



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

ARIGI-OIKELOMEN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**  
Seth Levine, OSLA

**Counsel for the Respondent:**  
Miouly Pongnon, UNON

## **Introduction**

1. The Applicant was recruited as an Administrative Assistant in the Procurement, Travel and Shipping Section (PTSS) of the Support Services Service with the United Nations Office at Nairobi (UNON) at the G-6 level on a three-month fixed-term appointment on 11 July 2006.

2. The Applicant's contract was subsequently renewed and on 1 April 2007, she received a two-year fixed-term appointment expiring on 31 March 2009.

3. Her last contract was a renewal for six months which expired on 31 October 2009.

4. The Applicant is contesting a decision dated 16 September 2009 separating her from service on 1 November 2009 on the basis of performance shortcomings.

## **Facts**

5. From July 2006 when she took up her duties at PTSS, the Applicant's first reporting officer was Ms. Josie Villamin until the end of the 2007/2008 reporting cycle in March 2008. The Applicant's first performance appraisal covering the period from 12 July 2006 to 12 April 2007 (2006/2007) recorded a rating of "fully successful performance" and was signed by Ms. Josie Villamin as the First Reporting Officer ("FRO") and by Ms. Vibeke Glavind as the Second Reporting Officer ("SRO"). For the period from 2 April 2007 to 31 March 2008 in the 2007/2008 performance appraisal ("ePAS") cycle, the Applicant received a rating of "frequently exceeds performance expectations" and her performance appraisal was again signed by Ms. Villamin and Ms. Glavind.

6. Ms. Vesna Vurdelja became the Applicant's supervisor and FRO with the departure of Ms. Villamin and her first performance appraisal in respect of the Applicant was for the 2008/2009 reporting cycle. For that cycle, the Applicant was given a rating of "partially meets performance expectations." This

performance appraisal was signed electronically by Ms. Vurdelja and by Ms. Glavind on 29 June 2009. The Applicant signed the ePAS electronically on 17 August 2009 and indicated her intention to rebut it. She subsequently signed the hard copy of the ePAS on 15 September 2009.

7. On 16 September 2009, the Applicant received notification from Ms. Glavind that her contract would not be renewed beyond 31 October 2009. On 15 October 2009, she submitted her request for rebuttal of her 2008/2009 ePAS. On 1 November 2009, the Applicant was separated from service.

8. The Applicant filed a request for management evaluation of the non-renewal decision on 13 November 2009.

9. The Management Evaluation Unit (“MEU”) provided its response on 27 December 2009 in which it concluded as follows:

- a. The decision not to renew the Applicant’s contract was taken in accordance with the relevant staff rules and did not violate her terms of appointment.
- b. At whatever time in the autumn of 2007 that Ms. Vurdelja became the Applicant’s supervisor; UNON did not itself verify that the ePAS reflected the accurate supervisory structure for the cycle.
- c. There was sufficient evidence in the form of emails showing that the Applicant’s supervisors had on-going concerns about her performance.
- d. The midpoint review recorded a discussion between the Applicant and her FRO on 17 November 2008 in which she was informed that her performance was not satisfactory and that it needed major improvements. The Applicant did not raise objections about her midpoint review.
- e. UNON had adequately documented its concerns with her performance during the ePAS cycle and made frequent, documented efforts in the context of specific incidents to call her attention to necessary improvements.

- f. While noting the need to observe a staff member's right to rebuttal before a decision is taken on a renewal of contract, there is a concomitant obligation on the staff member to follow-up his/her part of the performance appraisal process in a timely manner. This would necessarily include signing the ePAS in a timely fashion and submitting a rebuttal within the necessary time frame; that is, within 30 days of signing the completed ePAS.
- g. The rebuttal process could have been completed earlier had the Applicant signed her ePAS at the end of June or early July. The Applicant submitted her rebuttal on 15 October 2009, almost two months after she signed the ePAS electronically and had actual notice of her supervisors' assessment.
- h. Given that the Applicant did not follow-up with the ePAS and rebuttal process in a timely manner, UNON was under no obligation to await the outcome of the rebuttal process prior to proceedings with her separation.
- i. There is no indication that the Applicant raised a complaint outside the context of the notes to file regarding harassment, intimidation and stress caused by her supervisors.
- j. The discrepancy between the ratings in the Applicant's 2008/2009 ePAS and her previous ratings were not clearly indicative of bias or ill-motivation.

10. On 30 December 2009, the Rebuttal Panel issued its report which was transmitted to the Applicant on 5 January 2010. The Panel concluded as follows:

- a. The tasks used at the midpoint review were not an "improvement plan" as required by ST/AI/2002/3.
- b. The correct procedures governing performance appraisal in ST/AI/200/3 were not followed. The Applicant was unfairly rated and assessed as "partially meets performance expectations."

- c. The Applicant was entitled to a higher assessment and recommended that her overall rating be changed to “fully successful performance.
- d. It was disturbed to receive an intimidating and aggressive email from the SRO where she questioned the manner in which the Panel was conducting its work.

11. The Applicant filed the present Application on 30 March 2010. On 30 April 2010, the Respondent filed a Reply to the Application.

12. On 11 August 2011, the Tribunal issued Order No. 085 (NBI/2011) setting the matter down for hearing on 23 August 2011. On 19 August 2011, the Respondent sought an extension of time to file his list of witnesses and for rescheduling of the hearing.

13. Order No. 104 (NBI/2011), dated 23 August 2011 adjourned the hearing to 16 September 2011.

14. On 15 September 2011, Counsel for the Applicant filed a Motion for stay of proceedings stating that the Respondent had indicated earlier that day that he was amenable to the matter being settled out of court. The Tribunal advised the Parties, on 16 September 2011, to file a joint motion for suspension of proceedings pending mediation.

15. On 19 September 2011, the Respondent filed a joint Application pursuant to art.15 of the UNDT Rules of Procedure for stay of proceedings pending mediation. On 20 September 2011, the Tribunal issued Order No. 119 (NBI/2011) declining to rule on the joint Application and adjourned the matter *sine die*.

16. The hearing on the merits took place on Wednesday, 21 March 2012, at 11.00 a.m., pursuant to Order No. 048 (NBI/2012) issued on 20 March 2012.

17. The continuation of the hearing took place on 9 and 10 May 2012 when Ms. Villamin testified as a witness for the Applicant. The Respondent’s witnesses included Ms. Glavind, Ms. Vurdelja and Ms. Joyce Muiruri.

18. The Applicant and the Respondent submitted their closing submissions on 4 and 8 June 2012 respectively.

19. Ms. Villamin's testimony is summarized below:

- a. In July 2006 she was the Chief of Procurement, Travel, and Shipping at UNON. She was a P-4 level officer in charge of the Property Management Unit.
- b. She was involved in the Applicant's recruitment to work in UNON as a member of the interview panel.
- c. She was the Applicant's supervisor and FRO when she joined UNON in July 2006.
- d. Her 2006/2007 appraisal of the Applicant was "fully successful performance". Ms. Glavind, the Applicant's SRO supported her assessment of the Applicant's performance.
- e. Ms. Glavind had very little involvement with the Applicant since she did not directly supervise her.
- f. Ms. Glavind's comments as SRO were simply a reflection of her comments as FRO, rather than any particular contact she would have had with the Applicant during that reporting cycle.
- g. She had never had any difficulties with the Applicant following instructions or showing insubordination when she gave directions.
- h. She did not have any cause for concern about the Applicant's attendance at work during the reporting period.
- i. The Applicant worked late when she was required and did not request overtime pay, only transport pay.
- j. She never had any cause for concern about the Applicant's interaction with other team members. She found the Applicant to be a team player.

- k. During the 2007/2008 reporting cycle, she was the Applicant's FRO for nine months as she left UNON in January 2008. Ms. Vurdelja subsequently took over as the Applicant's FRO.
- l. She did not discuss with Ms. Glavind before assessing the Applicant's performance for the 2007/2008 performance cycle.
- m. Towards the last quarter of 2008, a reorganization of UNON/PTSS took place. Part of the re-organisation involved the separation of the inventory and insurance units from PTSS.

20. Ms Vurdelja's testimony is summarized below:

- a. She has worked for 16 years for the United Nations. She joined UNON on 1 September 2007 as Chief of the Property Management Unit. On her arrival, she became the Applicant's FRO. On her first day at UNON, she did not find the Applicant in the office. From that day, the Applicant was often absent from the office without informing her colleagues.
- b. She initially relied on the Applicant for help in establishing the Property Management Unit. When she first took up the managerial duties in the Property Management Unit in 2007, she instituted a policy of cross-training staff members so that they could backstop each other. She required the Applicant to train other staff members on the insurance aspect of her functions but the Applicant refused. The Applicant was responsible for another staff member's resignation.
- c. She was not involved in assessing the Applicant's performance for the 2007/2008 performance appraisal period. During the 2008/2009 performance appraisal period, her working relationship with the Applicant was "strange". The Applicant sometimes harassed and threatened her when she made notes to file regarding the Applicant's absences from work. The Applicant would stand at her door with her hands on her hips and make statements which she found threatening.

- d. The Applicant had a habit of not reporting her absences from work and would sometimes attend training without her approval. Prior to concluding the Applicant's performance appraisal for the 2008/2009 cycle, she undertook a midpoint review with the Applicant in November 2008.
- e. During the midpoint review, a discussion took place between herself, the Applicant and the SRO, Ms. Glavind. They placed the Applicant on a performance improvement plan because she lacked both integrity and professionalism and needed improvement in teamwork. All the tasks in the performance improvement plan were the same as in the Applicant's work plan but the purpose of the plan was to set deadlines for each task. The Applicant failed to meet the deadlines.
- f. The Applicant's lack of integrity was demonstrated by the fact that the Applicant reported her private calls as being official calls. The Applicant spent one third of her working hours on the telephone. She rated the Applicant's professionalism as "unsatisfactory" because she consistently missed deadlines.
- g. She asked the Applicant to work overtime and help with the financial report on ten occasions but she did not stay behind on all these occasions with the excuse that her son was at home alone and sick. She came to the office every Saturday and Sunday evening for two years doing the Applicant's job because the Applicant could not meet deadlines. She felt that she was working for the Applicant and not the other way round.
- h. She gave the Applicant the lowest ranking for teamwork because the Applicant was not a team player. The Applicant failed to provide files that she requested to be provided to auditors. The Applicant even delegated some of her tasks to interns.
- i. In September 2008, she was called to a meeting by the Staff Union to discuss a harassment claim brought to them against her by the Applicant. The Applicant had also complained to the Staff Union that she swore at her. Ms. Glavind, the then Staff Union President,

Ms. Rhoda Atana and the then Chief of the Procurement Section, Ms. Diana Mills-Aryee and some others, were present at the meeting.

- j. The Applicant did not sign her midpoint review on time and she was forced to send her three email reminders. For the 2008/2009 reporting cycle, she gave the Applicant a rating of “partially meets performance expectations”. She was involved in the Applicant’s rebuttal of her 2008/2009 performance appraisal by sending responses to the Applicant’s assertions. She, however, formed the impression that the rebuttal panel was partial because the Chairman of the rebuttal panel and one panel member were the Applicant’s friends.
- k. She had discussions with Ms. Glavind concerning the non-renewal of the Applicant’s contract. At this point she felt that she had exhausted all means of improving the Applicant’s performance.

21. Ms. Glavind’s testimony is summarized below:

- a. She is currently the Chief of the Support Services Section (SSS) of UNON. She was involved in recruiting the Applicant to UNON but the Applicant was not her preferred candidate. At the date of her recruitment and throughout her employment, she was the Applicant’s SRO. The reason Ms. Villamin gave the Applicant good performance ratings was to justify recruiting her.
- b. In 2006, the Property Management, or the inventory sub-unit was reporting to the Chief of Procurement, which was Ms. Villamin. An audit observation that there was a conflict of interest of the Chief of Procurement being supervisor of this particular sub-unit resulted in that sub-unit being moved to her direct supervision in 2007. A post of chief of that unit was established in 2007.
- c. As of September 2007, Ms. Villamin had no reporting duties in respect of the Applicant.
- d. With respect to the Applicant’s performance for 2007/2008, she was not happy with the rating the Applicant received from her

FRO, Ms. Villamin, and considered it an over-rating. She had observed that the Applicant came in late, went home early, disappeared for hours, did not meet deadlines, made many mistakes in her work, was constantly on the phone, was nasty to colleagues, did not follow instructions and intimidated her supervisor.

- e. She was involved in assessing the Applicant's performance during the 2008/2009 reporting cycle. She met with the Applicant and Ms. Vurdelja during the midpoint review of this cycle and was involved in drawing up a performance improvement plan for the Applicant. The plan involved setting timelines for duties that the Applicant performed.
- f. Following the midpoint review for the 2008/2009 reporting cycle, she was also involved in the end of cycle discussion during which she informed the Applicant that her appointment would only be extended for six months since she had failed to meet the deadlines established during the mid-point review.
- g. She was called to a meeting by the Staff Union involving the Applicant, Ms. Mills-Aryee, Ms. Vurrdelja and the Staff Union President during which all the accusations of harassment brought by the Applicant against Ms. Vurdelja were rebutted.
- h. She had to micromanage the Applicant during the 2008/2009 reporting cycle despite being the SRO since the Applicant did not adhere to instructions, warnings or to advice.
- i. The Applicant frustrated another staff member, Ms. Joyce Muiruri, to the extent that the latter resigned from the Organization.
- j. She had witnessed the Applicant refusing to do overtime work. She often stayed back at the office after hours and observed Ms. Vurdelja working late. Ms. Vurdelja informed her that the reason she was working late was because she had to rectify the work done by the Applicant as she did not trust the quality of that work.
- k. The Applicant's performance became worse when Ms. Villamin left.

- l. She believes that Ms. Villamin was of questionable integrity and she had a very low opinion of her.
- m. She had on numerous occasions given the Applicant pep talks in attempts to improve her attendance and her work performance.
- n. She was interviewed by the Rebuttal Panel over the Applicant's rebuttal of her 2008/2009 performance appraisal. The Applicant exclusively selected the members of the Rebuttal Panel. She expressed concerns about the membership of the Rebuttal Panel since she knew that the Chairperson of the Panel, another member of the Panel and the Applicant were friends. She was worried that the Applicant had constituted a panel of friends that would not give an objective assessment of the rebuttal case.
- o. When the case filed by the Applicant commenced, she began doing some background checks on the Applicant by phoning UNICEF's Chief of Human Resources where the Applicant had previously been employed and also called up an Institute in Nairobi to verify whether the Applicant had taken some computer examinations which were in her PHP. She discovered that she had not.

22. Ms. Muiruri's testimony is summarized below:

- a. She joined UNON's Property Management Unit in July 2007 where she worked with the Applicant.
- b. The Applicant denied her access to files relating to insurance issues and she was forced to register with a college to learn more about insurance matters.
- c. She found it very difficult to work with the Applicant whom she considered rude, arrogant, intimidating and not a team player. In the end she decided to leave and return to the Commercial Operations Unit where she had been working.
- d. She did not complain about the Applicant to her other superiors until she decided to leave as she was new to the office and did not want to be perceived as complaining about her boss.

**Applicant's case**

23. In her pleadings and evidence placed before the Tribunal, the Applicant's case can be summarized as follows:

24. The decision not to renew her contract beyond 1 November 2009 was unlawful because it failed to take cognizance of her right to rebuttal of the 2008/2009 performance appraisal especially because performance was the reason for the decision not to renew her contract. In taking the decision, the UNON Administration deprived her of her right to due process.

25. The act of separating her before the conclusion of the rebuttal process amounted to a lack of due process. It was unacceptable to make a decision on her future when the internal rebuttal process had not yet been finalized.

26. As stipulated by ST/AI/2002/3, even if her rating of "partially meets expectations" was justified, the decision not to renew her contract was still unlawful.

27. Elements of unfairness and bias as well as ill treatment underlined the evaluation of the Applicant's performance.

28. Rather than using the ePAS system as a means of addressing genuine concerns about performance, in the present case, the ePAS process was used as a means of targeting the Applicant with a view to removing her from office. The frequency with which notes were placed on the Applicant's official status file indicates that the Applicant's FRO was making a concerted effort to characterize the Applicant as a poor performer with a view to justifying a subsequent decision not to renew her contract.

29. The SRO, who was well aware of the strained working relationship that existed between the Applicant and her FRO, took neither a tangible measure nor offered a cordial platform to rectify the issues. This was particularly the responsibility of the SRO as per sections 4.3(d), 4.4 and 8.3 of the ST/AI/2002/3.

30. Evidence of the unfairness of the performance evaluation is clear from the sharp disparity in the Applicant's 2006/2007 and 2007/2008 appraisals (under the supervision of Ms. Villamin) and against the 2008/2009 appraisal under Ms Vurdelja.

31. The Applicant contends that it was impossible for her to carry out all the tasks assigned to her with anything like perfection. Additionally, she was given tasks well beyond her terms of reference and when she found these difficult to complete, she was given tighter deadlines and deliberately refused the opportunity to enhance her skill by undertaking training.

32. Ms. Vurdelja and Ms. Glavind in attempts to justify their decision not to renew her contract on the ground of poor performance have said that she has an attitude problem, is a poor communicator and is not a team player. The Applicant asserts that this is false and that the Rebuttal Panel's finding was that the FRO's and SRO's conclusions were not corroborated by the rest of the team.

33. There was indeed a period when the Applicant spent a lot of time on the phone because she was receiving work-related stress counselling. She received some of the counselling in the UNON compound from the Staff Counsellor's office and from her church Pastor. She also had an incident with her son at that time and would call him to check up on how he was doing. She would often telephone the staff counsellor or her church Pastor when she was feeling stressed and could not work.

34. It is untrue that the Applicant was hostile to her colleagues, made their lives generally miserable and had terrible working relationships. The reason that Ms. Muiruri gave when she left the department was that she could not work in a department where information was being given and changed at any time. Ms. Muiruri would not have been able to perform her duties without her assistance. She showed Ms. Muiruri how to do the work and Ms. Muiruri told her that she had been instructed to consult Ms. Vurdelja.

35. She had made a number of file notes in relation to her relationship with Ms. Vurdelja. Ms. Vurdelja felt that the Applicant was undermining her and Ms Vurdelja had sworn at her on several occasions.

36. She had brought it to Ms. Glavind's attention as her SRO that she was doing 75 per cent of her colleagues' work during the 2008/2009 reporting cycle midpoint review. Ms. Vurdelja refused to roll back the Applicant's ePAS to allow her to insert her self-appraisal comments in the final ePAS for that cycle.

37. Ms. Glavind, in her letter to the Chief of MEU stated that the Applicant was given continuous feed-back on her performance issues. She also mentioned that she had "pep-talks, discussions and well-meant advice" to the Applicant to change her attitude. There is no documentary evidence of such emails remotely suggesting a pep-talk or well-meant advisory relationship between the Applicant and her supervisors.

38. The Applicant submits that, contrary to the Respondent's assertions that she had failed to adhere to the 30-day timeline for initiating rebuttal proceedings, there is no absolute bar on seeking a rebuttal outside the 30-day period and this was subsequently proved by the Rebuttal Panel's acceptance of her submissions.

39. The Applicant submits that the Respondent is estopped from making the argument that the rebuttal system was flawed. The Secretary-General has mandated the process by which the rebuttal panels are constituted and it is therefore perverse for his Counsel to impugn that very system. No evidence was adduced to suggest that the system of selecting members of the rebuttal panel was wanting or is subject to change or review.

40. The Applicant further submits that the Respondent adduced no credible evidence that members of the Rebuttal Panel in the Applicant's case were in fact friends or biased in favour of the Applicant. The constitution and operation of rebuttal panels under ST/AI/2002/3 contained inherent checks and balances to ensure their fair and effective operation. No evidence was adduced to suggest that

the Secretary-General sought to exercise his discretion as Chief Administrative Officer to overturn the revised performance rating and he is therefore bound by it.

41. In view of the foregoing, the Applicant prays the Tribunal to award her two years' net base salary in damages and to order that all negative material relating to her performance for the relevant period be removed from her official status file.

### **Respondent's case**

42. The Respondent's case is summarized below:

43. In cases where the administrative process requires the participation of the Applicant, it is not equitable to allow the claim of violation of due process as injurious when it was the Applicant who did not observe the process.

44. Section 15.1 of ST/AI/2002/3 states that a staff member needs to rebut in writing within 30 days after the signing of the completed performance appraisal in case she is in disagreement with the performance rating that is given.

45. The ePAS was signed off by the Applicant's supervisors on 29 June 2009 and only after a great deal of difficulties to obtain the staff member's required input in the form of the self-appraisal, the Applicant then delayed the electronic signature in the system until 17 August 2009. The staff member chose to submit a rebuttal on 15 October 2009, 59 days after she had signed off the ePAS in the system on 17 August 2009 and 108 days after she was made aware of the ratings by her FRO and SRO.

46. The Applicant deliberately delayed the submission of the rebuttal to 15 October 2009 in order to be able to advance the argument that her separation was unlawful, as the rebuttal process against her ePAS was on-going.

47. Both the former UN Administrative Tribunal and the Dispute Tribunal have held that the observation of deadlines is an essential prerequisite for the transparent, predictable and timely handling of cases in formal processes. The Applicant therefore cannot claim that she was injured in her process rights in

respect to her performance appraisal, when she was the one who did not observe procedural deadlines.

48. The Administration does not need to give reasons for the non-extension of a fixed-term appointment and a fixed-term appointment does not carry an expectancy of renewal.

49. The decision not to extend the Applicant's appointment was based on a number of reasons including performance. The other reasons included the manner in which she conducted herself with both of her supervisors and colleagues, the lack of team spirit, insubordination, erratic attendance and work attitude issues.

50. There were serious misgivings with the Rebuttal process, the content of the review by the Rebuttal Panel and the resulting Report that was heavily biased in favour of the Applicant did not provide a fair platform for the consideration of the Administration's point of view.

51. The Rebuttal Panel had no authority to change Ms. Vurdelja and Ms. Glavind's comments in respect of the Applicant's performance and mastery of the core values and competencies of the United Nations.

52. It is not only performance that is the benchmark against which the legitimacy of a decision not to extend has to be measured; the conduct of the staff member also needs to be taken into account. The Secretary-General is entitled to take a staff member's conduct into account when deciding on the renewal of that staff member's contract.

53. When the shortcomings in the Applicant's work performance were brought to her attention, she resorted to accusations of harassment and provided accounts of events that, in part, were not truthful.

54. The Applicant has failed to substantiate her claim that her supervisors were prejudiced against her or that they engaged in a pattern of victimization against her.

55. There were no improper motives underlying the decision not to renew the Applicant's appointment.

56. Accordingly, the Respondent requests the Tribunal to dismiss this Application.

### **Considerations**

57. The issues arising from the facts in this case are as follows:

- a. Whether the evaluation of the Applicant's performance for the 2008/2009 reporting cycle was carried out in accordance with the established procedures.
- b. Were the allegations of a poor work attitude and absences from the office sufficiently established and serious as to warrant the non-renewal of contract decision against the Applicant?
- c. Did the relationship between the Applicant's former FRO, Ms. Villamin and the SRO Ms. Glavind, impact on the non-renewal of the Applicant's contract?
- d. The implications of post-facto investigations into the Applicant's qualifications by Ms. Glavind and the allegations of lack of integrity.
- e. The Rebuttal Process under the United Nations Rules.
  - i. Did UNON have an obligation to defer the Applicant's non-renewal until the rebuttal process was completed?
  - ii. Whether the Respondent can allow a Rebuttal Panel to proceed until completion only to later question its credibility.

f. Whether there is evidence of bad faith, ill-motive or extraneous factors behind the decision not to renew the Applicant's fixed-term appointment.

***Was the evaluation of the Applicant's performance for the 2008/2009 reporting cycle carried out in accordance with the established procedures?***

58. On 16 September 2009, the Applicant was notified that her contract would not be renewed beyond 31 October 2009 as a result of numerous problems with her performance, to wit, lack of team spirit, insubordination and work attitude issues.

59. At the time the Applicant was being evaluated on her performance, the applicable law was ST/AI/2002/3. Section 2 of ST/AI/2002/3 states that the purpose of the PAS is to optimize performance levels by promoting the desired culture of high performance; holding managers accountable and responsible for managing and motivating their staff; encouraging a high level of staff participation in the planning; delivery and evaluation of work; recognizing successful performance and addressing underperformance in a fair and equitable manner.

60. The appraisal cycle is annual and begins on 1 April of each year and ends on 31 March of the following year. The cycle comprises of the initial stage of making a work plan, a mid-point review (usually at the 6 month mark) and the end-of- cycle appraisal.

61. Section 4.1 of ST/AI/2002/3 defines the responsibilities of the FRO as setting the work plan with the staff member, conducting the mid-point review and final appraisal and providing supervision on the overall work of the staff member throughout the reporting period. The SRO has the responsibility of, amongst other things, ensuring that the FRO understands and applies ePAS principles and procedures, holding the FRO accountable for appraising staff in accordance with ePAS guidelines.

62. Section 7.1 of ST/AI/2002/3 provides that the heads of departments and offices are responsible for the implementation of the ePAS. Section 7.3 further provides that the primary responsibility for the timely execution of the ePAS rests with the head of department or office for overall compliance as well as consistent and fair implementation. Section 7.4 provides that timely implementation of all aspects of the ePAS and compliance with the spirit and the letter of the process, including completion of the ePAS forms and development of remedial action under section 8.3 is necessary, rests with the supervisor acting as the first reporting officer under section 4.1.

63. For the ePAS cycle 2008/2009, covering the period of 1 March 2008 to 31 March 2009, during which period the Applicant's FRO was Ms. Vurdelja and her SRO Ms. Glavind, the Applicant received a rating of "partially meets performance expectations."

64. The ePAS prepared in respect of the Applicant for 2008/2009 showed that the work plan (which included the restructuring of the Applicant's tasks) was only signed by the Applicant eight months after the cycle began, on 7 December 2008 and was signed by her FRO, Ms. Vurdelja, 10 months after the cycle began on 14 February 2009.

65. During the midpoint review, of 17 November 2008, it was noted that the Applicant's performance was not satisfactory and needed major improvements. In that regard, a meeting was held with the Applicant where streamlined key tasks were discussed, agreed and signed by her on 28 November 2008.

66. The end of year cycle was signed by the FRO, Ms Vurdelja, and by the SRO, Ms. Glavind on 29 June 2009 and then signed by the Applicant on 17 August 2009. The FRO commented as follows:

Comments on Values and Competencies

[The Applicant] did not show her professionalism. She is not meeting commitments, not observing deadlines and not achieving expected results. She did not demonstrate teamwork. When she worked closely with her colleagues she did not share information,

knowledge, nor assist the three new colleagues assigned to the Unit. She has difficulty completing tasks on time and consistently misses deadlines.

#### Overall Comments

Overall an unsatisfactory performance by [the Applicant] during this reporting period. In spite of having discussed her shortfall at length (*sic*) during the mid-point review and in spite of having drawn up a work plan with expected outputs and deadlines, agreed by [the Applicant], she still failed to take her job assignments seriously. She was therefore given final warning and 6 months contract extension to prove that she has what it takes to do the job she is recruited to do properly.

67. The manner in which the 2008/2009 performance appraisal was conducted demonstrates that it was neither completed in a timely manner nor according to the established procedures.

68. Firstly, the initial phase in the performance cycle is the development of a work plan which in turn provides a guide for evaluation of performance. When a staff member takes up new duties upon recruitment or renewal of a contract, that staff member works with the FRO to devise a plan for the performance cycle and to determine the competencies that would be used to carry out the work plan. This initial stage includes the work plan, the competencies and planning for development.<sup>1</sup> Section 6.2 (a) states that with regard to the work plan, each staff member prepares in a timely manner, a draft work plan for discussion with the FRO. In discussing the work plan, the staff member and the FRO also select the relevant core competencies and where appropriate, managerial competencies.<sup>2</sup>

69. There is no evidence tendered to show that the FRO and the Applicant had met to prepare a work plan at the beginning of the 2008/2009 cycle. It is the responsibility of the heads of departments or offices to implement the performance appraisal system.<sup>3</sup>

70. The FRO only signed the work plan on 14 February 2009, 10 months after the cycle began and less than two months to the end of the said cycle. From

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<sup>1</sup> ST/AI/2002/3 at section 6.2.

<sup>2</sup> Section 6.2 (b)

<sup>3</sup> ST/AI/2002/3 at section 7.1

all indications, the midpoint review meeting, which should have taken place in September 2008 but was instead done in November 2008 and signed, was done without a work plan. The FRO, during the mid-point review is required to review the manner in which the work plan had been carried out by the staff member and to provide performance feedback and guidance for the accomplishment of the goals and performance expectations set out in the work plan.<sup>4</sup> It is evident that the Applicant's mid-point review was carried out on the basis of a work-plan that either did not exist or had not been finalized.

71. Section 8.3 of ST/AI/2002/3 provides that where a performance shortcoming has been identified, steps are to be taken to rectify the situation, with the development of a performance improvement plan. The first reporting officer is expected to set up a performance improvement plan in consultation with the staff member. Accordingly, performance improvement measures may be instituted based on the on-going performance evaluation, including mid-point review, and prior to the finalization of the ePAS report.<sup>5</sup>

72. The midpoint review in this instance was signed by the FRO on 28 February 2009, 14 days after she signed the work plan and three months after the streamlined tasks were drawn up in November 2008. The SRO was also present at this meeting in November where the focus of the mid-point review appeared to be centred on the meeting of deadlines. There is no evidence that the FRO had spoken with the Applicant about her performance, before the SRO came in to intervene.

73. One of the functions of an SRO is to resolve ePAS disagreements between the staff member and the FRO. It is not clear what disagreements the SRO was addressing in the mid-point review meeting of November 2008. Ms Glavind testified that the Applicant twisted facts as to what was said in meetings and that for that reason; she insisted that she and Ms. Vurdelja would have meetings with the Applicant together so as to have evidence of what was said, how it was said and what happened. This posture definitely detracted from the role of a senior

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<sup>4</sup> ST/AI/2002/3 at section 8.1.

<sup>5</sup> UNDT Judgment No. UNDT/2010/213 *Jennings* at para 38.

officer who ought to resolve disagreements, if any, between the staff member and the FRO.

74. What happened was that Ms. Vurdelja and Ms. Glavind placed numerous notes to file instead of engaging in supportive discussions when the shortcomings were identified. What is referred to as the performance improvement plan set up for the Applicant only included a goal, a key related action and deadlines.

75. Unfortunately, nowhere in the performance improvement plan was there an indication of what, in the “work plan” the Applicant had failed to do in terms of her goals, expectations and core values and competencies. There was also no indication on the document as to how the said performance was going to be monitored and evaluated or any specific guidance to be provided to the Applicant. It appeared that the major fault of the Applicant was mainly in her failure to meet deadlines that were set for her.

76. The evidence does not even remotely show that the Applicant was provided any real support to improve her performance as provided for in ST/AI/2002/3. It must be noted that giving her a list of deadlines does not demonstrate an attempt to improve the Applicant’s performance. Ms. Glavind stated in her evidence,

I was involved in the midterm review and the development plan, or the improvement plan. And I was also involved in the end of cycle talk with [the Applicant], in which we outlined that she had not met these timelines. **As I said, very generous and very much achievable timelines** had not been met in that period that followed the midterm review. And in that discussion I said to her, "I'll give you six months, and this is a final warning. I'll extend your contract by six months. If you don't pull up your socks in those six months I will not extend your contract.

77. In March 2009, after four months of being given these tasks and strict deadlines, the Applicant was informed that based on her poor performance, her contract would only be renewed for six months to enable her to pull up her socks. Ms. Glavind also stated in her response to the MEU that she informed the

Applicant that she was tired of having to meet with her, to discuss her attitude, performance, insubordination and lack of team spirit.

78. In the former UN Administrative Tribunal Judgment No. 1290 (2006), the Tribunal ruled that before a staff member is terminated on grounds of unsatisfactory performance, such performance must be properly evaluated and the staff member must be allowed a chance to improve. Similarly, in UN Administrative Tribunal Judgment No. 1416 (2009) it was held that even where a staff member's performance is found wanting, he/she is entitled to the protection of the rules and regulations. Management is therefore under an obligation to demonstrate that the performance was properly evaluated and that the staff member received guidance and due care.

79. In section. 2 of ST/AI/2002/3, it is clearly provided that the purpose of the PAS is to improve the delivery of United Nations programmes through optimizing staff performance and not only to recognize successful performance but also to address underperformance in a fair and equitable manner. In the Applicant's end of year cycle appraisal, the FRO stated that the Applicant was given a final warning and a six month contract extension "to prove that she has what it takes to do the job she is recruited to do properly." Evidently no new steps were taken to rectify the situation in those last six months.

80. In this case, all the established procedures were carried out in arrears. The Applicant was not properly evaluated and provided the requisite guidance in order to improve her performance. Rather, it appears that the SRO, whose responsibility it was to ensure that the ePAS process was timeously and properly followed and implemented,<sup>6</sup> concurred with the FRO's comments and made the decision to rate the Applicant "partially meets performance expectations" based on an improperly implemented ePAS process.

81. It is clear from the fore-going considerations that the ePAS guidelines for appraising the Applicant were not followed and that the manner in which the staff member was rated was greatly lacking. The Tribunal finds that the

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<sup>6</sup> Section 4.3 of ST/AI/2002/3 "the second reporting officer is responsible for holding the first reporting officer accountable for appraising staff in accordance with PAS guidelines.

evaluation of the Applicant's performance for the 2008/2009 reporting cycle was not carried out in accordance with the established procedures.

82. Is this failure to properly follow the said ePAS guidelines material in determining whether the Applicant's performance appraisal as carried out by her supervisors can stand? Although the Rebuttal Panel had already upgraded the Applicant's rating, the Tribunal's considered view here is yes, the manner in which the ePAS guidelines were breached materially affected the outcome of the performance appraisal as to render it unreliable and an unfair basis for the non-renewal decision that followed.

83. Ms. Glavind had testified that the Applicant was smart and could do the job for which she was hired but that she had simply decided to be uncooperative. Based on this view expressed by the SRO, it emerges that the problems between the Applicant and her supervisors were rather due to personality and inter-personal communication issues.

***Were the allegations of a poor work attitude and absences from the office sufficiently established and serious as to warrant the non-renewal of contract decision against the Applicant?***

84. Several notes to file were recorded against the Applicant by her first and second reporting officers. In Ms. Glavind's testimony, she stated that the Applicant lacked team spirit, was often uncooperative and unhelpful to her colleagues and spent most of her working hours on the telephone instead of concentrating on her work.

85. In a note to file dated 8 July 2009, she recorded that she had been informed by Ms. Vurdelja that the Applicant was unwell and was not at work. She recorded also that she was surprised at the information because she had earlier seen the Applicant within the premises and that the Applicant did not greet her or acknowledge her presence as that was her usual habit.

86. For her part, in another note to file dated 27 August 2008, Ms. Vurdelja recorded several instances of wrong-doing spanning over several months from 13

March to 20 August 2008 against the Applicant. In another note dated 25 March 2009, she recorded two instances of absence from the office without permission. Yet another note to file recorded that the Applicant had not verified her telephone bills three months after a request to do so.

87. On one occasion, the Applicant attended a five-day training on procurement without the approval of her FRO. She was also said to have gone off to Staff Union meetings without permission and to have taken part in Staff Union demonstrations. Other instances recorded were her seeking permission to take her son to hospital.

88. An email which was tendered in evidence clearly established that the Applicant had attended the said training to which she was invited. It must be pointed out that the Applicant's attitude of attending the procurement training, even though officially invited, without her supervisor's approval was clearly wrong. The Tribunal is not in any doubt that the Applicant had sometimes not obtained permission as she ought to or that she had gone off to Staff Union meetings against the wishes of her supervisor.

89. With regards to Ms. Muiruri's testimony whose essence was that the Applicant was not a team player and did not teach her things she ought to know in carrying out her duties or help her while she worked in the same office, this was not by itself conclusive proof that the Applicant behaved badly towards her colleagues. While bearing in mind that the Rebuttal Panel report had stated that the Applicant's work colleagues had given the opposite impression, the Tribunal must be careful not to draw conclusions on the singular evidence of a G4 officer who was invited to testify by highly-placed superiors.

90. Due to the fact that the numerous notes to file clearly convey that there was a 'war situation' in the Applicant's office in which deep resentment and a lack of cordiality prevented a fruitful resolution of work issues between the Applicant and her supervisor, it is difficult to objectively establish the extent of the Applicant's wrongdoings. This is made even more difficult because of the non-conciliatory stance of Ms. Glavind who took the matter of the Applicant's

short-comings unduly personally and actively encouraged Ms. Vurdelja to create records.

***Did the relationship between the Applicant's former FRO and the SRO impact on the non-renewal of her contract?***

91. Ms. Villamin was the Applicant's FRO from the time she was recruited in July 2006 up until the new FRO, Ms Vurdelja, arrived in September 2007. Ms. Villamin was at the time the Chief of Procurement, Travel and Shipping Section (PTSS) at UNON which included the property management Unit. Ms. Glavind, the Applicant's SRO, was the Chief of Support Services in the Division of Administrative Services in UNON. She supervised the Facilities Management & Transport section, the Building Management, the Procurement Section and the General Services Section which includes the Travel, Shipping and Visa unit, Host Country and Property Management.

92. The Tribunal will in the following paragraphs assess whether the relationship between the Applicant's former FRO, Ms. Villamin, and the SRO, Ms. Glavind, impacted on the performance appraisal carried out on the Applicant and her work for the 2008/2009 reporting cycle.

93. With regards to the Applicant's recruitment, Ms. Villamin testified that she was involved in the process and that it was properly done. She further stated that she recommended the selection of the Applicant to Ms. Glavind. In response to a question posed by the Respondent's Counsel regarding her interest in seeing that the Applicant was perceived to be succeeding in the Organization, she stated that once staff members had been recruited, it was up to them to prove that they deserved the position.

94. Ms. Glavind testified that she was also involved in the recruitment of the Applicant and that she had preferred another candidate over the Applicant but when Ms. Villamin expressed her interest in the Applicant, she gave in. Since the Applicant would be working with Ms. Villamin, she thought that it was important that Ms. Villamin was comfortable with the person selected.

*Concerning the performance appraisal of the Applicant*

95. Ms. Villamin testified that the rating of “frequently exceed performance expectations” which she gave the Applicant for the 2007/2008 reporting cycle was a fair reflection of the Applicant’s performance during that period. She stated that she always had a professional relationship with all her staff and provided a rating that was based on their performance and that had she had any cause for concern as to the Applicant’s performance; she would have noted these in the ePAS.

96. Ms. Villamin further stated that she had no concerns with regard to the Applicant’s attendance at work adding that the Applicant would in fact stay late in the evenings, when necessary to complete work, never asked for overtime besides transport payment. According to Ms. Villamin, the Applicant was a team player as her work required a lot of interaction when she would perform the verification of assets in different offices.

97. For her part, Ms. Glavind testified that as of September 2007, the Applicant’s FRO was Ms. Vurdelja and not Ms. Villamin as indicated in the ePAS. In the assessment of the Applicant for the ePAS cycle 2007/2008, the Applicant had received a rating of “fully meets performance expectations” and then three weeks later the same performance appraisal rating was changed to “frequently exceeds a performance expectation.” She said that when she asked Ms. Villamin about this rating of the Applicant’s performance, she was told that it was okay.

98. When questioned about the comments made by Ms. Villamin in the Applicant’s 2006/2007 ePAS, Ms. Glavind stated that she had no reason to disagree with the comments as she had no first-hand evidence of the Applicant’s performance or complaints from Ms. Villamin. She added that since it was Ms. Villamin that insisted on selecting the Applicant for the job, she also had to support her decision and her selection.

99. Ms. Glavind testified that she did not have a bad opinion of the Applicant until the Applicant began to have problems with Ms. Vurdelja. She told the

Tribunal that she did not have a high regard for Ms. Villamin's integrity and competence.

100. Concerning the 2007/2008 ePAS and the fact that Ms. Villamin still prepared it as the Applicant's FRO, Ms. Glavind had in her response to the MEU, dated 1 December 2009, stated that that ePAS ought to have been prepared by the current FRO Ms. Vurdelja instead of Ms. Villamin who did not even as much as consult Ms. Vurdelja when she did so.

101. In her testimony, Ms. Glavind stated that one of the reasons for this error with regard to the FRO reflected for the 2007/2008 period, was that she did not understand the details of the ePAS system and that to that extent, it was an oversight on her part since as required by ST/AI/2002/3 it was for her as SRO to finalize the report.

102. The Tribunal finds it strange that Ms. Glavind as SRO had signed off on the high appraisal rating given the Applicant by Ms. Villamin when she was no longer the Applicant's FRO, only for her (Ms. Glavind) to turn around and complain about it to both the MEU and the Tribunal.

103. Unfortunately, the foregoing available evidence demonstrates that the relationship between Ms. Glavind and Ms. Villamin had not been cordial from late 2007 and evidently up until the hearing of this Application.

104. There is no gain-saying that Ms. Glavind's lack of trust towards Ms. Villamin and the obvious animosity that existed between them had spilled over to the ePAS ratings made in respect to the Applicant's work performance for the 2008/2009 performance cycle. The Tribunal is of the view that the said animosity between the two affected the manner in which Ms. Glavind perceived the Applicant and her work performance.

105. The Tribunal finds and holds that the distrust and negative relationship between Ms. Glavind and Ms. Villamin contributed in large measure to the Applicant's unfavourable ePAS rating in the 2007/2008 reporting cycle on which her non-renewal was based.

*The implications of post-facto investigations into the Applicant's qualifications and the allegations of lack of integrity*

106. In her testimony, Ms. Glavind spoke of unverified personal telephone calls made by the Applicant which in her view demonstrated the Applicant's lack of integrity. According to her, the Applicant had left the Organization before certifying or clearing her telephone bills.

107. Ms. Glavind also spoke of a lady who claimed that the Applicant owed her money and incidents where the Applicant would direct the official equipment movers to come to her office and carry two files for a distance of two meters. The information on the movers' incident, she said, was relayed to her after the Applicant had left the Organization and so she had not questioned the Applicant about it.

108. Ms. Glavind further took it upon herself to personally investigate the Applicant's qualifications by checking her employment record with the United Nations Children's Fund (UNICEF). Ms. Glavind also "investigated" the Applicant's computer qualifications from an institute in Nairobi and told the Tribunal that the said institute did not have in its records the exams the Applicant claimed to have taken. She testified that these "investigations" were undertaken after the Applicant had left the Organization and specifically just before the hearing of this matter in March 2011 because, according to her, she saw a pattern of lack of credibility on the part of the Applicant.

109. When Ms. Glavind was questioned as to whether she had a personal interest in the outcome of the case, and hence the need to engage in further investigations of the Applicant, she stated

I do have a personal-- I am the boss of that service. I am the second supervisor of the unit, and first supervisor of Vesna. I have, as manager, to deliver. And I can't have staff members on board that are not willing to deliver. Then I, as manager, am accountable for outputs. I need people who produce an output. So I think I've taken the right decision based on the facts of the case, I have taken the right decision not to extend. Therefore I have a direct interest in proving that I took the right decision.

110. Ms. Glavind's personal investigations into the Applicant's academic qualifications and place of former employment after the said Applicant's separation from service with UNON unfortunately raise questions as to her own integrity and good faith. If the basis for the non-renewal of the Applicant's contract was poor performance, it was irrelevant, unnecessary and unethical for Ms. Glavind to start a personal investigation in order to convince the Tribunal that there was good reason for separating the Applicant.

111. Where a staff member is alleged to have been recruited on the basis of false academic claims, it is a matter for the relevant investigations unit to undertake official investigations and for the Office of Human Resources Management (OHRM) to take appropriate disciplinary action where the allegations are established.

112. If indeed Ms. Glavind believed that she had made the right decision about the Applicant's performance and subsequent non-renewal, why would she need to wrongfully and unethically launch into her own private investigations of an official matter more than one year after the Applicant was separated?

113. The Tribunal seriously frowns upon such busy-body efforts and finds that evidence placed before it as a result of such efforts constitute an abuse of process of the Tribunal. In the case of Tadonki, (UNDT/2013/032), the efforts of the Respondent to introduce other matters outside the purview of the case in order to morally discredit the Applicant were held to constitute an abuse of process of the Tribunal.

### ***The Rebuttal Process***

114. ST/AI/2002/3 provides clearly and elaborately for the Rebuttal process. Some of the important highlights of this Administrative Instruction are explained in the next paragraphs.

115. Section 14.1 provides that the Rebuttal Panel members are chosen in consultation with the staff representatives of the department or office concerned, the head of the department or office or his or her representative. The Panel

members are comprised of three groups of staff members from the department or office concerned in equal numbers; namely rebuttal panel members designated by (1) the head of the department or office; (2) the staff of the department or office and (3) chairpersons selected by the head of department or office after consultation with the staff representatives. Section 14.1 (c) requires the head of the department or office to inform the staff member in writing of the composition of the approved list. The Rebuttal Panel serves for a two-year term as provided for in section 14.2.

116. According to section 15.1, staff members who disagree with the performance rating given them at the end of the performance cycle may, within 30 days of signing the completed performance appraisal form, submit to their Executive Office at Headquarters, or to the Chief of Administration elsewhere, a written rebuttal statement setting forth briefly the specific reasons why a higher rating should have been given.

117. The rebuttal statement, prepared by the aggrieved staff member, must indicate the names of the three individuals, one from each group, which she or he selects to be in the Panel. This rebuttal statement is then placed in the staff members official status file.

118. Section 15.2 requires that after the head of department or office or representative receives a copy of the rebuttal statement a reply should be promptly prepared and submitted to the Rebuttal Panel. The Panel shall then hear the staff member, the FRO, the SRO of the staff member and other staff members who may have information relevant to the review of the appraisal rating. The Rebuttal Panel then prepares a brief report setting forth the reasons why the original appraisal rating should or should not be maintained.

119. According to section 15.3, the Report is placed in the staff member's official status file and the resulting rating from the rebuttal process shall be binding on the head of the department or office and on the staff member subject to the ultimate authority of the Secretary-General as Chief Administrative Officer of the Organization, who may review the matter as needed on the basis of the record.

120. Thereafter, as stipulated by section 15.3, any change in the final rating, and the date of the decision, shall be marked by the executive or administrative office on the final appraisal section of the ePAS form, with annotation that the rating was changed as a result of an ePAS rebuttal.

*Did UNON have an obligation to defer the Applicant's non-renewal until the rebuttal process was completed?*

121. The Applicant filed her rebuttal statement on 15 October 2009 and was separated from service on 1 November 2009. The Rebuttal Panel, chosen by the Applicant, received the FRO's comments on 30 November 2009. On 30 December 2009, the Rebuttal Panel issued their report which the Applicant received on 5 January 2010. The Panel decided that the rating should be changed to "fully successful performance."

122. The Respondent argued that the Applicant submitted her Rebuttal Statement without keeping to the statutory deadline of 30 days after signing the completed performance appraisal and that the Applicant had deliberately delayed the submission of the rebuttal in order to advance the argument that her separation was unlawful. The Respondent submitted that the Applicant cannot claim that she was injured in her due process rights in respect to her performance appraisal when she did not observe procedural deadlines.

123. The rebuttal process is a creature of the Secretary-General. It exists to bring impartiality and give justice to those who may have been evaluated wrongfully. The Rebuttal Panel accepted the Applicant's rebuttal request and raised no issues of receivability. In fact, the Rebuttal Panel proceeded to complete the rebuttal process.

124. If UNON Administration had any objections to the receivability of the rebuttal statement, it had ample time to raise the said objections but never did. As correctly argued by Counsel for the Applicant, there is no absolute bar on seeking a rebuttal outside the 30-day period and this was evident in the Rebuttal Panel's acceptance of the rebuttal request.

125. The Respondent further argued that there was no provision in the ST/AI/2002/3 that required the Administration to forestall its separation of a staff member before the conclusion of the rebuttal process. The Tribunal's reading of the said Administrative Instruction is that such a stalling of the separation ought to be the case as a matter of course especially since the performance rating resulting from the rebuttal process is binding on the head of the department or office and on the staff member.

126. The drafters of the Administrative Instruction on rebuttal proceedings could not have intended that the Rebuttal Panel's rating which would be binding on all parties was to be rendered nugatory and the entire process an exercise in futility.

127. It is the responsibility of the Respondent to comply with the process and ensure that the Rebuttal process was finalized before making a decision premised on a disputed performance rating. In a memorandum to all heads of offices dated 12 March 2010, Ms. Angela Kane, the then Under-Secretary-General for Management, *reminded managers* that a staff member must be afforded the right to rebut the performance appraisal, and the final rating resulting from the rebuttal process must be taken into account before making the decision not to renew the staff member's appointment for unsatisfactory performance.

128. UNON therefore had an obligation to defer the non-renewal decision until the rebuttal process had been completed. It is at the point of completion of the rebuttal process that the final decision as to the performance rating is made. It will thereafter be left then to the Administration to decide to review the matter as needed on the basis of the rebuttal result. In other words, a review or decision-making negatively impacting a staff member cannot be done when the Rebuttal Process has not been finalized as this would not comply with the requisite due process rights of the staff member.

*Can the Respondent allow a Rebuttal Panel to proceed until completion only to later question its credibility?*

129. The Respondent submitted that there were serious misgivings with the rebuttal process and the context of the review of the Rebuttal Panel and that the resulting Report was heavily biased in favour of the Applicant thereby not providing a fair platform for the consideration of the Administration's point of view. Ms. Glavind alleged in her testimony that the constitution of the Panel was biased as two of the members were the Applicant's friends.

130. It was argued on behalf of the Applicant that the Respondent is estopped from putting forward this argument as the Secretary-General has established the process by which the rebuttal panels are constituted and it is therefore perverse for his Counsel to impugn that very system. The Applicant also submitted that no evidence was adduced to suggest that the system of selecting members of the rebuttal panel was wanting or is subject to change or review.

131. The Applicant further submitted that the Respondent adduced no credible evidence that members of the Rebuttal Panel in the Applicant's case were in fact friends or biased in favour of the Applicant and that the constitution and operation of rebuttal panels under ST/AI/2002/3 contained inherent checks and balances to ensure their fair and effective operation. No evidence was adduced to suggest that the Secretary-General sought to exercise his discretion as Chief Administrative Officer to overturn the revised performance rating and he is therefore bound by it.

132. According to the Rebuttal Process outlined in ST/AI/2002/3, the constitution of the Panel and its tenure clearly involves three groups: (1) the head of the department or office; (2) the staff of the department or office and (3) chairpersons selected by the head of department or office after consultation with the staff representatives. Thereafter, the heads of department or office inform the staff in writing of the composition of the approved list. The staff member then picks from that list.

133. Ms. Vurdelja stated in her testimony that there is memorandum with a list of panel members the staff member can choose from but that making an objection

to the choice was not possible. Ms. Glavind was requested to submit a reply to the Applicant's rebuttal statement which she did on 30 November 2009. She also wrote an email on 1 December 2009 to the Panel members complaining about the process of the Rebuttal hearings. She never raised any objections to the constitution of the Panel or alleged bias on the part of the panel members at those times.

134. The Respondent had allowed the Rebuttal Panel to complete and finalise its Report before attacking its integrity. It does not lie with the Respondent to discredit a properly constituted Rebuttal Panel simply because its report is not favourable to him. The Tribunal finds and holds that, in the present case, the Respondent cannot now question the credibility of the Rebuttal Panel.

***Was there evidence of bad faith, ill-motive or extraneous factors behind the decision not to renew the Applicant's fixed-term appointment?***

135. The Respondent had submitted that the decision not to renew the contract of the Applicant was based on a number of reasons, one of which was performance, the others were the manner in which she conducted herself with both supervisors and colleagues, the lack of team work spirit, insubordination and work attitude issues. It was argued on behalf of the Applicant that the decision not to renew, although purportedly based on poor performance, was in fact the culmination of a long period of harassment and victimization by both Ms. Vurdelja and Ms. Glavind.

136. In *Abdallah* UNDT/2010/049<sup>7</sup> it was held that "the discretion of the Secretary-General not to renew a fixed-term contract is not limitless and will be vitiated where it is motivated by prejudice, bias, or other extraneous factors."

137. In the first performance appraisal of the Applicant which was for the 2006/2007 reporting cycle, she had been rated "fully successful performance." Her supervisor at the time, Ms. Villamin had testified that she had a high sense of responsibility and was always willing to go out of her way to offer solutions when required. In the section reserved for SRO comments, Ms. Glavind remarked that

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<sup>7</sup> At para 7.2.

she fully supported the assessment of the Applicant's performance made by Ms. Villamin.

138. In the following 2007/2008 reporting cycle, the Applicant received a rating of "frequently exceed performance expectations". Ms. Villamin testified that the Applicant deserved the rating due to the extra work she had put in during that reporting period. Again, Ms. Glavind endorsed the rating and positive remarks made about the Applicant.

139. When the Applicant's rating fell in the following reporting cycle to "partially meets performance expectations", Ms. Glavind who had also endorsed it commented in her response to the MEU:

Obviously [the Applicant] would not have had the positive rating in the 2007/2008 cycle had [Ms Vurdelja]-as the rules dictate- been the first reporting officer. Therefore, and to conclude, the previous performance appraisal were not considered as honestly reflecting [the Applicant] performance."

140. Ms. Glavind stated in her testimony that she had just let the previous year's rating of the Applicant by Ms. Villamin pass as she did not want to make an issue of it. Her exact words to the Tribunal were:

Ms. Villamin has gone; we will start on a new page. But I still wanted to voice some reaction to that totally overrated performance grade that she had been given by Ms. Villamin, to have it on record that I was surprised, to say the least.

141. It is difficult to understand why Ms. Glavind would endorse Ms. Villamin's high rating of the Applicant only to tell the Tribunal that it was a totally over-rated performance grade. It is in evidence that Ms. Glavind had fallen out with Ms. Villamin over certain un-established and unproven allegations. The Tribunal found that the soured relationship between them had affected Ms. Glavind's attitude and rating of the Applicant and further finds that this constitutes an extraneous consideration.

142. Ms. Glavind told the Tribunal that she had decided to micromanage the Applicant because of her poor performance. She and the Applicant's FRO Ms.

Vurdelja also placed numerous notes to her official status file. The notes to file appeared to document every move the Applicant made in a negative light.

143. While the Tribunal is convinced that the Applicant's attendance at a procurement training to which she was invited for an entire week without the approval of her supervisor Ms. Vurdelja was wrong and wholly unacceptable, it appears that Ms. Glavind's interventions as SRO rather than help the situation, only served to deepen the problems between them.

144. A consistent habit of placing negative notes to file concerning a staff member may not encourage good performance but could intimidate and frustrate the said staff member. Ms. Glavind in her response to the MEU stated that she personally wrote notes to file or emails and advised Ms. Vurdelja to do the same each time there was an incident involving the Applicant. It appeared that at that point, Ms. Glavind had decided to get rid of the Applicant, was not inclined to informal resolution and only needed to gather enough documentation to do so. In other words, the SRO had an agenda and explored ways and means of achieving it.

145. The Tribunal had already found that Ms. Glavind had engaged in privately investigating the Applicant's academic credentials after the filing of this Application and had told the Tribunal that she had been informed by one institution that the Applicant's claims to certain Computer skills were false. Such actions on her part were desperate, unethical and unprofessional. It also constituted an abuse of the Tribunal's process.

146. In the former UN Administrative Tribunal Judgment No. 885 *Handelsman* (1998), it was held that the discretion exercised by the Administration must not be tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness or other extraneous factors that may flaw its decision.

147. The Tribunal finds that Ms. Glavind had unfortunately placed herself in a position in which she could not ensure objectivity and impartiality in making the decision not to renew the Applicant's contract. Her non-conciliatory role in the

problems between the Applicant and her immediate supervisor in this case appeared to depart from the role intended for an SRO in the Administrative Instructions that govern the Performance Appraisal System and only worsened matters. She gave the impression, during the proceedings, of an officer who would grasp at every straw to justify the impugned administrative decision.

148. The Tribunal finds and holds that there is sufficient evidence of bad faith, ill-motive and extraneous factors behind the decision not to renew the Applicant's fixed-term appointment as to vitiate the said decision.

### **Findings**

149. The Tribunal's findings are summarized below:

- a. The evaluation of the Applicant's performance for the 2008/2009 reporting cycle was not carried out in accordance with the established procedures and materially discredits the Respondent's case.
- b. The negative relationship between Ms. Glavind and Ms. Villamin was contributory to the non-renewal of the Applicant's contract.
- c. Ms. Glavind, the Applicant's SRO, demonstrated ill-motive and unethical conduct when, after the Applicant's separation from service, she decided to personally "investigate" the Applicant's qualifications. Her efforts to introduce the purported results of this investigation into evidence constituted an abuse of the process of the Tribunal.
- d. UNON had an obligation to defer the non-renewal decision until the rebuttal process had been completed but failed to do so. This was a violation of the Applicant's due process rights.
- e. UNON Administration cannot challenge the credibility of the Rebuttal process at the Tribunal after the Panel had completed its sittings and finalized its Report.

- f. There is sufficient evidence of bad faith, ill-motive and extraneous factors behind the decision not to renew the Applicant's fixed-term appointment as to vitiate the decision.

### **Judgment**

150. In view of the foregoing, the Tribunal:

- a. Orders the Respondent to reinstate the Applicant in service of the UNON with retroactive effect.
- c. Since the non-renewal of the Applicant's appointment is a termination within the meaning of art. 10.5 (a) of the Statute of the Dispute Tribunal, the Tribunal must, pursuant to that article, set an amount of compensation that the Respondent may elect to pay as an alternative to the reinstatement of the Applicant. An appropriate compensation in lieu of reinstatement is to be the amount of one year's net base salary of the Applicant.
- d. Awards the Applicant two months' net base salary for the violation of due process arising from her separation before the Rebuttal Panel concluded its proceedings thereby rendering her gains from the Panel's decision nugatory.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 28<sup>th</sup> day of February 2013

Entered in the Register on this 28<sup>th</sup> day of February 2013

*(Signed)*

Jean-Pelé Fomété, Registrar, Nairobi