



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/089

Judgment No.: UNDT/2019/029

Date: 22 February 2019

Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ALLEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Brandon Gardner, OSLA

Counsel for the Respondent:
Kong Leong Toh, UNOPS

Introduction

1. At the time of this application, the Applicant was Country Director for the Somalia Programme under the United Nations Operations for Project Services - Kenya Operations Hub (UNOPS-KEOH). He served at the P-5 level on a fixed term appointment and was based in Mogadishu.

Procedural History

2. On 7 December 2016, the Applicant filed this application challenging the Respondent's decision to i) place adverse material in his personnel file without providing him with the opportunity to rebut it; ii) place him on special leave with pay; and subsequently iii) not renew his appointment on the basis of unsubstantiated allegations.

3. The Respondent filed his reply to the application on 10 January 2017.

4. On 4 September 2018, the Tribunal issued Order No. 132 (NBI/2018) setting this matter down for a case management discussion (CMD).

5. The CMD took place as scheduled on 11 September 2018.

6. Both parties indicated a willingness to have this matter formally mediated so that the dispute can be resolved amicably and without recourse to litigation.

7. On 11 September 2018, the Tribunal issued Order No. 137 (NBI/2018) suspending the proceedings and referring this matter for mediation to the Office of the United Nations Ombudsman and Mediation Services (UNOMS).

8. On 20 October 2018, the Ombudsman informed the Tribunal that the parties were unable to reach an agreement through mediation.

9. On 25 October 2018, the Tribunal issued Order No. 166 (NBI/2018) directing the parties to file their closing submissions.

Facts

10. The Applicant, Michael J. Allen, was the Somalia Country Director at the P-5 level for the UNOPS-KEOH from 10 October 2015 until 9 October 2016 on a fixed-term contract.

11. On 10 June 2016, the Applicant had a Skype conversation with Deputy Director for UNOPS's Human Resources Department (People and Change Group) [Deputy Director] Nasser Shammout in which he was informed that a formal complaint had been filed against him for abuse of authority. No investigation panel was established nor were any documents provided to the Applicant in this regard. Indeed, there was no further communication of any kind from the United Nations Operations for Project Services-Headquarters (UNOPS-HQ) or UNOPS Kenya on this matter until 8 July 2016.

12. On 8 July 2016, the Applicant was informed by the Deputy Director, with Applicant's supervisor Mr. Frauenfeld in attendance, that he was being removed from Somalia and would be placed on Special Leave with Pay. The reason given for this decision was that a formal complaint had been filed against the Applicant for abuse of authority. No evidence was provided to substantiate that the complaint had actually been filed.

13. On 11 July 2016, the Applicant received a letter from the Deputy Director:

I refer to our discussion of 8 July...where you were informed of the decision below, and also to the conversation we had on 10 June 2016 regarding:

a. Your shouting at a colleague using offensive words in the presence of a large number of UN colleagues, including the Special Representative of the Secretary-General. You admitted this.

b. Photographs showing that you had attached cartoons with offensive captions (i.e. "From now on we'll fuck things up my way!" and "Some days I feel like I am surrounded by fucking idiots. Other days I realise...it's not just some days.") to UNOPS health and safety posters in the UNOPS office. You denied that you had attached these cartoons, but admitted that these cartons were attached to the posters. I note that

even assuming that it was not you who attached the cartoons, you as UNOPS Country Director are responsible for ensuring a harmonious working environment, free of intimidation, hostility offence and any form of prohibited conduct.

The Executive Director has decided that your conduct is highly inappropriate, especially for a UNOPS Country Director. The Executive Director also noted that you had been previously warned about your behaviour.

In view of the forgoing, the Executive Director has decided that it is in the interest of the Organization to place you on special leave with full pay with immediate effect for the remainder of your appointment. The Executive Director has also decided that your appointment will not be renewed when it expires on 9 October 2016. Your supervisor...will contact you shortly to arrange for the handover of your responsibilities.

14. The shouting incident noted above occurred on 4 June 2016 at the Mogadishu International Airport (MIA), where UNOPS and other UN organizations worked, when it came under a standoff attack. Because of this, more than one hundred UN personnel (including the Special Representative of the Secretary-General [Mr. Michael Keating]) gathered in a bunker for safety reasons.

15. In this bunker, with numerous UN personnel present, the Applicant repeatedly shouted in anger at a UNOPS colleague (Mr. Ahmed Aden, a national liaison officer). The Applicant repeatedly used the word “*fucking*”. Eventually, the UNOPS Field Security Advisor separated the Applicant from Mr. Aden.

16. The Applicant understood that this letter was to be placed in his personnel file.

17. On 2 September 2016, the Applicant submitted a Management Evaluation Request (MER) to UNOPS-HQ challenging the Respondent’s decision to grant him Special Leave with Pay and not renew his appointment based on unproven allegations and without affording him any due process rights.

18. Paraphrasing distorts the intent and meaning of the language used in certain relevant email exchanges. As such, excerpts from the actual conversations follow:

From: Kong Leong TOH

Sent: 10 September 2016 04:43

To: Nasser SHAMMOUT

Subject: RE: Request for a Management Evaluation - Michael Joseph ALLEN

Hi Nasser,

Sorry to bother you, but I am working on the response to Mr. Allen's RME, and would like to make sure that I have not misunderstood the facts.

Mr. Allen claims in the RME (my underline emphases):

Concerning the first allegation, the Applicant argues that although he admitted that there was a brief heated exchange between himself and a UN colleague in which harsh language was used, he never stated that there was any shouting; in fact, there was not. Additionally, while the applicant concedes that the SRSG was in the same room, the Applicant believes that the SRSG was not privy to the substance of the conversation. The SRSG was on the other side of the bunker and there was a cacophony of other conversations occurring within it, such that the specifics of the Applicant's discussion was drowned out amidst the general din in the room. Furthermore, the Applicant contends that the only reason for mentioning the SRSG's presence near the exchange was an attempt to lend gravitas to an otherwise inconsequential moment.

Concerning the second allegation, the Applicant strenuously denies being responsible for, encouraging or condoning the placement of cartoons containing expletives being placed inside the UNOPS Somalia office. The Applicant further argues that the offensive cartoons were placed in an office 200 yards away from his own where he rarely had any occasion to visit. The Applicant categorically denies ever seeing this material, noting that the last time he saw the posters, they were in their original, unaltered state- i.e., without the offensive cartoons attached.

Do you recall if he said (during his discussion with you) anything along the lines of the underlined?

If you have any other comments, they would of course be very welcomed.

Best regards Kong

Kong Leong Toh | Legal Specialist

From: Nasser SHAMMOUT

Sent: 10 September, 2016 6:03 PM

To: Kong Leong TOH <KongleongT@unops.org>

Subject: RE: Request for a Management Evaluation - Michael Joseph ALLEN

Hi Kong,

Thanks.

On the first issue, he explicitly said that 'he had lost it' and that he used bad language, and acknowledged that he should not have done so, but because of the seriousness of the issue he felt very outraged. This was reported to us by the colleagues too in the original communication I believe. On the second issue, he did say to me that he had seen them, but also said that these were not in his office but in the conference room, and he did say that he had seen them with the additions to them because he said categorically that he did not feel responsible if other people felt that way and had hung them. The original letter, also mentions that this [*sic*] are in the office, which we all had agreed was part of his responsibility especially that he had mentioned seeing them and not acting on them.

Hope it helps.

Cheers.

Nasser.

Nasser Shammout | Deputy Director

From: Kong Leong TOH

Sent: 11 September 2016 01:06

To: Nasser SHAMMOUT

Subject: RE: Request for a Management Evaluation - Michael Joseph ALLEN

Thanks! Just to make sure I do not misunderstand: did he claim that no one noticed that he was shouting at someone?

Best regards,

Kong

Kong Leong Toh | Legal Specialist

From: Nasser SHAMMOUT

Sent: 11 September, 2016 4:09 PM

To: Kong Leong TOH <KongleongT@unops.org>

Subject: RE: Request for a Management Evaluation - Michael Joseph ALLEN

Hi Kong, no he did not specifically say that, but he realized that it was wrong, and I told him that the fact that several people heard it was clearly because it was apparent and that he was loud, to which he said that he was so outraged that he over-reacted this way.

Cheers.

Nasser.

Nasser Shammout | Deputy Director

From: Kong Leong TOH

Sent: 13 September 2016 19:50

To: Nasser SHAMMOUT

Subject: RE: Request for a Management Evaluation - Michael Joseph ALLEN

Hi Nasser,

Sorry to trouble you again, but just to make sure I do not misunderstand: can you advise if you scheduled a meeting specifically to talk to him about the two issues (the shouting and the cartoons)? If so, would you happen to have an email requesting a meeting with him?

If you have any other comments, they would of course be very welcomed.

Best regards,

Kong

Kong Leong Toh | Legal Specialist

On Sep 13, 2016, at 8:53 PM, Nasser SHAMMOUT
<NasserS@unops.org> wrote:

Hi Kong, here it is, attached.

Cheers.

Nasser.

Nasser Shammout | Deputy Director

From: Nasser SHAMMOUT

Sent: 13 September, 2016 9:46 PM

To: Kong Leong TOH <KongleongT@unops.org>

Subject: RE: Request for a Management Evaluation - Michael Joseph
ALLEN

Hi Kong, this week my calendar is cramped and tomorrow we have a 5-
hour planning session with the HQs directors. Maybe in the evening?
Or could Alejo help? What is it we want to discuss?

Cheers.

Nasser.

Nasser Shammout | Deputy Director

From: Kong Leong TOH

Sent: 14 September 2016 03:03

To: Nasser SHAMMOUT

Subject: Re: Request for a Management Evaluation - Michael Joseph
ALLEN

Thanks! Would you happen to be available for a Skype call sometime
tomorrow?

Best regards,

Kong

Sent from a mobile phone so please excuse brevity and typos.

From: Kong Leong TOH

Sent: 14 September 2016 04:09

To: Nasser SHAMMOUT

Subject: RE: Request for a Management Evaluation - Michael Joseph ALLEN

Hi Nasser,

Thanks for your reply.

What I think might be helpful to understand is whether it was conveyed to Mr. Allen how seriously we viewed the shouting and cartoon incidents. For example, if we had set up a meeting specifically to discuss this, that would be helpful. But if the discussion was incidental to another issue, that would be less helpful. Since you are even busier than usual, I am fine with discussing this by email, but if you think it might be faster for you to discuss this over a call, I am available at your convenience (evenings and otherwise).

Best regards, Kong

Kong Leong Toh | Legal Specialist

On Sep 14, 2016, at 6:18 AM, Nasser SHAMMOUT <NasserS@unops.org> wrote:

Hi Kong, Thanks. The call was asked for by me, and specifically around those issues that were raised. We had several prior calls on issues he had with Rainer, and vice-versa which we also spoke about, but this call was specifically around the allegations that came in. I confronted him with the pictures, and also with the use of bad language. I also mentioned during the meeting to him that these will take their path in terms of review, to which he responded in the email I attached last night¹

¹ Note that this subject email attachment was not attached to the case file. Nothing in the Applicant's submissions disputes its existence.

in waiting to see the results. He did confirm the use of bad language and his outrage which was out of place and in front of others, including more senior non-UNOPS people and he apologized for that mishap. On the pictures, I said we have pictures that show these graphics and that these were inappropriate especially that he allows them, regardless where they were. Let me know if that helps. If you need to talk more, I can possibly make it around 5:30 right after the HQs planning meeting we have today. You can call me on my cell phone any time. Cheers.

From: Kong Leong TOH

Sent: 14 September 2016 13:33

To: Nasser SHAMMOUT

Subject: Re: Request for a Management Evaluation - Michael Joseph ALLEN

Thanks! Do you happen to recall how long the discussion lasted?

Best regards, Kong

Sent from a mobile phone so please excuse brevity and typos.

From: Nasser SHAMMOUT

Sent: 14 September, 2016 10:59 AM

To: Kong Leong TOH <KongleongT@unops.org>

Subject: RE: Request for a Management Evaluation - Michael Joseph ALLEN

Hi Kong, I think it lasted for at least 30-40 minutes. I had it for 30 minutes in my schedule...

Nasser Shammout

(The time differences in the last two emails are correct since the author and the recipient are located in different time zones.)

19. On 26 September 2016, the Management Evaluation Unit (MEU) upheld the Respondent's decisions.

Issues

20. The Applicant's case is that the Respondent i) placed adverse material in his personnel record without providing him the opportunity to respond to the allegations made against him. This violated paragraph 3 of ST/AI/292 on the Filing of Adverse Material in Personnel Records; and ii) sanctioned the Applicant without any formal process.

21. The Respondent disputes both contentions, and particularly argues that ST/AI/292 does not apply to UN Funds and Programmes.

Considerations

Whether the Administration's failure to renew the Applicant's contract without using the Administration's Standard Performance Evaluation process was lawful?

22. The Respondent complied with the *audi alterem partem* principle. In *Peglan* UNDT/2016/059, the Dispute Tribunal described the *audi alterem partem* principle in the following terms:

The principle of *audi alteram partem* is a universal principle of natural justice which applies to administrative decisions. It has been well expressed as follows:

It is a breach of the *audi alteram partem* principle for a decision maker to base a decision on information that has not been disclosed to the party adversely affected.

The principle ensures that a party adversely affected has the right to know, the opportunity to comment on and the ability to answer the case against him or her.

23. The Applicant's own statement in the "Request for Management Evaluation" form that he submitted to the UN Secretariat's Management Evaluation Unit shows that the Respondent substantially complied with the *audi alterem partem* principle.

24. At the start of the Skype discussion, the Deputy Director said to the Applicant that UNOPS had received two serious allegations about the Applicant.

25. The Applicant wrote ("Request for Management Evaluation" form):

The incidents that were eventually used as the basis for the decision were briefly discussed via Skype on 10 June 2016 with the deputy director for UNOPS's human resources department (People and Change Group), Mr. Nasser Shammout.

26. With regard to the Applicant's use of the term "briefly discussed", the PCG Deputy Director recalled that the discussion "lasted at least 30 minutes".

27. The Applicant knew what shouting incident the PCG Deputy Director was referring to during the 10 June 2016 Skype discussion. The Applicant wrote in his "Written Submission in Support of the Management Evaluation Request":

Concerning the first allegation, the Applicant argues that although he admitted that there was a brief heated exchange between himself and a UN colleague in which harsh language was used, he never stated that there was any shouting; in fact, there was not. Additionally, while the applicant concedes that the SRSG was in the same room, the Applicant believes that the SRSG was not privy to the substance of the conversation. The SRSG was on the other side of the bunker and there was a cacophony of other conversations occurring within it, such that the specifics of the Applicant's discussion was drowned out amidst the general din in the room. Furthermore, the Applicant contends that the only reason for mentioning the SRSG's presence near the exchange was an attempt to lend gravitas to an otherwise inconsequential moment.

28. However, the Deputy Director recalled informing the Applicant that others said that they heard him shouting, with Applicant replying that this was because he was “outraged.”

29. As such, the Applicant did use offensive language where persons from other UN organizations heard it and saw the Applicant’s demeanor and comportment.

30. Concerning the second allegation, the Applicant strenuously denied being responsible for, encouraging or condoning the placement of cartoons containing expletives being placed inside the UNOPS Somalia office. The Applicant further argued that the offensive cartoons were placed in an office 200 yards away from his own where he rarely had any occasion to visit. The Applicant categorically denied ever seeing this material, noting that the last time he saw the posters, they were in their original, unaltered state – i.e., without the offensive cartoons attached.

31. However, “others in UNOPS Somalia describe the situation very differently from what the Applicant had written above:

1. The part of the office in which the cartoons with the expletives was used by you to hold morning meetings, and you spent time in this part every working day.

2. You used this part of the office during the period that the cartoons with the expletives were there.

The Executive Director had previously warned the Applicant about his behavior. The Applicant denies this and claims that “this falsehood appears to have been added to try to create the appearance of a pattern of bad behavior when in fact no such pattern exists.”

32. The Applicant’s supervisor wrote to the Applicant on 6 April 2016 stating:

I request you you [sic] not to hold grudges - it is impossible to work on that basis. I expect us to work together. I expect Mogadishu and Nairobi to work as a team and I expect any divisive rhetoric to stop with immediate effect. I expect issues to be highlighted and assessed constructively and not with an attitude of defeatism or defensively.

33. During an email exchange with his supervisor on 12 April 2016, the Applicant, in relevant part, stated “You wonder why I get angry and disgruntled....”

34. In response, the supervisor wrote, in relevant part, “Please help us have a constructive dialogue and not a stand off”.

35. In an email exchange of 19 April 2016, the Applicant wrote the following:

Folks:

This does not work and I object to the changes being made without consulting me. I made it perfectly clear that the cap on the budget was 250,000. What was not to understand about this?

What is wrong with this organisation.

Rainer this is the final straw for me. Find yourself a new country director.

36. In response, the Applicant’s supervisor wrote: Dear Michael-it would be useful to resolve this constructively.

37. The supervisor recalled discussing Applicant’s behavior with him at several meetings, including a meeting held in Mogadishu on or around 21 April and a meeting held in Nairobi sometime in the first half of June 2016.

38. Herein, the Applicant was well aware of the complaints that were lodged against him, was confronted with each claim and responded thereto, was repeatedly warned about his unprofessional behaviour and performance issues yet failed to heed to these warnings.

Was the decision not to renew the Applicant’s contract due to poor performance lawful?

39. In *Morsy* 2013-UNAT-293, the UNDT held that “poor performance ... may [lawfully] be the basis for the non-renewal of [a] fixed-term appointment”.

40. The International Civil Service Commission’s 2001 Standards of Conduct for the International Civil Service were adopted by the Secretary-General and annexed to

ST/SGB/2002/13, entitled “Status, basic rights and duties of United Nations staff members”. Paragraphs 15 and 16 of the 2001 Standards of Conduct provide:

15. Managers and supervisors are in positions of leadership and it is their responsibility to ensure a harmonious workplace based on mutual respect ... Managers are also responsible for guiding and motivating their staff ...

16. It is natural for managers to be seen as role models and they have therefore a special obligation to uphold the highest standards of conduct. ...

Staff members in high-level management positions [] are expected to be able to quickly step into their positions and to provide quality leadership.

...the Executive Director was concerned about only one thing:

[] unsatisfactory managerial performance and style. Concern about a high level manager’s poor performance is not an improper motive or basis for the Agency’s (preliminary or ultimate) decision not to renew a fixed-term appointment.

41. The Standards of Conduct for the International Civil Service, 2013 is even more stringent. It provides, “Managers and supervisors serve as role models and they have therefore a special obligation to uphold the highest standards of conduct....3 UNOPS Organizational Directive No. 8 (rev 1), Policy on Prohibition of Discrimination, Harassment, including Sexual Harassment, and Abuse of Authority provides:

“4.2.2 Heads of Business Units, managers and supervisors must act as role models by upholding the highest standards of conduct and have the duty to take all appropriate measures to:

(a) Promote a harmonious working environment, free of intimidation, hostility, offence and any form of prohibited conduct. In order to achieve such an environment, Heads of Business Units, managers and supervisors must act as role models by upholding the highest standards of conduct.”

42. The Respondent submits that the Applicants shouting (using offensive words [fucking]) at a supervisee in the presence of UN colleagues (including a Special Representative of the Secretary-General); the Applicants attaching cartoons with offensive captions (i.e. "From now on we'll fuck things up my way! and "Some days I

feel like I am surrounded by fucking idiots. Other days I realize... it's not just some days") to UNOPS health and safety posters in the UNOPS office or, in the alternative, the Applicants failing to ensure a harmonious working environment, free of intimidation, hostility, offence and any form of prohibited conduct knowing that the offensive posters existed yet consciously failing to remove them were egregious actions that were completely inconsistent with the Applicants responsibilities as UNOPS Country Director. The foregoing were lawful bases for the UNOPS decision not to renew the Applicants appointment.

43. The Applicant claims that the decisions were disciplinary sanctions, and claims that Staff Rule 10.3 applied. But they were in fact non-disciplinary decisions flowing from the Applicant's poor performance, which decisions were supported by the *Morsy*, supra and *Assale*, 2015-UNAT-534 cases of the UN Appeals Tribunal.

44. It is claimed in the Application "B. [that] (t)he Administration effectively sanctioned the Applicant without any formal process." The Application goes on to claim that Staff Rule 10.3 applied, and that the Respondent breached it.

45. As detailed above, the decisions were not disciplinary sanctions but rather non-disciplinary decisions flowing from the Applicant's poor performance, in particular the Applicant's lack of the required leadership skills, which decisions were, again, supported by the judgments of the UN Appeals Tribunal in *Morsy* and *Assale*, supra.

46. Secretariat Administrative Instruction ST/AI/292, ("Filing of adverse material in personnel records" does not apply to the UN funds and programmes. In *Weerasooriya* 2015-UNAT-571, the UNAT reviewed Section 2.3 of ST/SGB/2009/4 and concluded that:

Accordingly, administrative issuances do not apply to [the UN funds and programmes], unless their applicability is expressly provided for in the administrative issuance or expressly accepted by...[the] separately administered fund.

47. In the instant case, the Applicant contends that even if UNOPS has not expressly adopted ST/AI/292, the legislation contained therein is so well established throughout the UN that it has become akin to a UN administrative peremptory norm, such that UNOPS is mandated to adhere to it, specifically the abovementioned requirement that “[a]s a matter of principle, such material may not be included in the personnel file unless it has been shown to the staff member concerned and the staff member is thereby given an opportunity to make comments thereon.”

48. The Applicant’s claim that UNOPS had not raised concerns about the Applicant’s performance are contradicted by the Applicant’s own e-mails of 12 April 2016 - “You wonder why I get angry and disgruntled”- and 12 May 2016 - “You want another example here it is”. These show that Mr. Frauenfeld, the Applicant’s supervisor, had on several occasions discussed the Applicant’s behaviour with the Applicant. In addition, Mr. Frauenfeld’s e-mails to the Applicant show that he was trying to get the Applicant to change his behaviour.

49. It was subsequently argued in the Application:

The Applicant would submit that such reasoning [that the Applicant’s contract was not renewed because of his poor performance] has been given after the fact. It should be noted that at no stage prior to the Applicant’s non-renewal had he ever been informed that his performance did not meet expectations. No performance improvement plan or other reviews of the Applicant’s performance had ever taken place. ... The Applicant states that he was never informed that his performance was poor, neither verbally nor in writing. Furthermore, the Applicant also argues that if the Administration believed there was an issue with substandard performance, it was required to follow the procedures outlined above. The fact that none of these mandated procedures took place casts doubt on the Administration’s claims of the Applicant’s alleged poor performance.

50. This claim must be rejected, because the Applicant's 12 April 2016 e-mail ,in particular, the Applicant's statement that ("You wonder why I get angry and disgruntled") and 12 May 2016 e-mail namely, the Applicant's statement that "You want another example here it is" which was made to his supervisor (Mr. Frauenfeld) show that the Applicant's supervisor had previous discussions about the Applicant's behaviour. In addition, Mr. Frauenfeld's e-mails to the Applicant (quoted above) show that he was trying to get the Applicant to change his behaviour.

51. Furthermore, Mr. Frauenfeld on several occasions discussed the Applicant's behaviour with him, including a meeting held in Mogadishu on or around 21 April 2016 and a meeting held in Nairobi sometime in the first half of June 2016.

52. The Applicant's argument that there has been "no performance improvement plan" must be rejected because (i) the UN Appeals Tribunal has confirmed in *Said* 2016-UNAT-500 that absent any specific provision in the applicable rules, there is no obligation for the Administration to take remedial measures before deciding not to renew a contract due to poor performance; and (ii) the Applicant does not cite any specific provision setting out any such obligation

53. With regard to the Applicant's contention that there has been "...no performance improvement plan", as noted in *Charot* UNDT/2016/060:

The Appeals Tribunal recently held that absent any specific provision in the applicable rules, there is no legal obligation to afford a staff member an opportunity to improve over the course of another appointment or to otherwise take remedial measures before deciding not to renew a contract due to poor performance (*Said*, supra). Consequently, the Tribunal finds that the Organization had no legal obligation to take any remedial measure aimed at improving the Applicant's performance before deciding not to renew her fixed-term appointment, although this is certainly a desirable managerial practice.

54. Indeed, the Applicant's Letter of Appointment shows that UNOPS was not under any obligation to offer the Applicant a performance improvement plan before deciding not to renew the Applicant's appointment when it expired on 9 October 2016.

55. As noted, the Appeals Tribunal's judgment in *Sarwar* 2017-UNAT-757 holds that the Administration can decide not to renew a staff member's appointment when it is shown that (a) the staff member failed to meet the required performance standard, (b) the staff member was aware, or could reasonably be expected to have been aware, of the required standard; (c) the staff member was given a fair opportunity to meet the required standard; and (d) termination of appointment is an appropriate action for not meeting the standard in the circumstances. The processes and standards contained in [UN Secretariat Administrative Instruction] ST/AI/2010/5 [titled "Performance Management and Development System"] are geared to the specific attainment of these general objectives.

56. In *Sarwar*, supra, the Appeals Tribunal set out conditions in which the Administration may separate a staff member for unsatisfactory performance. The Appeals Tribunal cautioned against using a formalistic approach, and stated that "the ultimate question of procedural fairness is whether the staff member was aware of the required standard and was given a fair opportunity to meet it."

57. The Application states "[a]dditionally, pursuant to UNOPS AI/PCG/2015/03 on Performance Management and Appraisal for staff members, Instructions and Procedures, the supervisor is required to provide continuous feedback and review in order to highlight instances of poor performance prior to any evaluation and certainly prior to any possibility of non-renewal on those grounds. Such review should be recorded in writing and updated as necessary." The discussions between the Applicant and the Applicant's supervisor (written above) show that this was indeed done.

58. The Letter of Appointment provided:

This appointment shall begin with a probationary period of twelve (12) months. There shall be no expectation of renewal of appointment. The Executive Director may in his absolute discretion decide on the extension of appointment. In case the probationary appointment is not extended, you should be given thirty (30) days' written notice and no termination indemnity shall be payable.

59. For ease of reference, the Applicant's appointment started on 10 October 2015. The Applicant's appointment expired within the twelve (12) month probationary period specified in the Letter of Appointment, i.e. on 9 October 2016.

Was the decision to place the Applicant on Special Leave with Full Pay lawful in light of UN Staff Rule 5.3(f) ?

60. UN Staff Rule 5.3(f) provides that

In exceptional cases, the Secretary-General may, at his or her initiative, place a staff member on special leave with full or partial pay or without pay if he or she considers such leave to be in the interest of the Organization.

61. A Country Director who conducts himself in the manner described above qualifies as "an exceptional case" and it was in the interest of UNOPS to have the Applicant on special leave with full pay so that the UNOPS personnel in Somalia would no longer be subject to demoralizing conduct from a person who was supposed to be providing leadership to them, and to avoid further damage to the UNOPS reputation and that of the United Nations in general.

62. In *Michaud* 2017-UNAT-761, the Appeals Tribunal stated:

This is also one of those cases where the so-called "no difference" principle may find application. A lack or a deficiency in due process will be no bar to a fair or reasonable administrative decision or disciplinary action should it appear at a later stage that fuller or better due process would have made no difference. The principle applies

exceptionally where the ultimate outcome is an irrefutable foregone conclusion, for instance where a gross assault is widely witnessed, a theft is admitted or an employee spurns an opportunity to explain proven misconduct. As said, in this case the e-mails speak for themselves and invite admonition, if not censure, without further ado.

63. Thus even if it is assumed (notwithstanding the Respondent's above submissions re: *Assale*, supra and *Sarwar*, supra) that UNOPS should have used its standard performance evaluation process before deciding not to renew the Applicant's contract (i.e. an assessment by the UNOPS Executive Director outside of that process is not enough), the evidence in this case is so clear and overwhelming that any such performance evaluation would have concluded that the Applicant's performance was indeed unsatisfactory, and the Applicant would still have been separated from service for unsatisfactory performance. The Respondent notes that at the time of the contested decisions, the facts were either already admitted by the Applicant (to the PCG Deputy Director (Mr. Shammout)) and/or in the Applicant's own e-mails. The "no difference" principle set out in *Michaud* 2017-UNAT-761 results in the contested decision being lawful.

Conclusion

64. In view of the foregoing, the TRIBUNAL DECIDES:

The application is rejected.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 22nd day of February 2019

Entered in the Register on this 22nd day of February 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi