. In evaluating the fairness of the rebuttal process, this Tribunal finds that the rebuttal panel ignored its own findings that the Applicant had no objectives set for her, had had three supervisors in the reporting year and had had no performance feedback or mid-year review. In spite of noting its concerns in the non-compliance with PRA guidelines while preparing the Applicant’s PRA, the panel concluded that the non-compliance was irrelevant but should be avoided in the future. This clearly amounted to blowing hot and cold at the same time.

259. Whilst finding that the Applicant and FS who was her supervisor had a difficult relationship, the panel failed to avert its mind to whether the said relationship gave rise to any adverse implications for the Applicant in the rating of her performance by FS. The same panel also failed to acknowledge an equally difficult and tense relationship between the Applicant and the Global HR Director PMP who since January 2011 had taken an uncommon interest in the Applicant’s management of JMOC and her PRA process.

260. The rebuttal panel also ignored every explanation given by the Applicant with respect to the state of JMOC when she took over as its head in 2009 and

blamed her for an office restructuring and a movement of the office to a MORSS-compliant premises which were approved and supported by the EMO. The panel did not bother to consider any constraining factors that existed or the impact of such factors with regard to the Applicant's failure to meet set targets for net revenue, delivery and project management.

261. On the whole, the Tribunal finds that the rebuttal process was biased and unfair and violated the Applicant's due process rights as it readily adopted most of the views of the Applicant's supervisor, the unfavourable views of PMP and her PRA team without any independent assessment or reference to any behavioural examples. The panel was also tainted by the presence and participation of PMP who was not only a witness before it but was part of the PRA team for the Applicant. The panel was little more than a rubber stamp of the impugned PRA process for the Applicant.

### **Conclusion**

262. The Tribunal's findings are summarized below:

- a. An expectancy of renewal had been created by the written assurances of a contract extension through 2011 made to the Applicant who relied on these assurances by her supervisors.
- b. The Applicant's supervisors repeatedly and erroneously disregarded relevant UNOPS PRA guidelines while completing her performance appraisal. This disregard for UNOPS PRA guidelines is fatal to the case made out by the Respondent.
- c. The rebuttal process was biased and unfair and violated the Applicant's due process rights as it readily adopted most of the views of the Applicant's supervisor and her PRA team without any independent assessment or reference to any behavioural examples. The rebuttal panel was also tainted by the presence and participation of PMP who was not only a witness before it but was part of the PRA team for the Applicant

## **Judgment**

263. The Tribunal Orders the Respondent to pay the Applicant the equivalent of six months net base salary for failure to extend her contract for a period of one year, having created a legitimate expectancy of a one year renewal.

264. The Applicant is entitled to compensation for the procedural irregularities occasioned to her by the failure of the Administration to follow its own guidelines and its rules and procedures. The Tribunal accordingly awards the Applicant three months' net base salary as compensation for these procedural irregularities.

265. The Applicant is entitled to compensation for violation of her due process rights during the rebuttal process. The Tribunal accordingly awards the Applicant three month's net base salary as compensation for this violation.

266. The reliefs awarded the Applicant are 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 Nkemdilim Izuako

Dated this 30<sup>th</sup> day of October 2014

Entered in the Register on this 30<sup>th</sup> day of October 2014

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi