



Before: Judge Coral Shaw

Registry: Geneva

Registrar: René M. Vargas M.

MASLEI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Karen M. Farkas, UNHCR

Introduction

1. The Applicant, a former staff member of the United Nations High Commissioner for Refugees (“UNHCR”), contests the decision to “‘unextend’ her contract beyond 31 December 2013” on the grounds of performance, despite her standard assignment length (“SAL”) having been extended until 31 December 2014.

2. The application was filed with the New York Registry and transferred to the UNDT Registry in Geneva on 31 July 2014.¹

3. Following case management discussions the parties filed a joint statement of agreed facts. Those facts together with the oral and documentary evidence presented at the substantive hearing form the basis for the findings of fact in the case. At the hearing, the Applicant, who had recently engaged Counsel, confirmed that she would not pursue her allegation that extraneous factors motivated the impugned decision.

Issues

4. The issues in the case are:

a. Did either party comply with the UNHCR promulgated rules regarding performance evaluation, and has the Applicant’s unsatisfactory performance been established through a fair and transparent process?

b. Did the second SAL extension raise legitimate expectations of renewal?

c. Was there a mutual loss of trust such as to justify the non-renewal decision?

¹ Order No. 209 (NY/2014) of 24 July 2014; Order No. 215 (NY/2014) of 31 July 2014; Order No. 19 (GVA/2015) of 27 January 2015 and Order No. 34 (GVA/2015) of 11 February 2015.

d. If the Tribunal holds that the non-renewal decision was illegal, what were the consequences to the Applicant and, if applicable, what remedies are appropriate?

5. The Applicant was recruited in November 2010, as Resettlement Officer (P-3), Head of Resettlement Unit, in the UNHCR Country Office in Pakistan. She was granted a one year fixed term appointment (“FTA”) that was renewed annually until 31 December 2013; subsequently, it was renewed for administrative purposes from 1 to 31 January 2014, until her separation from UNHCR on 1 February 2014.

Facts

6. The Applicant’s SAL in Islamabad, Pakistan, was initially for two years owing to the hardship classification of the duty station, and in line with UNHCR’s rotation framework. In March 2012, the Applicant’s SAL was extended until 31 December 2013.

7. From 1 January to 31 December 2011, the Applicant reported to Ms. Maya Ameratunga, Deputy Representative (D-1). The Applicant’s Reviewing Officer was Mr. Neill Wright, the UNHCR Representative, Pakistan.

8. In her electronic Performance Appraisal Document (“e-PAD”) for that period, the Applicant was rated: “Overall work objectives rating: Achieved (6.8)²”, whereas under “Competencies Overall Rating”, she was rated 6.7 (Proficient). Under additional comments, her Manager stated:

[the Applicant] is a hardworking, dedicated, diligent, energetic and results-oriented staff member who cares about refugees and could be an asset to any resettlement operation. In her capacity as the head of the resettlement unit, she is a driving force behind the much greater attention given by the Pakistan operation as well as by Headquarters to resettlement out of Pakistan as a global resettlement priority, as part of the regional Solutions Strategy for Afghan Refugees. As cases’ submission rapidly increase, so has

² The Policy Framework for the Performance appraisal and Management System (“PAMS”) provides for a rating system under work objectives and competencies, as follows: 1-2: Not achieved/not proficient; 3-5: partially achieved/partially proficient; 6-8: achieved/proficient; 9-10: Exceptionally proficient/achieved.

[the Applicant's] workload and she is stepping up to the mark. As she is a recent staff member, I recognise that she has potential for further professional growth. I am confident that she will pay attention to areas of improvement relating to refinement of communication skills, respect for reporting lines and wider team work, as noted by colleagues, which would enhance an already good performance, as reflected in the overall grading of proficient.

9. The Applicant agreed with the overall evaluation in her 2011 e-PAD acknowledgement, including the recommendations on communication, although pointing out that she did not recall any incident or tendency to substantiate the reference to respect for reporting lines.

10. The Applicant, Ms. Ameratunga and Mr. Wright signed the 2011 e-PAD between 21 December 2012, and 28/29 January 2013.

11. In her evidence to the Tribunal, Ms. Ameratunga stated that in the 2011 e-PAD, she was trying hard to give the Applicant a good rating, but while she did her best to accentuate the positive in the Applicant's overall performance, it was impossible to overlook what she regarded as serious problems with her interpersonal skills, work relationships and acceptance of reporting lines. She referred to issues that had allegedly arisen during the performance cycle that were not mentioned in the e-PAD.

12. From 1 January to 31 December 2012, the Applicant was supervised by a new Assistant Representative (Protection) ("the Manager"); her Reviewing Officer was Ms. Ameratunga, Deputy Representative, who remained her Reviewing Officer until the Applicant's separation from the Organisation.

13. The Applicant's 2012 e-PAD gave her a rating of 7.7 for both "Work objectives overall" (Achieved) and "Competencies overall rating" (Proficient). Under "Performance Improvement Objective", the Manager noted that there was a need for improvement in coordination and communication with protection colleagues and improvement of time management. Under "Performance development Objective", it stated that the Applicant should improve her managerial and team building skills, as well as her time management and communication skills and her analytical writing skills. In spite of this comment

the Applicant was rated 7 for the core competency of “communication”, 8 for the managerial competency of “empowering and building trust” and 7 for the cross-functional competency of “negotiation and conflict resolution”. The mid-point review for this period states *inter alia*, “Some improvement in communication seen, but [Applicant] encouraged to work closely with protection colleagues and encourage team work”. Under additional comments (Performance summary), her Manager stressed:

[the Applicant] is a member and acting chair of the Staff Council in Pakistan, and has had to juggle this role with the growing pressure at the work front. The Pakistan operation is heavily staffed both at the international and national level. This subsequently comes with a range of staffing and personal issues needing the attention of the staff association. Her role in this is highly commended. [the Applicant’s] command of the Urdu language widely used in Pakistan is an asset to navigate several important channels to achieve professional results.

14. In her 2012 e-PAD acknowledgement, the Applicant stated that adequate managerial support is crucial for any capable staff member and the team overall to succeed.

15. The Manager, the Applicant and Ms. Ameratunga signed the 2012 e-PAD between 8 and 28 February 2013.

16. In evidence, Ms. Ameratunga said that although she signed off on the Manager’s evaluation, she still had concerns while accepting that the Applicant was performing at a satisfactory level for the most part.

17. In December 2012, the Applicant sought guidance from Human Resources (“HR”) on extending her SAL beyond 31 December 2013 on personal grounds; on 8 January 2013, she spoke to Mr. Wright about this. He told her that as it was her second extension, and because it was based on personal grounds, he was not convinced Headquarters (“HQ”) would approve it. Although he believed she would benefit professionally from a new assignment, he encouraged her to consult HQ about the SAL extension.

18. Mr. Wright received messages from UNHCR HQ that the request would be supported if made on operational grounds. He contacted Ms. Ameratunga during her home leave, who told him that she agreed to support the request only if the Applicant called her, had a civil conversation and was willing to listen and accept advice.

19. Mr. Wright agreed with this approach. In an email to Ms. Ameratunga he said “[i]f she won’t call you, then her interpersonal issues are such that I will not send the memo and I will explain this very clearly to her when I see her”.

20. In accordance with Mr. Wright’s request, the Applicant phoned Ms. Ameratunga in January 2013 to discuss the extension. The contents of this call are disputed.

21. Ms. Ameratunga told the Tribunal that she had misgivings about requesting a SAL extension on operational grounds due to continuing problems in maintaining a harmonious workplace, and also that she knew that a request on personal grounds was unlikely to succeed. However, based on her personal experience in a similar situation, she had some sympathy for the Applicant, and therefore agreed to draft a submission in support of the extension based primarily on operational grounds.

22. She said that in the phone call, she encouraged the Applicant to work on her interpersonal skills and work relationships (para 23 Statement of evidence) and to meet with her upon her return to Pakistan so she could support her in working on these issues. Ms. Ameratunga said that she stressed to the Applicant that this was the condition agreed with Mr. Wright for drafting the SAL extension request.

23. The Applicant said in evidence that during the phone call, Ms. Ameratunga told her that the request would be better received if it were on operational rather than personal grounds. They also discussed the Applicant’s response to her performance appraisal for 2011, and talked about the work targets for the year and some key achievements of 2012 that would form the basis for the memo for the SAL extension. She denied that Ms. Ameratunga made her support for the extension dependent on any express or implied conditions.

24. On 15 January 2013, Mr. Wright requested a SAL extension for the Applicant until 31 December 2014. In his requesting memorandum, he made a passing reference to the Applicant's personal reasons for the extension but the memorandum focused on the operational requirements of the resettlement unit. It stated *inter alia*,

As a well performing countrywide head of the resettlement unit, [the Applicant] is central to coordination of these critical strategic initiatives. Continuity of assignment by the head of the resettlement unit is essential in this critical period of 2013-2014.

25. The request was endorsed by the Joint Review Board and the High Commissioner and announced in the Summary of Decisions of the High Commissioner on Assignments on 22 March 2013.

26. During the e-PAD cycle of 1 January to 31 December 2013, Ms. Zuefle joined UNHCR Pakistan, on 15 February 2013, as the new Assistant Representative. Following a period of overlap with her predecessor and discussions with the Applicant about the appropriate reporting lines, effective 17 April 2013 Ms. Zuefle became the Applicant's Manager. Ms. Ameratunga remained her Reviewing Officer for this cycle.

27. At the request of the Representative, and in accordance with UNHCR HQ benchmarks, Ms. Zuefle established refugee status determination and resettlement performance benchmarks for the units reporting to her based on the staffing levels in each unit.

28. On 8 April 2013, HQ asked UNHCR, Pakistan, whether the contracts of all current International Catholic Migration Commission ("ICMC") deployees under the Applicant's direct supervision, should be extended. In her response to UNHCR, HQ of 21 April 2013, copied to the Applicant, Ms. Zuefle stated that while the same number of ICMC deployees was indeed needed, she was concerned about the problematic behaviour of one or two of them whose contracts might need to be discontinued, and that she was following up on this.

29. Also on 21 April 2013, the Applicant sent an email to the Regional Staff Welfare Officer, without copying Ms. Zuefle, expressing her concern that

Ms. Zuefle had raised allegations with HQ although there had been no investigation into them.

30. On 2 May 2013, the Applicant emailed Ms. Zuefle suggesting that they should meet over a cup of tea or coffee to discuss the resignation of one of the ICMC deployees. Ms. Zuefle agreed to meet on 8 May 2013 at a time and place suggested by the Applicant.

31. On 8 May 2013, the Applicant and Ms. Zuefle met for five hours at a café. The meeting was not contemporaneously minuted or noted and the contents of the discussion are disputed.

32. In her evidence to the Tribunal, Ms. Zuefle said that the meeting was a performance management one. She said she presented in detail her concerns with the Applicant's management of the Resettlement Unit, as well as her expectations of her as the manager of that unit and the resettlement programme in Pakistan. She said that the Applicant agreed that her expectations were reasonable, and that she would be guided by these points in her future performance.

33. The Applicant told the Tribunal that she had suggested the meeting to address the issue of the allegations against staff in her team. She wanted to see if there was a way to address the concerns of the staff, and to improve the working environment. The meeting did not go as expected. She said that Ms. Zuefle shared her contempt for the staff members, and showed no concern for losing them although the Applicant explained that it took a long time to secure replacements. The Applicant described Ms. Zuefle as aggressive and giving her little opportunity to speak. What she did say was disregarded. Ms. Zuefle repeatedly asked the Applicant if she was "in her camp or not". The Applicant said that it was not a formal meeting or discussion and that they reached no conclusions or agreements.

34. On 29 May 2013, Ms. Zuefle wrote to the Applicant an email entitled "Our meeting of 8 May 2013". It began:

I refer to our almost 5-hour long meeting on 8 May 2013, during which we discussed my main expectations vis-à-vis you as the head of the Resettlement Unit based on the concerns I have expressed in relation to the manner in which I have observed you manage the Unit and the way in which some of your staff communicate with other colleagues as well as reports on their alleged misconduct when interviewing refugees. I have been reviewing your follow-up to that meeting, but have now decided to put my views in writing for the purpose of additional clarity.

35. The email went on to set out Ms. Zuefle's expectations of the Applicant particularly vis-à-vis the management and performance of the Resettlement Unit staff members. She asked, *inter alia*, to be copied into substantial correspondence from the Applicant and her team, and to have external communications that did not concern routine matters cleared by her or the OIC before they were sent out. Ms. Zuefle also noted that one way to ensure that the communication between the staff under the Applicant's supervision and herself improve would be to invite her to the unit meetings. The email concluded by asking the Applicant to let her know if any of the above points were not clear. She said they would be taken into consideration during the Applicant's performance evaluation in the course of the year.

36. The Applicant told the Tribunal that this email did not reflect the five hours conversation on 8 May 2013, and lacked sufficient detail for her to deny allegations made in it. She felt it would be wiser to let the situation cool down, not to respond to it but to try to implement Ms. Zuefle's suggestions. She invited Ms. Zuefle to a resettlement staff meeting on 31 May 2013, and understood this had gone well and represented some progress in addressing Ms. Zuefle's concerns. In her evidence to the Tribunal, Ms. Zuefle also noted that the Applicant started copying her on each and every communication, which she perceived as not useful.

37. Mr. Wright met with the Applicant on 3 June 2013. This meeting was summarised in a note for the file that the Applicant agreed captures the main points discussed.

38. Mr. Wright told the Applicant that Ms. Zuefle had shared with him her email of 29 May 2013, in which she had expressed concerns about the Applicant's management skills and interpersonal relationships with colleagues in the Protection Unit, and overall dissatisfaction about the Applicant's attitude toward her supervising manager. He noted these had already been expressed by the Applicant's previous supervisors and seemed to be recurrent.

39. Mr. Wright acknowledged the good progress being achieved by the Applicant and her team but said that the interpersonal issues had to be addressed urgently. The Applicant agreed that there were interpersonal tensions and agreed to discuss solutions with Ms. Zuefle. Mr. Wright told her he would monitor the situation and call the Applicant and Ms. Zuefle to a meeting in August to see whether the challenges to their working relationship had been resolved. If not, he advised that he would have to address them through administrative procedures. Mr. Wright told the Tribunal that the purpose of the meeting was also to hear the Applicant's side, and an attempt to mediate the problems between the Applicant and Ms. Zuefle, to prevent a further escalation of what he regarded as an interpersonal rather than a professional issue. He had no wish to damage the Applicant's career and was looking for ways to avoid confrontation.

40. He told the Tribunal that although he did not spell them out at the meeting the administrative procedures he was considering at that time included guidance and support for the Applicant, reassignment or a movement within UNHCR upon expiration of her term.

41. Mr. Wright also said that he had discussed these matters repeatedly with Ms. Ameratunga, as the Applicant's Reviewing Officer, who had told him that she would continue to work together with both parties and was trying to mediate the situation.

42. On 25 June 2013, Ms. Zuefle informed the Applicant by email that she had finalized her e-PAD objectives and asked her to nominate multi-raters. Following home leave in July and August, on 20 September 2013 the Applicant informed Ms Zuefle of the 10 multi-raters she had nominated. Ms. Zuefle advised the Applicant that she could not nominate more than six multi-raters and asked her to take out four persons.

43. In addition, email exchanges between August and September 2013 show that Ms. Zuefle and the Applicant disagreed about other matters including handover notes and extension of staff contracts.

44. On 17 September 2013, Ms. Zuefle wrote to the Applicant about these and other human resources issues, including performance evaluation of staff under the Applicant's supervision. She noted that the Applicant had failed to take action/follow-up in these matters as requested by Ms. Zuefle. She had explicitly requested that the Applicant, *inter alia*, immediately send a message to a staff member with respect to a contract extension. She concluded her message advising the Applicant that, "[her] continuous lack of follow-up on these and other matters and [her] disrespect of deadlines [would] be reflected in [her] own [e-PAD]".

45. On 17 September 2013, Ms. Zuefle approached Mr. Wright about the issues between her and the Applicant. Mr. Wright told the Tribunal that she was upset and emotional, and that he decided to call a meeting "on the spur of the moment". He regarded it as an opportunity to educate himself about what progress had been made in the relationship between the two. He invited Ms. Ameratunga and the Applicant to attend. The Senior Administrative Officer attended and made a note for the file. The Applicant had only a few minutes' notice and was not told what the meeting was about before she went in.

46. Mr. Wright asked the Applicant to speak first; Ms. Zuefle followed. The Applicant told at the meeting that her supervisor's expectations had constantly been changing, and that instructions and guidance she had received from her were ambiguous and lacked clarity. Ms. Zuefle and Ms. Ameratunga both said that the Applicant's performance was below standard and that she needed to improve her inter-personal skills. Mr. Wright concluded that it was apparent from the

statements made during the meeting that the inter-personal relationship between the Applicant and Ms. Zuefle had deteriorated. The concerns expressed at the meeting of 3 June 2013 continued to exist, and he told the Tribunal that neither the Applicant nor Ms. Zuefle had taken any action to improve the situation since June 2013. He thought that the problems were affecting the performance of the Resettlement Unit and put the good name of UNHCR, Pakistan, at serious risk.

47. Mr. Wright requested Ms. Zuefle to fully substantiate and document her serious concerns about the Applicant's performance and attitude. He said that as it was in his mind to rescind the SAL that had been granted to the Applicant, he requested the Senior Administrative Officer to enquire with UNHCR, Personnel Section, Budapest, about the procedures for reducing the Applicant's SAL should such a reduction be decided to be in the best interest of the Organization.

48. Mr. Wright advised the Applicant that all future external communications from her and her unit should be cleared by Ms. Ameratunga. He further requested the Applicant to seek advice if she was concerned about the two meetings chaired by him, or about the supervision she had received. Both the Applicant and Ms. Zuefle were further requested to provide their own written/signed report on their opinions as expressed during the meeting.

49. On 27 September 2013, the Applicant sent Mr. Wright her comments on the 17 September meeting. She underlined her achievements as a first time international staff member, and her good performance as highlighted in her second SAL extension request; she further noted that differences with her supervisor were more about management style than work output, and that Ms. Zuefle had enforced strict command structure with little autonomy, strict hierarchical communications, over-bureaucratization and instances of "bullying".

50. In her comments, the Applicant also challenged the allegations about her performance and management style. She provided figures that, according to her, showed that objectively the work output of her team had been progressively and significantly increasing, and that relationships with key stakeholders were excellent. She noted that she was shocked to learn at the meeting that the termination of her SAL would be considered, and stressed that she had been

informed about the meeting only seven minutes before it was going to take place, without being informed in advance about its purpose. Hence, she had no opportunity to raise a number of issues. She referred to an increase in her team's workload, without a proportionate increase of resources.

51. The Applicant then suggested ways forward. These included a performance agreement with tangible outcomes, weekly meetings as a forum to discuss issues with the ultimate decision making for operational matters lying with Ms. Zuefle; at the same time, the Applicant agreed to work on her communications skills, and requested to be supported in her role; she stated that the proposal should be given time to work, and if targets were not met and relationships were not improved, then the SAL issue could be looked at.

52. Ms. Zuefle finalized the Applicant's mid-year development review on 29 September 2013 and, on 30 September 2013, asked the Applicant to complete her part on the same day, stressing that the short notice was due to the Applicant's late nomination of multi-raters.

53. In the mid-year development review, Ms. Zuefle noted:

By end-September, [the Applicant] ha[d] not yet embarked on any activities related to a large number of her key objectives, notably capacity-building, data analysis, trainings, development of abridged RRFs, fraud prevention, feedback on registration and RSD, updated SOPs, regular reports and planning initiatives. [the Applicant's] focus has been on pre-submission reviews and post-submission follow-up with a view to meet a doubled resettlement target. However, the a/m objectives are arguably even more important in achieving this goal. The management of her unit has also been neglected, which has led to low output by staff and an inefficient use of resources. Receiving inputs or draft documents from [the Applicant] has also proven to be challenging, deadlines were not always respected, and those drafts received were often of low quality. As regards her personal conduct, [the Applicant] has continuously failed to make efforts to integrate in the team. Her accusatory communication style has isolated her and made it difficult for her to resolve cross-functional issues. Several extensive discussions were held with [the Applicant] in order to clarify expectations and engage her commitment. Regrettably, her performance has instead deteriorated over the year. She will have to show in the remaining months that she is willing and able to fulfil her job.

54. The Applicant responded to the mid-year review on the same day she received it, by *inter alia* providing figures with respect to the submission and review of resettlement submissions, RRFs, the RST unit having initiated fraud gaps analysis procedures.

55. In a detailed email of 27 October 2013 to the Representative, Ms. Zuefle reiterated her concerns about the Applicant's performance, as expressed at the meeting of 17 September 2013, and reflected in the mid-term review of the Applicant's e-PAD. In relation to the Applicant's argument made at the meeting that she was not clear on what was expected of her, Ms. Zuefle stressed that she and the Applicant had agreed on clear objectives in her e-PAD in March 2013, and that she had had several long meetings with the Applicant to clarify her role and Ms. Zuefle's expectations of her, which were recapitulated in an email of 29 May 2013. She stressed that the Applicant had not taken any action with respect to the objectives contained in her 2013 e-PAD.

56. On 28 October 2013, Mr. Wright emailed the Senior Administrative Officer copying, *inter alia*, the Applicant, asking her to add Ms. Zuefle's email of 27 October 2013 and the Applicant's report to the finalised note of the meeting of 17 September 2013. He stated that he wished to proceed with a request to the Division for Human Resources Management ("DHRM") to rescind the Applicant's SAL extension in 2014, and that the above reports be used as the basis for such action.

57. On 30 October 2013, Ms. Zuefle noted that "following further assessments, the RST benchmark [was] likely a bit too ambitious for [the Pakistan] operational context".

58. On 7 November 2013, the Applicant submitted her comments on Ms. Zuefle's email of 27 October 2013. On 11 November 2013, she requested that her comments to Mr. Wright of 27 September 2013, and her response to Ms. Zuefle's email of 27 October 2013 be added to the minutes of the meeting of 17 September 2013.

59. Also in November 2013, the Applicant and Ms. Zuefle had continuing exchanges about the low output of the Applicant's team as compared to the 2013 benchmarks. In an email of 8 November 2013 addressed to the Applicant, Ms. Zuefle expressed the view that "it [was] in the best interest of [the Applicant] as Head of RST Unit and [her] staff to ensure that the 5 cases [she had] now agreed as target [were] in fact achieved".

60. On 11 November 2013, the Representative wrote to the Director, DHRM, requesting that the Applicant's SAL be reduced until the end of March 2014. He said that "the request [was based on the Applicant's poor performance, interpersonal and managerial problems, and seriously deteriorating working relationships, which meant that it [was] no longer in the operation's interest ... for her to continue as head of the country's Resettlement Unit". He stated that "he had discussed these issues in a series of meetings with [the Applicant] over the course of 2013, as had her supervisor, in order to give [the Applicant] the opportunity to improve her performance and working relationships". He stated that the Applicant's FTA was to expire in December 2013, and that his request be taken into consideration when assessing the Applicant's supervisor's response with respect to the extension of the Applicant's contract.

61. The 2013 e-PAD was made available to the Applicant as of 14 November 2013 for her self-evaluation, with a deadline set at 31 January 2014. She finalized her self-evaluation in June 2014. At the date of the hearing, Ms. Zuefle had not yet completed the Applicant's end-of-year performance appraisal.

62. In an email dated 21 November 2013 to the Director, DHRM, reference was made to the readiness by the Office to request an extension of the Applicant's FTA to the end of March 2014.

63. On 26 November 2013, Ms. Zuefle informed in writing the Chief, Personnel Administration and Payroll Section, UNHCR, that she did not recommend the Applicant's contract extension beyond 31 December 2013; she stressed that this negative recommendation "[was] supported by a proven track record of

unsatisfactory performance of the staff member as highlighted in the mid-term review”.

64. On 28 November 2013, Mr. Wright met with the Applicant in the presence of the Senior Administrative Officer, and told her of Ms. Zuefle’s recommendation not to extend her contract on the basis of poor work performance. He noted that the decision to request a reduction of her SAL extension had been taken in view of the differences between the Applicant and Ms. Zuefle, which he believed were “irreconcilable”. He said “that the SAL reduction and the contract extension were two separate and un-related procedures”.

65. The Applicant inquired during the meeting how Ms. Zuefle could recommend that her contract not be renewed, and on what grounds the Representative had agreed to this, since her e-PAD 2013 had not yet been finalized. She also inquired about the possibility of rebutting her e-PAD after separation, and if the decision would be upheld after rebuttal. The Representative stated that it was his understanding that the mid-year review containing negative comments about poor performance had been completed, and that the Applicant’s e-PAD should be completed by Ms. Zuefle before the expiration of the Applicant’s contract, giving her an opportunity to express her (dis)agreement.

66. The Applicant was informed about her separation by memorandum dated 4 December 2013. Her appointment was subsequently extended on sick leave until 31 January 2014, for administrative purposes only. She was separated on 1 February 2014. Medical evidence on file shows how the situation affected the staff member, who suffered from depression and anxiety.

67. The Applicant filed a request for management evaluation on 27 January 2014, and a request for suspension of action with the Tribunal on 9 May 2014. The latter was rejected, since the decision had already been implemented (Order No. 116 (NY/2014) of 14 May 2014). The Applicant did not receive a response to her request for management evaluation.

Parties' submissions

68. The Applicant's principal contentions are:

Merits

- a. The record shows that she was a good performing staff member, as clearly reflected in her 2011 and 2012 e-PAD, respectively finalized on 29 January and 28 February 2013; her good performance was also praised in the request for a second SAL extension on 15 January 2013;
- b. Even if the argument that the above documents did not reflect the reality were accepted (which it is not), the messages received by the Applicant were too confusing to put her on notice about any alleged performance issues at the beginning of 2013;
- c. The alleged conditionality of the second SAL extension is only evidenced through an email between Ms. Ameratunga and Mr. Wright, on which the Applicant was not copied, and which refers only to *one* precondition, namely that the Applicant call Ms. Ameratunga, which she did; no further condition was attached to the request for SAL extension;
- d. Alternatively, even if the Respondent's evidence with respect to the (ill-defined and unrecorded) conditionality of the request were accepted, any such conditionality would have been *ultra vires*, since the authority to grant a SAL extension lies neither with Mr. Wright, nor with Ms. Ameratunga and the relevant rules do not provide for such conditionality;
- e. The Administration cannot escape its obligation to follow the properly promulgated rules on performance management under the pretext of such an unwarranted, and un-transparent *ad hoc* arrangement;
- f. There was no mutual and irrevocable breakdown in the relationship between the Applicant and UNHCR;
- g. The responsibility for the failure to complete the Applicant's 2013 e-PAD lies exclusively with UNHCR management;

h. The Applicant's managers were not aware of the requirement under UNHCR rules on performance management that the e-PAD has to be finalized before a decision of non-renewal on the basis of bad performance can be taken;

i. The Applicant's evaluation in 2013 by Ms. Zuefle was not fair. The Applicant's Reviewing Officer for the e-PAD cycle 2013 failed to comply with her duty to act as a mediator,

j. The three meetings that took place prior to the decision to curtail the Applicant's appointment did not constitute formal performance management meetings;

k. The correctness of her performance assessment was never reviewed, and the failure to comply with UNHCR performance management rules precluded a specialized external review by a rebuttal panel; UNHCR management did not make any concrete proposal on how the situation could be improved; the only concrete proposal for improvement came from the Applicant, but was not acted upon by the Administration;

l. The Administration admits that no formal performance evaluation was completed for the year 2013; the alternative process followed in the case at hand did not comply with the standards and due process requirements provided for under the UNHCR performance management rules;

m. The Applicant requests compensation in the amount of two years net base salary for the unlawful non-renewal, and six months for the particularly serious moral injury, which is supported by the evidence;

n. She further requests the Tribunal to order UNHCR to finalize the 2013 e-PAD, and to allow her access to the rebuttal process provided for under the rules.

69. The Respondent's principal contentions are:

a. The application should be rejected;

b. Fixed-term appointments do not carry any expectancy of renewal or conversion, and expire automatically and without prior notice on the expiration date specified in the letter of appointment;

c. In view of the unsatisfactory performance of the Applicant, which was established through a fair and transparent process, the non-renewal decision constitutes a valid exercise of discretion;

d. The jurisprudence clarified that there may be situations in which a decision not to renew an appointment on the basis of bad performance may be established through means other than a performance appraisal;

e. Although sec. 55 of the PAMS, which provides for completion of the e-PAD before a decision of non-renewal is taken, was not complied with, the decision was justified as it has been the case in similar applications dealt with by the Tribunal; the Administration provided sufficient evidence to show that the Applicant's performance was evaluated in an objective, fair and well based manner, that it was unsatisfactory, and that she was given sufficient notice of performance concerns;

f. Specific work objectives were set and the Applicant's performance was assessed against these objectives in the formal mid-term review in September 2013; the Applicant was given extensive, continuous notice by senior managers about her performance shortcomings through various meetings, written reports and email exchanges. Her performance shortcomings had already been reflected in the 2011 and 2012 e-PAD and throughout 2013 she was given the opportunity to comment and to address these shortcomings in consistent and time-consuming follow-up. The Applicant's comments have been duly taken into account in the decision making process;

g. The lack of a final end-of-year appraisal in 2013 is directly attributable to the Applicant, who completed her self-evaluation, which is the first mandatory step in the final appraisal cycle, only in June 2014; therefore, and particularly in view of the extensive record with respect to the

poor performance of the Applicant, the Administration cannot be held responsible for the non-completion of the e-PAD in question;

h. The Applicant failed to address her shortcomings, and to work on her interpersonal and managerial skills and “ignored all attempts by her supervisor and senior management to help her to address these issues”;

i. The unsatisfactory performance by the Applicant has been established through a fair and transparent process, the decision was not based on extraneous motives or marked by procedural flaws;

j. A complete breakdown of relationship between a staff member and the Organization or mutual loss of trust between a staff member and senior management, may in itself constitute “a valid ground for the non-renewal of the Applicant’s contract”;

k. Although the decision was not explicitly based on a “mutual loss of trust” between the Applicant and UNHCR senior managers in Pakistan, it might and would have been a valid ground, in itself, for the contested non-renewal decision; in a duty station like Pakistan, harmonious working relationships are crucial and while Mr. Wright tried to mediate the situation, he lost confidence that the Applicant was willing to change; hence, he had no other alternative than to reduce the Applicant’s SAL and not to renew her FTA, for the benefit of the Pakistan Operation;

l. While there may be cases in which an extension of a SAL may raise legitimate expectations of contract renewal, the circumstances of the present case do not allow such a conclusion. In view of the record of negative feedback provided to the Applicant, this cannot be presented as a case of an express promise creating a legitimate expectation of renewal (*Ahmed* 2011-UNAT-153; *Abdallah* 2011-UNAT-138);

m. Should the Tribunal find that the decision was illegal, the following matters are relevant to any remedies:

- i. Even if the e-PAD had been finalized, including a rebuttal, the whole process would have been completed at the latest by the end of April 2014;
- ii. Also, independently of the outcome of the rebuttal, in view of the irreconcilable differences and mutual loss of trust between the Applicant and the Organization, “there was no reasonable likelihood in the renewal of the Applicant’s contract beyond this date”;
- iii. Any economic loss should be limited to three months’ net base salary;
- iv. The Applicant’s own conduct in addressing the problems should be taken into account in determining the amount of compensation in lieu of rescission or moral damages; and
- v. The fact that the Applicant worked since September 2014 has to be taken into account by the Tribunal when determining the amount of compensation, if any.

Considerations

70. The role of the Tribunal is not to evaluate competing claims concerning performance or to substitute its own decision for that of the Administration³. The Tribunal is limited to reviewing the reasons for the non-extension of the Applicant’s fixed term appointment and assessing whether those reasons were based on objective facts, reached following adherence to the performance management procedures promulgated in the Policy for UNHCR Performance Management and Appraisal System⁴ or to a process of an equivalent standard.

³ *Sanwidi* 2010-UNAT-084, affirmed in relation to performance cases in *Said* 2015-UNAT-500.

⁴ IOM/087-FOM/089/2008 (“IOM/FOM”) with its annexes.

Issue one: Did either party comply with UNHCR Performance Management and Appraisal System regarding performance evaluation, and was the Applicant's unsatisfactory performance established through a fair and transparent process?

71. The Respondent accepts that it did not finalise the Applicant's 2013 e-PAD as required by the PAMS before taking the decision not to renew her fixed term appointment.

72. In *Rees* 2012-UNAT-266, the UNAT found that "the former Administrative Tribunal and the UNDT made an exception to the rule that a formal evaluation (of performance) was required based on the evidence that, at the very least, the staff member had been given extensive notice of any performance concerns and the opportunity to provide written comments on those concerns". In recalling this jurisprudence, UNAT stated that it is imperative that the Administration adheres to the rule of law and standards of due process in its decision-making.

73. In *Riquelme* UNDT/2010/107, the UNDT held that the Organization met the due process standards by giving an informal and continuing process of review by way of setting specific tasks and analysing the outcome. In other cases such as *Rees* UNDT/2011/156, the UNDT specifically found that the Secretary-General did not meet the standards in its alternative procedures.

74. The Tribunal holds that any performance management process implemented in substitution of a promulgated policy must at least provide the basic protections and obligations of the policy. Flexibility of process cannot excuse the Administration from meeting its mandatory obligations.

75. In this case it is necessary to examine the extent to which the Administration and the Applicant adhered to UNHCR policy on both performance evaluation and performance management, and what alternative procedures were adopted by the Respondent to evaluate and manage the Applicant's performance.

Performance evaluation

76. The Respondent submitted that the Applicant's performance was evaluated in an objective, fair, and well based manner that gave her sufficient notice of performance concerns and the opportunity to provide written comments.

77. Section 55 of the PAMS⁵ states:

The final appraisal takes place in most cases during the last two months of the annual performance appraisal cycle. Notwithstanding the normal cycle, the completion of [an] e-PAD is required in the following circumstances:

...

b) Prior to taking a decision to terminate or not renew a contract for reasons related to the performance of the individual concerned.

78. The article is a clear stipulation of a precondition that must be met before a decision is made not to renew a contract for reasons of performance. It does not confer an absolute right or expectancy of renewal, but it does give a right to a specific process.

79. The Respondent submitted that the absence of a completed e-PAD in this case was justified for a number of practical reasons, but the Tribunal holds that it is not a question of justification. The question is whether not completing the evaluation of the Applicant's performance before taking the decision not to renew her contract was a sufficient substitution for the otherwise mandatory completed e-PAD.

80. Under the PAMS, a performance cycle covers the period from 1 January to 31 December. Objectives are to be set in the period from 15 January to 28 February, the mid-year development review is to be conducted between 1 June to 31 August, and the performance appraisal shall be done between 1 December and 28 February of a given year.⁶

⁵ Annex 1 to the IOM/FOM

⁶ cf. Background and overview of the PAMS Process, December 2008.

81. Section 58 of the PAMS states that an annual appraisal is completed:

- a) **When there is agreement**, the staff member accepts the e-PAD and checks the box indicating that they agree with the appraisal. The Reviewing Officer signs off the e-PAD and submits to PMU;
- b) **When there is disagreement** and the staff member indicates within the required timeframe and all parties complete the mediation protocols established in sec. 2.1 of the disagreement rebuttal process;
- c) When disagreements persist following the Reviewing Officer's mediation, the staff member agrees to disagree with the appraisal, and submits comments within the required time frame ; and
- d) When rebuttal is sought, the annual appraisal is completed when the rebuttal panel report is submitted and final actions are taken according to the rebuttal protocols established in sec. 3 of the disagreement and rebuttal process.

83. The assessments recorded in the Applicant's finalised 2011 and 2012 e-PADs were, by and large, positive and her ratings were within an acceptable performance level. The Tribunal rejects the Respondent's submission that the late finalization of the 2013 e-PAD was entirely due to the fault of the Applicant who did not nominate multi-raters and did not complete her self-evaluation in time.

82. The PAMS emphasises that both the manager and the staff member are accountable for timely e-PAD completion.

84. If a staff member does not comply with a task falling under his/her responsibility under the e-PAD, the e-PAD process should proceed to the next step anyway (cf. sec. 46 of the PAMS). When the Applicant did not correctly nominate her multi-raters in time, the Administration did not proceed to the next step as it should have.

85. The self-evaluation for the e-PAD 2013 was made available to the Applicant as of 14 November 2013 for, with a deadline to finalize it by 31 January 2014. The recommendation to reduce the Applicant's SAL, which effectively meant that her fixed term appointment would not be renewed, had already been made on 28 October 2013 and the manager recommended the non-renewal of the Applicant's FTA on 26 November 2013.

86. For these reasons, the Tribunal rejects the Respondent's contentions that the Applicant was responsible for not finalising the 2013 e-PAD, and that this justified the Respondent in not renewing her contract on the grounds of performance contrary to sec. 55 of the PAMS.

87. Both the Representative and the Applicant's manager admitted during the hearing that they were not aware that a finalized e-PAD was a precondition to taking a decision not to renew a fixed-term appointment on the basis of unsatisfactory performance, even though the Applicant referred to this at the meeting on 28 November 2013.

Performance Management

88. The PAMS provides for a detailed process for the management of performance issues. If a staff member and manager disagree on performance, the e-PAD is only finalized after the completion of mediation and rebuttal protocols have been completed.

89. Section 1.1 of Annex 5 to the IOM/FOM *Disagreement and rebuttal process* states that:

conciliation and mediation efforts should be emphasized in the performance management process when there are disagreements in order to address the issues and develop a plan of action to prevent similar issues from arising.

90. The Reviewing Officer is required to take specific steps to mediate eventual disagreements between a staff member and a manager, and to document their recommendations within a defined time frame. In addition the conciliation capability of Rebuttal Board members and the responsible DHRM officers is strengthened in order to assist managers and the Reviewing Officers to mediate disagreements, with due respect for the integrity of the performance appraisal, and to address the basis for rebuttal.

91. The mid-year progress and development review described in sec. 16 of the PAMS is a mandatory step in the process of performance management, and sec. 19 provides that if a staff and a manager fail to reach agreement on any aspect

of Phase 2 of the process, the Reviewing Officer should be involved to mediate the discussion.

92. At the annual appraisal stage, sec. 29 mandates that in cases of disagreement the staff member should follow the procedure outlined in sec. 3 of the *Disagreement and rebuttal process*.

93. The role of the Reviewing Officer is spelled out in secs. 51 to 54 of the PAMS. Section 52 states that “[t]he Reviewing Officer tries to help resolve any disagreement between the staff member and the manager throughout the performance appraisal cycle in respect of any aspect of the e-PAD.”

94. In case of disagreements between staff and managers, the Reviewing Officer is required to review the case, convene a meeting with both parties, to mediate the disagreement and to prepare minutes of the meeting(s) outlining their recommendations to resolve the issue. Detailed guidance on this process is given in annex 4 to the PAMS.

91. Once the annual appraisal is completed, sec. 58 of the PAMS provides that when there is still disagreement and the staff member so indicates within the required timeframe, all parties are to complete the mediation protocols established in sec. 2.1 of the *Disagreement and rebuttal process*.

95. If the staff member disagrees with the final appraisal and advises the Reviewing Officer of this within the correct time frame, the latter is required to review the case with both parties and only after making a concerted effort to mediate the differences, include his/her comments on the e-PAD form.

96. If the disagreement persists, the finalised comments of the Reviewing Officer and the staff member are uploaded to the staff member’s fact sheet. In this model the staff member agrees to disagree and the staff member may decide to invoke the 2 stage rebuttal process.

97. According to the Representative, he kept the Applicant’s 2013 Reviewing Officer informed about the problems throughout 2013, and the latter told him that she had had many meetings with both the Applicant and her manager, and that she

had tried to mediate the issues between them. However, the Reviewing Officer said that she trusted that the Representative was acting as a mediator, and that he took on that role at the Applicant's request, so she was not at all involved in any mediation process in her capacity as Reviewing Officer.

98. The Tribunal finds that the mediation protocols were not followed. The Reviewing Officer was aware of the performance and interpersonal problems between the Applicant and her manager, but she did not take specific steps to mediate their disagreements and to document their recommendations within a defined timeframe.

99. Although the Representative described the meetings he held on 3 June and 17 September 2013 as attempts to mediate, he did not have the authority to mediate disagreements between the Applicant and her manager, since this role lay exclusively with the Reviewing Officer.

100. The first meeting, on 3 June 2013, was convened only with the Applicant. The Representative had separate discussions with her manager, had asked both the Applicant and the manager to take action to improve their relationship, and had advised that he would review the matter within three months.

101. The second impromptu meeting, which took place on 17 September 2013, was held with both parties, and in the presence of the Reviewing Officer. The Representative told the Tribunal that he called it to get an idea about progress made and that it was not a scheduled meeting; rather, it was convened urgently by the Representative when faced with the manager who was distressed and upset about the Applicant.

102. The Tribunal finds that neither meeting was convened as mediation with the aim of assisting the parties to find common positions and to negotiate a settlement of outstanding disputes.

103. The Representative informed the Tribunal at the hearing that, in his view, neither the manager nor the Applicant had done anything since June 2013 to improve the situation, and that after the last meeting (September 2013) he had lost

confidence that the relationship between the two would improve. For this reason, he seriously considered reducing the Applicant's SAL to avoid having them working together any longer.

104. The Representative asked the parties for their comments during and after the meeting of 17 September 2013. None of these—including the Applicant's list of constructive proposals or recommendations as a way forward—were taken into account by the Representative, or used as a basis for a conciliated settlement or for an action plan. He passed them without comment to DHRM. This does not meet the due process requirement for seeking comments from affected parties. It is futile to request comments and then fail to consider them.

105. The 2013 mid-term assessment, signed off on 30 September 2013, was the first evaluation of the Applicant's performance to formally articulate the performance issues alleged by the Manager who stated that "[the Applicant] will have to show in the remaining months that she is willing and able to fulfil her job". In spite of the Manager's regular complaints to the Applicant and others about her performance, there is no evidence of any plan of action put in place to prevent similar issues from arising as required by sec. 1.1 of the *Disagreement and rebuttal process*. The Applicant was the only person to suggest a plan in her comments after the 17 September 2013 meeting. This was not considered, let alone put in practice, by her manager, the Representative or the Reviewing Officer.

106. In conclusion the Tribunal holds that the Administration failed to manage the Applicant's performance in accordance with the PAMS.

Alternatives to PAMS

107. The Tribunal next considers whether the Administration adopted an acceptable alternative process meeting the requirements and standards of PAMS to evaluate and manage the Applicant's performance.

Performance Evaluation

108. As noted above, despite some critical comments, the Applicant's performance evaluation for the e-PADs for 2011 and for 2012 were positive. Further, the memo supporting her SAL extension was also a positive endorsement of the Applicant's value to the Organisation.

109. On the account of witnesses for the Respondent given at the hearing, neither these assessments nor the SAL memo fully reflected the true performance of the Applicant as they understated the extent of problems she was responsible for.

110. These attempts to resile from the 2011 and 2012 e-PADs do the Respondent no credit. If the later criticisms of the Applicants performance are correct, the only conclusion to be drawn is that the assessments in the e-PADs were a sham as they did not reflect the reality of her performance for two years. The Tribunal further notes that in contrast to the Reporting Officer, the Representative believed that the Applicant's performance in 2011 and 2012 had been satisfactory.

111. Given that the assessments were written and official, signed off by all the appropriate officials, accepted by the Applicant, and put on the official record, the Tribunal accepts them at face value and finds that the Applicant was entitled to rely on them. They gave no notice that her contract renewal was in jeopardy.

112. The Respondent also relied on a series of meetings to establish that the Applicant was given sufficient notice of performance issues that put the extension of her appointment at risk.

113. The Tribunal does not accept that the meeting of 8 May 2013 between the Applicant and her manager can be considered as a performance evaluation of the Applicant. It was held outside office premises, at the Applicant's sole initiative, and to discuss her concerns about her manager's approach to issues relating to staff under the Applicant's supervision.

114. Even if it had been a performance evaluation meeting, the evidence does not support the contention that the Applicant failed to meet the performance standards set by her manager at that meeting and reiterated in her email of 29 May 2013.

The Manager said that during the meeting she expressed her expectation that the Applicant copy her on (important) communications; however, in her evidence to the Tribunal, the Manager expressed her discomfort with the fact that after that meeting, the Applicant copied her on each and every email.

115. The Manager also asked the Applicant that one way to improve communication between her and the Applicant's team would be to invite her to the unit meetings. The evidence established that the Applicant invited the manager to at least one team meeting soon after the meeting of 8 May 2013.

116. There is one instance where the Applicant did not comply with a directive by the Manager. In her email of 29 May 2013, Ms. Zuefle asked the Applicant to "present a plan to her on how they could jointly address the perception by many other staff that the staff in her unit, including herself, were deliberately isolating themselves from the rest of the protection team and show an attitude of superiority". There is no evidence that the Applicant presented such a plan of action. However, there is no evidence of any formal follow up by Ms. Zuefle on this issue between her 29 May 2013 email and the mid-year development review.

117. The Tribunal finds that to the extent they had been formulated in concrete actions, the Applicant tried to comply with most of the specific expectations, if any, that the Manager raised at their 8 May 2013 meeting, and in her email of 29 May 2013.

118. The meetings of 3 June and 17 September 2013 were not clearly identified as performance related meetings either. The Representative, who did not have any formal role in the Applicant's performance evaluation during that term, told the Tribunal that the meetings concerned interpersonal issues between the Applicant and her manager. At the second meeting, he concluded that there was no way to find a solution to the problems between them.

119. During the meetings, the Representative advised the Applicant that she should change some of her behaviours but also asked both parties to take action to improve the situation. According to him, neither of them did. Although both the Reviewing Officer and the Manager made negative comments about the

Applicant's performance at the 17 September 2013 meeting and in subsequent communications, these could not replace a formal performance evaluation, with properly recorded and measurable improvement objectives, subject to subsequent monitoring.

120. The Tribunal observes that at the 17 September 2013 meeting, the Representative found it necessary to request the Manager to fully substantiate and document her serious concerns about the Applicant's performance and attitude. This appears to be the first time this had been done since May 2013 when the Manager started to voice her concerns.

Performance Management

121. While the 2013 mid-term assessment was conducted in the framework of the PAMS on 30 September 2013, it was significantly different from the performance ratings given to the Applicant in the previous two years by her managers. Due process required that the Applicant be given a real chance to improve any deficiencies identified formally for the first time, with clear and measurable improvement objectives, to be monitored and reassessed over a reasonable period of time. However, no action plan, or an equivalent, was devised even though this had been suggested by the Applicant two days before the mid-term assessment was signed off.

122. The Reviewing Officer did not act on the matters raised in the mid-term assessment to try to resolve the obvious personality clash between the parties.

123. The Tribunal concludes that up to the mid-term assessment, any attempts to manage the Applicant's performance were inappropriate and inadequate. The alternative methods of performance management relied upon by the Respondent did not meet the standards of the PAMS. The Administration did not proceed on a clearly articulated plan, other than exhortations by the Representative that the Applicant and her manager should try to get along better with each other. Following the mid-term assessment the Administration made no attempt to manage the Applicant's performance; rather, already prior to and after the mid-term, it explored ways to remove her.

124. The recommendation to reduce the Applicant's SAL was foreshadowed by the Representative on 17 September 2013 and taken on 28 October 2013, on the basis of alleged bad performance. The subsequent recommendation not to extend the Applicant's appointment on the same grounds was merely an extension of that earlier decision. In these circumstances, the Applicant had no realistic chance of making the improvements referred to in the mid-term assessment. This is a breach of the implied requirement of fair dealing (*James* UNDT/2009/025).

125. Having found that the Administration did not comply with the statutory requirements provided for under the PAMS (cf. above), the Tribunal further concludes that the alternative process followed by the Administration was unlawful since it did not provide the Applicant with the necessary safeguards, standards and due process requirements of a proper performance evaluation and performance management system.

Issue 2: Did the second SAL extension raise legitimate expectations of renewal?

126. There is no doubt that through the performance evaluations in the Applicant's 2011 and 2012 e-PADs, and the positive description of the Applicant's contribution to the operation in the second SAL request, the Administration gave the Applicant good cause in writing to believe that her performance was of an acceptable standard at least up to the end of February 2013.

127. The Tribunal does not accept that the opinions in the request for the SAL cannot be relied upon because they were conditional upon certain steps being taken by the Applicant. The alleged conditionality was never formulated in writing to the Applicant, nor submitted or shared with UNHCR Headquarters when the second extension request was sent.

128. The only condition attached to the second request for extension of the SAL, discussed between the Representative and his Deputy but not with the Applicant, was that before the memo to request a second SAL extension could be written, the Applicant was to phone the Deputy. That was done. The fact that the memorandum requesting a second SAL extension was written and sent, is

evidence that it had become unconditional and the Tribunal must infer that its contents were written in good faith and represented a true assessment of the Applicant's worth to the Organisation.

129. The Tribunal agrees with the Respondent's position that the SAL and the term of the fixed term contract are theoretically separate; however, it finds that the SAL memorandum legitimately gave the Applicant an expectation that her contract would be renewed until the expiry of her SAL on 31 December 2014.

Issue 3: Was there a mutual loss of trust such as to justify the non-renewal decision?

130. In his reply, the Respondent raised new justifications for the decision, *post facto*. He alleges that the non-renewal was because of a mutual loss of trust and that the PAMS policy was therefore not applicable.

131. The reason for the non-renewal decision provided to the Applicant was her bad performance. The Respondent is bound by the reasons given at the time of the decision. It is inappropriate for different reasons to be raised at such a late stage of the proceedings.

132. In any event, the Tribunal observes that the PAMS policy states at sec. 1.3 of the *Disagreement and rebuttal process* that disagreements can relate to all elements of the performance appraisal, including the evaluation of staff performance on objectives and competencies by the manager, and any related comments on a staff member's performance.

133. As the alleged lack of trust obviously arose from the personality conflict and disagreements over performance, the applicable criteria for managing these issues is the same as that for any performance issue. The Respondent is not absolved from following the UNHCR policy on performance management to manage these issues by calling them a mutual loss of trust.

134. In addition, the Applicant's concrete proposals on how the personality conflict and disagreements over performance issues could be addressed, which she made after the critical meeting of 17 September 2013, demonstrate that at

least from her point of view this was not a situation that had reached a final impasse. As a matter of fact, the loss of trust, if any, was not mutual.

135. In view of the foregoing, the Tribunal holds that the non-renewal of the Applicant's contract was unlawful and has to be rescinded.

Issue 4: If the Tribunal holds that the non-renewal decision was illegal, what were the consequences to the Applicant and, if applicable, what remedies are appropriate?

136. The breaches to the PAMS policy deprived the Applicant of the opportunity to rebut her performance evaluation. As at the date of this judgment, the rebuttal process has not been invoked as the end-of-year appraisal has not yet been completed by the Applicant's manager and the Reporting Officer.

137. Before the reduction of the Applicant's SAL and the non-renewal of her appointment were requested on performance grounds, the Applicant had a reasonable expectation that her fixed term appointment would be renewed at least until the term of her SAL, namely 31 December 2014.

138. The Applicant told the Tribunal that although she had unsuccessfully applied for many positions, she finally obtained employment in September 2014. To this extent she has mitigated her losses.

139. Pursuant to art. 10(5) of its Statute, when a decision is rescinded, the Tribunal shall set an amount of compensation to be paid as an alternative to the rescission of the contested administrative decision. Such alternative compensation is not compensatory damages based on economic loss (*Eissa* 2014-UNAT-469 para 27).

140. The compensation to be paid to the Applicant as an alternative to the rescission of the decision is her net base salary and entitlements not related to actual service performance from 31 January to 31 December 2014, less any salary she earned from September 2014.⁷

⁷ Cf. *Harding* 2011-UNAT-188, quoting *Cohen* 2011-UNAT-131.

141. In support of her claim for moral damages of six months' net base salary, the Applicant described the effects of the non-renewal decision on her and produced a medical report from her physician. The Respondent objected to the production of the medical report arguing that in the absence of its drafter, it constituted hearsay. However, the Respondent did not challenge the Applicant's own description of her state of health since the non-renewal decision. In addition, her condition was accepted by the Administration to be a stress related illness from 7 December 2013 to 31 January 2014 sufficient to entitle her to sick leave and an exceptional extension of her contract to cover that period.

142. The Tribunal is satisfied that the unlawful decision not to renew her contract caused the Applicant medical harm which entitle her to compensation for moral damages. This harm was aggravated by the fact that the decision was made on the grounds of alleged poor performance that the Applicant strenuously and to this day denies.

143. The Applicant is awarded six months' net base salary as compensation for this harm.

144. The Tribunal has no power to order the finalization of an e-PAD as requested by the Applicant. It does, however, encourage the Administration to complete the Applicant's 2013 e-PAD if not already done.

Conclusion

145. In view of the foregoing, the Tribunal DECIDES:

- a. The decision not to extend the Applicant's fixed-term appointment beyond 31 December 2013 is rescinded;
- b. The amount of compensation that the Respondent may elect to pay to the Applicant as an alternative to the rescission is set at her net base salary and entitlements not related to actual service performance from 31 January to 31 December 2014, less any salary she earned from September 2014;

- c. The Respondent shall pay to the Applicant six months' net base salary for moral damages;
- d. The above shall be paid within 60 day from the date this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional 5% shall be added to the US Prime Rate until the date of payment;
- e. Any other pleas are rejected.

(Signed)

Judge Coral Shaw

Dated this 27th day of May 2015

Entered in the Register on this 27th day of May 2015

(Signed)

René M. Vargas M., Registrar, Geneva