



Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

NCUBE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Daniel Trup, OSLA

Counsel for the Respondent:

Nicole Wynn, ALS/OHRM

Introduction and Procedural History

1. The Applicant joined the Office for Coordination of Humanitarian Affairs (OCHA) as a National Professional Officer in Zimbabwe in 2007. On 11 July 2010, OCHA deployed him to Afghanistan on a one-year fixed-term appointment as a Humanitarian Affairs Officer at the P3 level. His appointment was extended through 20 March 2012, and not renewed thereafter.
2. On 11 May 2012, the Applicant filed the present Application with the United Nations Dispute Tribunal (UNDT) in New York challenging OCHA's decision to separate him from service on grounds of unsatisfactory performance.
3. On 18 June 2012, the Respondent filed his Reply to the Application.
4. On 1 November 2013, the UNDT in New York issued Order No. 281 (NY/2013) transferring this case to the UNDT in Nairobi.
5. On 28 November 2013, the UNDT in Nairobi issued Order No. 258 (NBI/2013) advising the Applicant that representation by counsel would assist him and the Tribunal in the conduct and management of this case. To this end, the Tribunal directed the Registry to serve the Order on the Office of Staff Legal Assistance (OSLA) to facilitate the process.
6. On 3 December 2013, the Applicant formally enlisted the services of OSLA.
7. On 13 December 2013, counsel for the Applicant filed a motion for leave to amend the Application.
8. The Respondent filed his submissions in response to the Motion on 23 December 2013.

9. On 15 January 2014, the Tribunal issued Order No. 005 (NBI/2014) allowing the Applicant to amend his Application and adjusting the timeline for the Respondent to file his reply.

10. The Applicant filed his amended Application on 16 January 2014.

11. The Respondent replied to the amended Application on 26 February 2014.

12. On 4 November 2014, the Tribunal issued Order No. 244 (NBI/2014) directing counsel for both Parties to file joint submissions on the facts and issues in this case, and to indicate their position on the need for an oral hearing.

13. On 2 December 2014, the Parties filed their joint submissions.

14. Both Parties indicated that an oral hearing was necessary in this case.

15. Three hearing days were scheduled covering 2-5 February 2015, and trial commenced as scheduled.

16. It became apparent the three afternoons scheduled for the matter to be heard was insufficient and that a further six hearing days was necessary for the testimony of the Respondent's three remaining witnesses.

17. On 6 February 2015, the Registry wrote to the Parties setting the continuation of this trial down for 14-16 April and 21-23 April 2015.

18. On 8 April 2015, counsel for the Respondent moved the court to reschedule the continuation of this trial because of the absence of his "spouse from New York" and the "consequent change in the allocation of family responsibilities."

19. Counsel for the Applicant responded to the Respondent's request indicating that he did not object to the matter being rescheduled.

20. On 8 April 2015, the Tribunal issued Order No. 113 (NBI/2015) denying the Respondent's motion to have the hearing rescheduled and directed the Respondent to make the necessary arrangements for the matter to proceed as scheduled.

21. On 9 April 2015, the Respondent filed a Response to Order No. 113 (NBI/2015) seeking a postponement of the hearing for one day to allow the newly assigned co-counsel time to prepare for the hearing.

22. On 10 April 2015, the Tribunal issued Order No. 114 (NBI/2015) allowing the Respondent's request.

23. The hearing resumed on 15 April 2015. Co-counsel for the Respondent sought the Court's indulgence to have the three remaining witnesses testify over a three day period, which request was also granted.

24. On the morning of 21 April 2015, the Registry wrote to the Respondent asking for the contact details of Mr. Aidan O'Leary who was to testify later that afternoon.

25. Counsel responded saying she had written to Mr. O'Leary and would revert as soon as she heard from him.

26. Later that morning, Counsel wrote to the Registry:

I have located a note indicating that Mr. O'Leary might be reached at +92 345 500 3644. I have tried the number, but there currently is no response. You might want to test the number closer to the hearing time. I will let you know if Mr. O'Leary responds to my message of today with a different contact number.

27. The hearing commenced as scheduled at 1400hrs that afternoon, and the witness could not be reached or contacted. Later that afternoon, the Respondent

moved to withdraw the witness and close his case given the “oral testimony presented to the Tribunal and the written evidence on record”.

28. On 24 April 2015, the Tribunal issued Order No. 122 (NBI/2015) granting the Respondent’s Motion and set a deadline for the filing of the Parties’ closing submissions.

29. This matter was heard on 3, 4 and 5 February 2015; 15, 16 and 21 April 2015.

30. The Applicant gave evidence on his behalf and called one witness, Mr. Megbaru Alawe. The Respondent called Mr. Andrew Willie, Ms. Jessica Bowers and Mr. Joseph Inganji.

FACTS

31. The Applicant is a citizen of Zimbabwe. On 11 July 2010, he was assigned to a P-3 fixed-term post of Humanitarian Affairs Officer with OCHA.

32. He assumed his functions with OCHA on 11 July 2010.

33. On 27 September 2010, the new Head of Office of OCHA for Afghanistan, Mr. Tim Pitt, re-assigned the Applicant to the Donor Relations Section. His position title remained the same.

34. The Applicant had almost completed one year of continuous service as Humanitarian Affairs Officer when, on 3 July 2011, he was asked to attend a meeting with Mr. Pitt, Mr. Inganji, Deputy Head of Office, and the Finance Officer. The Applicant was informed that his contract would not be renewed because of poor performance.

35. In August 2011, the Applicant was rated as “partially meets expectations” and he filed a rebuttal against that appraisal of his performance.

36. At the same time, the Applicant was informed that he would be placed on a probationary three-month fixed-term contract, and given a three-month work plan with the stipulation that “the staff member [was] to prove himself within the three months or face termination of employment”.

37. A work plan was signed on 11 August 2011 by Mr. Inganji, Ms. Jessica Bowers, Humanitarian Affairs Officer and the Applicant. Mr. Andrew Wyllie, the subsequent Head of Office (who took over from Mr. Pitt), told the Applicant that his appraisal for the period April 2011 to March 2012 would be based on this work plan, and would determine the extension of his contract.

38. On 9 September 2011, the Rebuttal Panel issued its decision and found a number of substantive irregularities in the process to the extent that it concluded it was “unable to evaluate the contents of the e-PAS, until the procedural irregularities described have been fixed”.

39. In August 2011, the Applicant became aware that a number of micro evaluation reports were written by Mr. Inganji and Ms. Bowers to appraise him, which were submitted to Mr. Wyllie. These evaluations formed the basis of a further three-month extension through to 10 February 2012. The extension was also to allow for the existing performance evaluation issues to be properly addressed.

40. The Applicant sought management evaluation of the decision not to extend his contract on 15 November 2011. The request for management evaluation raised the performance appraisal and extension of contract issues he had thus far faced.

41. On 7 December 2011, Mr. Inganji contacted the Applicant whilst he was on leave to inform him that he would be appraising his performance as his Second Reporting Officer (SRO). No mention was made of the First Reporting Officer’s (FRO’s) appraisal.

42. The Applicant heard no more about this performance review until 23 January 2012, when he was summoned to a meeting with the Head of Office, Mr. Wyllie, to discuss his contract which was due to expire on 10 February 2012. The Head of Office asked the Applicant for “a solution and a way forward given the adverse performance reports”.

43. On 8 February 2012, the Management Evaluation Unit (MEU) decided that since the Applicant’s contract was to be extended through 15 March 2012, his request for review was “moot”. There was sufficient time, they said, for the Applicant to “receive the outstanding performance appraisal document from [his] supervisors and follow up as appropriate”.

44. On 12 February 2012, the new Head of Office, Mr. Aidan O’Leary, informed the Applicant that his performance would be re-appraised, and that a single assessment would be conducted for the period 11 July 2010 to 21 January 2012. Ms. Bowers was assigned as his FRO for the purposes of this omnibus appraisal.

45. The omnibus appraisal found the Applicant to have fallen short of performance expectations, and recommended that his contract not be renewed.

46. The Applicant filed a second rebuttal on 14 February 2012. On 15 March 2012, the Rebuttal Panel found that this e-PAS had “been compiled as a performance appraisal by the FRO/SRO, without first agreeing on a work plan, then performing a mid-year review, and finally performing an evaluation”. It concluded that whilst there was “sufficient evidence of the S/M’s underperformance in Afghanistan, [it is] of the view that multiple irregularities occurred in the process of the performance evaluation”. Notwithstanding those findings, the Panel upheld the performance appraisal rating.

47. On 16 March 2012, the Applicant was informed by the Head of Office that his contract with OCHA would not be renewed.

48. On 23 March 2012, the Applicant filed his second request for management evaluation. MEU found against the Applicant on 9 May 2012.

SUBMISSIONS

Applicant

49. Upon his entry on duty, the Applicant was never designated an FRO. He attempted to ascertain who in the office he was to report to, but there seemed to be no clear answer. Notwithstanding the lack of clarity on reporting lines, he performed his functions to the best of his abilities and never received any negative feedback in relation to his performance from the then Officer-in-Charge, Mr. Carlos Ferreira-Pereira.

50. On 6 July 2011, almost one year after the Applicant had commenced his employment with OCHA, the then Head of Office, Mr. Pitt, informed him that he was in fact also his FRO. Mr. Pitt then went on to sign off on the Applicant's work plan for the preceding year. This surprised the Applicant as Mr. Pitt was unfamiliar with his functions and the terms of reference of his post.

51. On 14 July 2011, Mr. Pitt left the mission without completing the Applicant's e-PAS.

52. The Administration failed to adhere to both the letter and spirit of ST/AI/2010/5 (Performance Management and Development System). As a consequence, its exercise of discretion in not renewing the Applicant's fixed-term contract must be regarded as unlawful.

53. The Administration failed to undertake the necessary and proper performance evaluations of the Applicant for the period 2010/2011 and 2011/2012 as required in ST/AI/2010/5. Realising the error of its ways, the Administration belatedly undertook

an eighteen-month and twenty-one day omnibus assessment, which exercise was intended to justify separating the Applicant from service. This assessment was not based on any work plan or mid-point review mandated under ST/AI/2010/5.

54. The Applicant's dismissal took place without the Administration having undertaken a Performance Improvement Plan (PIP), a necessary requirement pursuant to section 10 of ST/AI/2010/5, before dismissing the Applicant on grounds of poor performance.

55. As part of any decisions regarding separation or renewals on the basis of unsatisfactory performance, account must be taken of the United Nations system of performance appraisals. Such appraisals are governed by the Administrative Instruction ST/AI/2010/5. The Respondent failed to adhere to the tenets of the legislation on performance appraisal and development, and in so doing failed to assess the Applicant in a manner necessary to demonstrate whether or not he should have continued in his role.

Respondent

56. The Applicant worked as a Humanitarian Reporting Officer with the Humanitarian Reporting Section from 11 July 2010 to March 2011 (7 months and 28 days) and as a Humanitarian Affairs Officer with the Clusters Coordination Unit (CCU) from 10 March 2011 to 21 January 2012.

57. The reason for the change in duties was that the Applicant failed to meet performance standards in the performance of his functions as a Humanitarian Reporting Officer with the Humanitarian Unit. It was considered that he would be better suited as a Humanitarian Affairs Officer and the Applicant agreed to the move to CCU.

58. During the 18-month period that he served in both capacities the Applicant was provided with a final performance assessment on two occasions.

59. The first performance assessment was prepared by the Deputy Head of Office, Mr. Inganji in regard to the functions of the Applicant as Humanitarian Reporting Officer for the period 11 July 2010 to March 2011. The Applicant successfully rebutted that performance evaluation.

60. A second performance evaluation was prepared on 12 February 2012 that addressed the Applicant's performance as Humanitarian Reporting Officer for the period 11 July 2010 to March 2011 and, as a Humanitarian Affairs Officer for the period 10 March 2011 to 21 January 2012. The performance therefore covered the period of 18 months. The Applicant was found not to have met performance expectations and it was recommended that his contract not be renewed.

61. The Applicant sought to rebut that performance evaluation. Although the Rebuttal Panel took the view that multiple irregularities occurred in the course of the performance evaluation it upheld the rating that he had not met performance expectations.

62. When a Rebuttal Panel maintains a performance rating, procedural irregularities in the management of a staff member's performance are not sufficient basis to overturn a non-renewal decision. In this case, the evidence unequivocally establishes that the Applicant's performance was inadequate.

63. Although the Applicant was given an opportunity to improve his performance, he did not cooperate in the performance management process. In terms of the decision not to renew the Applicant's appointment taken on 18 March 2012, the assessment of his performance for the period up to March 2011 was simply background information. The critical determining issue for the non-renewal decision

was whether, in substance, the Applicant's performance from March 2011 to March 2012 met performance expectations.

CONSIDERATIONS

64. The Tribunal will begin by considering and determining whether the proper procedure was complied with in the appraisal of the Applicant's performance.

65. In the event of irregularities in the evaluation process how would the irregularities impact on the rating and the consequent non-renewal of the Applicant's contract?

66. The rules governing the system for managing and developing performance are provided for in ST/AI/2010/5, which deals *inter alia*, with

- i) performance cycle;
- ii) the need for, and role of, a First Reporting Officer (FRO) and a Second Reporting Officer for a staff member subject to the need of additional supervisors when a staff member works for more than one supervisor for more than 25 per cent of his/her time;
- iii) individual work plans; midpoint review;
- iv) performance appraisal;
- v) addressing performance shortcomings;
- vi) the responsibility of heads of departments for the implementation execution of the Performance Management and Development System process;
- vii) the primary responsibility of the head of department for the timely execution of the Performance Management and Development System, overall compliance and consistent and fair implementation;
- viii) the rebuttal process.

67. The performance cycle must, as a rule, cover the 12 months from 1 April to 31 March of the following year. In exceptional cases, the cycle should be at least six

months but no longer than 18 months¹. When a staff member takes up new duties upon reassignment or transfer, the e-PAS or e-performance document shall be completed by the staff member and his/her supervisor for the period between the beginning of the performance period and the date of reassignment, transfer or separation².

68. The Applicant was deployed to Afghanistan in July 2010 from Zimbabwe. The performance cycle in his case started on 1 April 2010 when he was still in Zimbabwe. When he was reassigned to Afghanistan in July 2010, his performance should have been completed by the Zimbabwe office for the period April 2010 to July 2010. This was mandatory as the Applicant started occupying a different function in Afghanistan; having moved from being a National Professional Officer in Zimbabwe since 2007 to Humanitarian Affairs Officer on 11 July 2010.

69. While noteworthy, the Tribunal is not however concerned with this aspect of the performance cycle. What is relevant for present purposes are the events that unfolded from July 2010 until the Applicant's contract was not renewed.

70. When the Applicant moved from Zimbabwe to Afghanistan, a work plan had to be established. This is a requirement under section 3.3 of ST/AI/2010/5, which reads

When a staff member takes up new duties upon recruitment, transfer or assignment in the course of the performance year, an individual work plan shall be established within the first two months of assumption of the new function.

71. It is obvious that the framers of ST/AI/2010/5 intended the establishment of a new work plan within the first two months to be a mandatory requirement. The rationale and underlying philosophy is only logical. Without a work plan a staff

¹ Section 3.1 ST/AI/2010/5

² Section 3.3 ST/AI/2010/5

member would be at a loss as to the precise nature of his/her duties and functions and the corollary is that without a work plan, a supervisor who has to evaluate the performance of that staff member would be placed in the invidious position of appraising performance against a blank slate with no benchmarks or performance indicators.

72. Was a work plan prepared when the Applicant assumed duties in Afghanistan? The provision on work plans subsumes that a staff member has a supervisor or FRO to work with. Section 6.2 and 6.3 of ST/AI/2010/5 spells out this requirement very clearly:

6.2 At the beginning of the performance cycle, supervisors shall meet with the staff under their direct supervision to ensure that the objectives of the work unit are understood and individual work plans are prepared. Supervisors may meet with the staff in their work unit either as a group or individually.

6.3 First reporting officers shall work with staff members they supervise on the development of the staff member's individual work plan for the performance cycle.

73. The work planning stage *per* section 6.3 includes: (a) establishing individual performance evaluation criteria by setting goals/key results/achievements; (b) defining core competencies, managerial competencies (where applicable), and job-related competencies (where applicable); and (c) formulating a personal development plan, as follows:

(a) Work plan: each staff member, together with his or her first reporting officer, prepares a draft work plan for discussion between the staff member and the first reporting officer. Upon the discussion and an agreement with the first reporting officer, the staff member revises, if necessary, and submits the final work plan to the first reporting officer. The format of the work plan may vary depending on the functions of the staff member, but must include results-oriented elements such as goals/key results/achievements; actions to undertake to achieve each goal/key result/achievement; and measurement through a statement of success criteria, performance expectations and behavioural indicators to evaluate performance at the end of the cycle. When more than one staff member performs the same function, performance expectations may be collectively developed, while

allowing for individual variations, where appropriate performance expectations may be collectively developed, while allowing for individual variations, where appropriate [...]

74. The presence of a first reporting officer is crucial; the establishment of a work plan is predicated on the existence of the FRO. The Applicant states that when he assumed his duties in Afghanistan in July 2010, he was not assigned an FRO and was given little or no direction on whom he should report to. There was no Head of Office and the *interim* head (at the time he joined the Office) was Mr. Ferreira-Pereira from whom he received no negative feedback.

75. In the absence of a designated FRO, the Applicant had no work plan. He told the Court that from July 2010 to March 2011, he performed his functions on the basis of a generic Terms of Reference (TOR) for Reporting Officers.

76. On 27 September 2010, the new Head of Office of OCHA for Afghanistan, Mr. Pitt re-assigned the Applicant to the Donor Relations Section as a Humanitarian Affairs Officer.

77. The Applicant once again asked who his first reporting officer was, but no information was forthcoming. The Applicant continued to perform his functions without any supervision and feedback until July 2011.

78. The Respondent concedes that there were delays in the development of a work plan for the Applicant. The delays were attributable in part to changes of personnel within OCHA Afghanistan. The Respondent alleges that the Applicant was also responsible for the delays as he refused the FRO assigned to him in March 2011.

79. The Respondent's allegation that the Applicant contributed to the delay does little to help his case in this matter given the mandatory requirement for a work plan to be completed within two months of a staff member assuming new functions *per*

section 3.3 and section 4.2 of ST/AI/2010/5. This mandatory requirement was violated.

80. The Respondent's allegation as to the Applicant's behaviour in March 2011 is irrelevant for the purposes of the cycle ending March 2011. To appraise his performance, and any shortcomings in his deliverables, a work plan had to have been established. The Administrative Instruction provides for situations in which a staff member does not comply with his/her responsibilities within the Rule. Section 4.2 provides that:

Non-compliance with the terms of the present instruction by a staff member shall be recorded in his/her individual e-PAS or e-performance document and reflected in his/her overall rating. If the staff member does not take the required action on time to advance or complete the e-PAS or e-performance document, then the evaluation process may proceed outside the electronic application.

81. The Respondent argues that between July 2010 to 10 March 2011, the Applicant was working under the direction of Mr. Pitt and fell short of performance expectations there.

82. The Applicant had almost completed one year of continuous service as Humanitarian Affairs Officer when on 3 July 2011 he was asked to attend a meeting with Mr. Pitt. The Applicant was informed that his contract would not be renewed, as "we [OCHA management] are not happy and you [the Applicant] are not happy, so you must go". The Applicant was extremely surprised by this, particularly as no reference had been made to any performance issues in the past.

83. Mr. Andrew Willie became acting head of the office on the departure of Mr. Pitt. Mr. Willie told the Court that when he arrived at the mission in July 2011, he had a conversation with Mr. Pitt and one of the matters discussed was the Applicant. He was told by Mr. Pitt that there were performance issues and that the Applicant's contract would only be renewed for one month and no further. It appeared to Mr.

Willie that the paper work on the Applicant's performance, including his appraisal, had not been completed. There had been discussions about performance but they were not documented. Mr. Pitt told Mr. Willie that the e-Pas was being completed.

84. Mr. Willie went on to testify that he had several conversations with the Applicant, Mr. Inganji, Ms. Bowers and other colleagues. He added that there were a number of documents on performance issues. There were examples of action plans not being delivered or of not good standard. There were issues about the Applicant not being able to work with Ms. Bowers to whom he was reporting daily. Mr. Pitt never told Mr. Willie that he was the Applicant's FRO. Although the appraisal procedure was not followed he had seen evidence of performance issues from emails between the Applicant and Ms. Bowers. A look at the emails shows that there were some disagreements on the manner or content of assignments that Ms. Bowers was asking the Applicant to do.

85. The emails do not specifically point to non-performance. Even if they showed non-performance, there is nothing on record to indicate compliance with sections 7.1 and 7.2 of ST/AI/2010/5 on midpoint review and sections 10.1-3 of the same ST/AI on non-performance.

86. Pursuant to section 7.1 of ST/AI/2010/5:

The first reporting officer should conduct a midpoint review, usually six months after the creation of the work plan, after discussing with the staff member the progress to date of the goals/key results set in the work plan. The review should indicate the progress made, and justify any updates to the work plan goals/key results. The first reporting officer should also note the progress made in demonstrating the competencies and the progress on the personal development plan. Staff members may note the progress made on the goals set in the work plan, the competencies and the personal development plan.

87. Section 10.1 of ST/AI/2010/5 reads:

During the performance cycle, the first reporting officer should continually evaluate performance. When a performance shortcoming is

identified during the performance cycle, the first reporting officer, in consultation with the second reporting officer, should proactively assist the staff member to remedy the shortcoming(s). Remedial measures may include counselling, transfer to more suitable functions, additional training and/or the institution of a time-bound performance improvement plan, which should include clear targets for improvement, provision for coaching and supervision by the first reporting officer in conjunction with performance discussions, which should be held on a regular basis.

88. It was only on 6 July 2011 that Mr. Pitt and the Applicant agreed on a work plan. By this time, the Applicant had already been reassigned to the CCU and Mr. Pitt was on his way out of the mission.

89. There is no evidence that the Applicant's performance was being evaluated while he served in the Humanitarian Reporting and Donor Relations Sections as required by section 10.1 of ST/AI/2010/5. There was also no midpoint review that should have been conducted within six months from 11 July 2010 as required by section 7.2 of ST/AI/2010/5. His midpoint review was signed by Mr. Pitt on 10 July 2011.

90. In the absence of work plan that had to be worked out with an FRO, and in the absence of a midpoint review, it was and indeed would have been impossible to appraise the performance of the Applicant for the period July 2010 to March 2011 while he served with the Humanitarian Reporting and Donor Relations Sections. The Applicant was not even made aware of his FRO until 6 July 2011!

91. The question arises then how was it possible for Mr. Pitt to conclude that the Applicant was not performing. The Tribunal is also disturbed that counsel for the Respondent defended the appraisal despite the multiple clear violations of ST/AI/2010/5.

92. It is noteworthy that Mr. Pitt left the mission on 14 July 2011 without completing the Applicant's e-Pas and a new *interim* head of office, Mr. Wyllie was

assigned to Afghanistan. Mr. Pitt was allowed to leave in such circumstances and in disregard of section 3.4 of ST/AI/2010/5 that reads

To ensure timeliness of completion of the e-PAS or e-performance document, if supervisors leave the United Nations, it is their responsibility to complete the Performance Management and Development System duties required of them prior to the date of separation. Separation procedures and processing of final entitlements of supervisors may be delayed until the evaluations for which they are responsible are completed.

93. From these facts and the conversation that Mr. Pitt had with Mr. Willie as outlined above, it is clear that when Mr. Pitt told Mr. Willie that the Applicant was under performing he was bent on the Applicant being separated from OCHA Afghanistan without a complete appraisal and in clear violation of the rules and procedures governing performance evaluations within the United Nations system. *Alea iacta est* or the die, it seems, was already cast for the Applicant as subsequent events will show.

94. Mr. Inganji, who was Deputy Head of Office at the time, completed the Applicant's e-Pas for the period 21 September 2010 to 31 March 2011. Mr. Willie stated that he had asked Mr. Inganji to complete the e-Pas on the advice of the OCHA Human Resources in Geneva. He added that Mr. Inganji was aware of the performance issues from the conversation he had with him. Mr. Willie conceded, in testimony, that Mr. Inganji had no "direct knowledge or responsibility" over the Applicant. He added that it "appeared" that Mr. Inganji had knowledge and understanding of the Applicant's performance. When asked if an appraisal could be done on a "few things", he replied that Mr. Inganji had supervisory responsibilities and was in a position to comment on the staff member's performance.

95. Mr. Inganji rated the Applicant as "partially meets expectations". Mr. Willie denied having told Mr. Inganji to give the Applicant a bad e-Pas and insisted that the appraisal was independent. He could not explain why Mr. Inganji acted both as FRO

and SRO, and agreed that having different persons acting as FRO and SRO constituted a check and balance mechanism.

96. Mr. Inganji told the Court that he wore both the FRO and SRO hats as a result of a “mutual agreement” between the Applicant and himself. For his part, the Applicant denied any such agreement and, instead testified he was devastated by this turn of events.

97. Mr. Inganji agreed that this was not the correct procedure, but curiously seemed to have labored under the belief that the rules could be overridden by private agreement. Mr. Inganji also disagreed with the Rebuttal Panel’s finding that the appraisal was fraught with irregularities and told the Court that, “nothing had been explained to the panel. The panel should have looked at the whole picture”.

98. On 9 September 2011, the Rebuttal Panel concluded that in view of a number of irregularities in the completion of the e-Pas it was unable to evaluate the contents of the e-Pas. The Panel found it unacceptable that Mr. Pitt left the mission without completing the e-Pas. The Panel also pointed out that while Mr. Pitt was the FRO, it was an officer subordinate to him who was the SRO in breach of section 5.3 of ST/AI/2010/5. The e-Pas initiated by Mr. Inganji listed him both as FRO and SRO in breach of the provisions of section 5 of ST/AI/2010/5. The Panel also concluded that the FRO had failed to comply with section 5.1 of ST/AI/2010/5 which reads:

A first reporting officer shall be designated for each staff member at the beginning of the performance cycle. The first reporting officer is responsible for:

- (a) Developing the work plan with the staff member;
- (b) Conducting the midpoint review and final evaluation;
- (c) Providing ongoing feedback on the overall work of the staff member throughout the performance cycle;
- (d) Advising, supporting and coaching the staff member on professional development and in the development of a personal development plan;

(e) Developing a performance improvement plan in consultation with the staff member in the case of performance shortcomings or underperformance, if applicable;

(f) Ensuring that all e-PAS and/or e-performance documents of staff supervised are completed in accordance with the prescribed procedures.

99. On 10 March 2011, the Applicant was transferred to the CCU. An action plan of his duties was prepared for the period 10 August 2011 to 10 November 2011. It was signed by the Applicant and Ms. Bowers. According to the Respondent, from August to November 2011, the Applicant and the Administration “worked to improve the Applicant’s performance in accordance with the goals set in the Action Plan”.

100. Given the alleged performance issues, once the Applicant was at the CCU, he was put on a performance improvement plan. However, his duties at the CCU were materially different from those at the Humanitarian Reporting and Donor Relations Sections. Whether the Applicant should have been allowed to function in his new assignment according to the action plan, or be evaluated on his performance following his alleged non-performance at the Human Reporting and Donor Relations Sections is pertinent because he was assuming new duties upon reassignment.

101. The Respondent concedes this point by pleading in paragraph 8 of his Reply that “prior to his transfer to the CCU, Ms. Bowers met with the Applicant to discuss **his new role and work expectations within the CCU**”. [Emphasis added]. The observations in the e-Pas for the period 11 July 2010 to 31 January 2012 confirm this fact. The comments of the FRO in that e-Pas read:

This evaluation is for the period of 18 months and 21 days. During this period, Pios [Applicant] worked for two sections, the Humanitarian Reporting Section and the Clusters Coordination UNIT. Each section had a **different Tor [Terms of Reference], Goals and expected outcomes** as clearly stipulated in the plan (emphasis added).

102. The Applicant was reassigned to the CCU and an action plan was prepared and agreed by him. He should have been allowed to perform in this new assignment,

as a new performance cycle had started for him as from March 2011. His first reporting officer Ms. Bowers should, in compliance with section 7.2 of ST/AI/2010/5 have conducted a midpoint review that is usually six months after the creation of a work plan.

103. Instead, an Action Plan was developed to “assist” the Applicant to improve his performance. But this was done on the basis of the Applicant having allegedly fallen short of performance expectations at the Humanitarian Reporting and Donor Relations Sections , which appraisal the Applicant successfully challenged. Indeed, the record clearly shows that the Applicant had not been properly appraised prior to his reassignment to the CCU.

104. Sections 8.2 and 8.3 of ST/AI/2010/5 provide

8.2 [P]rior to to the end-of-cycle discussion between the first reporting officer and the staff member, the staff member is encouraged to conduct a self-appraisal of the manner in which he or she has carried out the work plan defined at the beginning of the performance cycle”.

8.3 [T]he first reporting officer shall evaluate the extent to which the staff member has achieved the goals/key results/achievements as set out in his/her work plan. The first reporting officer shall also evaluate and comment on the manner in which the staff member has demonstrated the core values and competencies. The first reporting officer may comment on the staff member’s self-appraisal in his/her evaluation of the staff member.

105. The Respondent submits that between August and November 2011, there were some improvements in performance and the Applicant’s contract was extended for a further three months.

106. The issue when the Applicant was reassigned to the CCU was not whether his performance had improved but whether he had lived up to the goals in the Action Plan when he assumed totally different duties.

107. Ironically Ms. Bowers who had never been the Applicant's FRO between July 2010 and 10 March 2011 evaluated him for the period 11 July 2010 to 31 January 2012 "concentrating on the period she was the Applicant's FRO, from March 2011 to February 2012". Mr. O'Leary, the new Head of Office, and Mr. Inganji also contributed to the e-Pas in which the Applicant was rated as not meeting performance expectations.

108. The correct approach would have been to evaluate the Applicant on whether he had improved since leaving the Humanitarian Reporting and Donor Relations Sections, and the FRO was obligated to prepare a written performance improvement plan in consultation with the Applicant as required by section 10.2 of ST/AI/2010/5. This was not done and the Rebuttal Panel that decided on the rebuttal against the 11 July 2010 to January 2012 appraisal pointed out that this was an irregularity.

109. Mr. O'Leary was not the Head of Office from July 2010 to March 2011, but still placed his observations on the Applicant's performance during that period in the appraisal. Ms. Bowers stated in that respect that Mr. O'Leary was informed verbally about the performance of the Applicant. He had no participation in the monitoring or appraisal of the Applicant. He just "commented and signed off".

110. Ms. Bowers conceded that she understood the importance of a work plan but stated that this could not be done in spite of meetings with the Applicant.

111. The Applicant denied that Ms. Bowers had tried to finalise a work plan with him. He told the court that after being assigned to the CCU, Ms. Bowers and he met in May 2011 to discuss his functions. The Applicant also denied that he did not cooperate with Ms. Bowers to finalise a work plan. He was taking instructions on a day to day basis from her, he said.

112. The Applicant's witness, Mr. Megbaru Ayalew told the Tribunal that Ms. Bowers never communicated with people. She would not talk to anybody.

113. The Tribunal had the opportunity to hear both Ms. Bowers and the Applicant. When analysed in the context of all the irregularities that attended the whole appraisal process, the Tribunal finds the Applicant's version of events more credible.

114. When faced with an uncooperative staff member, the Tribunal finds that it remains open to the Respondent to take appropriate action as provided by section 4.2 of ST/AI/2010/5.

115. This provision seems to have been overlooked by the Respondent. The e-Pas for the period 11 July 2010 to January 2012 refers only to improvement and not to initial performance. There was no midpoint review six months after the initiation of a work plan at the CCU. Ms. Bowers in her testimony at the hearing admitted that there was no midpoint review but testified that there were numerous discussions with the Applicant.

116. As the Rebuttal Panel that reviewed the second e-Pas observed

This PAS seems to have been compiled as a performance appraisal by the FRO/SRO, without first agreeing on a work plan, then performing a mid-year review, and finally performing an evaluation in collaboration between the S/M [Staff Member] and FRO.

117. The Tribunal will here refer to what the Appeals Tribunal held in the case of *Das*³

It is in the reporting cycle immediately after the attention of a staff member has been brought to his unsatisfactory performance and given an opportunity to improve his performance that the performance of the staff member should be assessed to determine whether there has been an improvement. If the staff member does not fully meet expectations for the second time in succession, then the appointment may be terminated for unsatisfactory performance.

³ 2014-UNAT-421.

118. In his testimony, Mr. Inganji who acted as SRO in the second appraisal stated that he became the Applicant's FRO after the departure of Mr. Pitt. He conceded that the appraisal he did on the Applicant's performance was limited to information the Applicant provided. He added that he had first-hand knowledge of the Applicant's responsibilities because they were in constant discussion and that he supervised the Applicant for three months after the departure of Mr. Pitt. He claimed that he had a lot of experience in conducting appraisals and therefore the appraisal of the Applicant was properly done. When asked whether a "few things" would be enough to conduct an appraisal his answer was "yes".

Conclusion

119. This is an interesting case in which, despite repeated and consistent violation of the rules and regulations governing performance management and appraisals, the Respondent persisted with spirited arguments to defend the impugned decision.

120. The process of managing and appraising the Applicant's performance was fraught with irregularities from the onset of his appointment with OCHA Afghanistan. The Respondent, through successive heads of office and other staff members who assumed supervisory roles, then decided through convoluted and murky processes of evaluation that the Applicant should be separated from service for poor performance.

121. When a decision not to renew a contract is taken on grounds of non-performance, the process of establishing that a staff member has not performed must scrupulously comply with the legislation governing performance management. It is of equal and paramount importance that the rules made by the Secretary-General or under his delegated authority be complied with. Anything short of careful and considered compliance with the relevant rules and regulations would make a mockery of the authority of the Secretary-General to prepare and issue administrative instructions or bulletins.

122. In the case of *Tadonki*⁴, the Appeals Tribunal held

The objectiveness, transparency and legality of a performance evaluation stems primarily from the procedures indicated in the applicable Administrative Instruction, which were established in a detailed manner to ensure that these objectives are reached, that the staff member acknowledges the faults or reasons for his or her under-performance, and that the managers properly guide, advise and supervise their staff, provide adequate performance improvement goals and communicate goals to be achieved.

If the Administration does not follow the clear norms which apply to evaluate staff members' performances, it risks arbitrariness and bears the burden of proof that an evaluation reached after an irregular procedure is nonetheless objective, fair and well based.

123. In *Rees*⁵, UNAT held

In the absence of a PAS to verify the views of management about the performance of a staff member in compliance with ST/AI/2002/3, the Administration's decision of non-renewal of contract based on non-performance or under-performance may be successfully contested.

124. The first e-Pas was successfully rebutted by the Applicant. The Rebuttal Panel also found "multiple irregularities" in the second appraisal. Curiously, the Panel - comprising the same members - decided not only to maintain the performance rating, but went on to recommend that the Applicant's contract not be renewed!

125. The Panel was clearly misguided both in its final decision and its recommendation. It is quite surprising that the Panel, having found almost the same type of irregularities in the second e-Pas, chose to maintain the rating and recommend that the Applicant not be extended.

126. When a staff member's appraisal is so fraught with irregularities, that staff member has been denied due process to which he/she is entitled. It is rudimentary

⁴ 2014-UNAT-400.

⁵ 2012-UNAT-266.

that a breach of due process taints decisions that follow from a flawed or irregular process.

127. It is not the role of the Dispute Tribunal to review *de novo* the Respondent's rating of the Applicant. The Tribunal should not place itself in the role of the decision-maker and determine whether it would have renewed the contract, based on the performance appraisal. This is not the role of a reviewing tribunal under the UNDT Statute as was held in *Said*⁶. The role of the Tribunal is to determine whether the proper procedures had been applied. In this case it was not; and a finding based on an irregular procedure cannot be acted upon.

128. The Panel also erred when it recommended that the contract of the Applicant should not be renewed. Section 15 of ST/AI/2010/5 explains the duties and responsibilities of a rebuttal panel. In particular section, 15.4 of ST/AI/2010/5 states:

The rebuttal panel shall prepare, within 14 days after the review of the case, a brief report setting forth the reasons why the original rating should or should not be maintained. In the event that an overall rating or comments should not be maintained, the rebuttal panel should designate the new rating or modify the narrative on performance evaluation. The report of the rebuttal panel shall be placed in the staff member's official status file as an attachment to the completed e-PAS or e-performance document and communicated to OHRM, or the Field Personnel Division of the Department of Field Support, as appropriate.

129. Nowhere is there mention that a rebuttal panel has the power to make recommendations on the extension or termination of a staff member's contract. The mandate of the rebuttal panel is limited to determining whether the rating obtained by a staff member is the correct one due regard being had to the procedural requirements of ST/AI/2010/5 and nothing more. It is then left to the manager concerned to take whatever action that manager deems appropriate. By recommending the non-renewal of the contract of the Applicant the Rebuttal Panel may have shown lack of

⁶ 2015-UNAT- 500.

objectivity and therefore lack of impartiality. That conclusion may well have influenced the decision maker in not renewing the contract of the Applicant.

130. In *Rangel*⁷, disciplinary proceedings were initiated against the applicant following two investigations but the Applicant was not notified. The Respondent submitted that the forwarding of the investigation reports to the applicant constituted sufficient notification of the charges. The Appeals Tribunal held that sending the reports of the investigation to the applicant was not the same as charging her with misconduct. She was therefore not apprised of the charges. The Appeals Tribunal disregarded the findings of the investigations.

131. The same reasoning applies to the facts of the present case. The Tribunal considers that in view of the numerous irregularities in the whole process of appraisal and the rebuttal, the second e-Pas could not be used to justify non-renewal on grounds of non-performance.

132. The Appeals Tribunal has held that not all procedural errors are prejudicial and not all procedural errors violate a party's due process rights⁸. It behooves the Tribunal to determine on a case by case basis whether procedural irregularities have violated a staff member's rights.

133. The Tribunal finds that the irregularities denied the Applicant the due process he was entitled to.

134. When a staff member is found to be under performing, managers are required to record unsatisfactory performance and bring it to the attention of the staff member in a timely manner, in order to offer the staff member an opportunity to improve his

⁷ 2015-UNAT-535.

⁸ *Abou Jarbou* 2013-UNAT-292.

or her performance.⁹ Where a staff member's performance is the reason for the decision to terminate his/her appointment, the Administration is required to provide a performance-related justification for its decision¹⁰.

135. The Tribunal is satisfied that these principles were plainly absent in the process leading to the non-renewal of the Applicant's contract on the ground of non-performance.

Judgment

136. The Tribunal finds that the non-renewal of the contract of the Applicant was unlawful, as the decision was made in breach of his due process rights.

137. The Applicant is praying

(i) for his reinstatement together with all salaries and benefits due to him since his separation to be paid to him;

(ii) compensation as an alternative calculated on a 5-year gross salary using the salary scale since the date of separation from OCHA;

(iii) 300,000 as compensation for trauma and stress he has suffered.

138. Under art. 10.5(a) the Tribunal may order rescission or specific performance except "where the contested administrative decision concerns appointment, promotion or termination". In the latter situation the Tribunal must also set an alternative amount of compensation that should not exceed two years' net base salary unless there are exceptional circumstances. In *Gakumba*¹¹ the Appeals Tribunal

⁹ *Das* 2014-UNAT-421.

¹⁰ *Rees* 2012-UNAT-266; *Das* 2014-UNAT-421.

explained the distinction between articles 9.1(a) and (b) of the Statute of the Appeals Tribunal [Articles 10.5(a) and (b) of the UNDT Statute]:

This compensation [for humiliation, embarrassment and negative impact of the Administration's wrongdoing on the staff member] is completely different from the one set in lieu of specific performance established in a judgment, and is, therefore, not duplicative. The latter covers the possibility that the staff member does not receive the concrete remedy of specific performance ordered by the UNDT. This is contemplated by Article 9(1) (a) of the Statute of the Appeals Tribunal as an alternative. The former, on the other hand, accomplishes a totally different function by compensating the victim for the negative consequences caused by the illegality committed by the Administration, and it is regulated in Article 9(1) (b). Both heads of compensation can be awarded simultaneously in certain cases, subject only to a maximum ceiling.

139. In *Eissa*¹², the Appeals Tribunal made similar observations:

An award under Article 10(5)(a) of the UNDT Statute is alternative compensation in lieu of rescission. It is not an award of moral damages for the fundamental breaches of Mr. Eissa's rights not to be unlawfully terminated from service and to be automatically transitioned to the post of UNMISS Spokesperson. It is not the same remedy and does not serve the same purpose.

140. Article 10.5(b) was amended by the General Assembly in December 2014. The new article reads:

Compensation, for **harm, supported by evidence** which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision (emphasis added).

¹¹ 2013-UNAT-387.

¹² 2014-UNAT-469.

141. With or without the amendment both the UNDT and UNAT have invariably assessed evidence of harm on evidence given either *viva voce* or inferred from documentary evidence. In *Asiarotis*¹³ the Appeals Tribunal held:

To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:

(i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a fundamental nature, the breach may of itself give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.

(ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the Dispute Tribunal.

Following the identification of the moral injury by the UNDT under (i) or (ii) or both, it falls to the Dispute Tribunal to assess the quantum of damages. This will necessarily depend on the magnitude of the breach that may arise under (i). With regard to (ii), it will depend on the contents of any medical or other professional report or evidence before the Dispute Tribunal.

¹³ 2013-UNAT-309.

142. In the light of the principles laid out above, the Tribunal awards the Applicant 12 months' net base salary, for wrongful termination of his contract, *in lieu* of rescission of the impugned decision.

143. In addition the Tribunal awards him USD10,000 as moral damages for harm suffered as result of a breach of his fundamental right that resulted from a denial of due process.

(Signed)

Judge Vinod Boolell

Dated this 7th day of June 2016

Entered in the Register on this 7th day of June 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi