



Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

SERA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Duke Danquah, OSLA

Counsel for Respondent:
Alan M. Gutman, ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former Benefits Assistant at the G-4 level, step 4, with the United Nations Joint Staff Pension Fund (“UNJSPF”), contests the decision not to renew her temporary appointment beyond 12 June 2016, alleging that her negative performance appraisal was incorrect as a matter of fact, that she did not receive adequate guidance, feedback and training, and that the non-renewal was tainted by ulterior motives. In response, the Respondent submits that the application is without merit.

Facts

2. In the jointly-signed submission of 29 September 2017, the parties set out the agreed facts as follows (footnotes omitted):

... On 15 June 2015, the Applicant was appointed on a temporary appointment as a Benefits Assistant, at the GS-4 level, in the UNJSPF. Her appointment was to expire on 12 June 2016.

... On 18 May 2016, [the First Reporting Officer (“FRO”) and the Second Reporting Officer (“the SRO”)] informed the Applicant that her appointment would not be renewed upon its expiration.

... The Applicant’s performance was rated as “does not meet performance expectations” at the end of her temporary appointment.

... On 23 May 2016, the Applicant submitted a request for management evaluation and an application for a Suspension of Action with the Dispute Tribunal. She also filed a complaint of harassment ST/SGB/2008/5 [Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority] against [the FRO] to the Chief Executive Officer [“CEO”] of the UNJSPF.

... On 24 May 2016, UNJSPF indicated that it would extend the Applicant’s appointment pending management evaluation. In light of this, on 27 May 2016, the UNDT dismissed the [Suspension of Action] application.

... On 17 June 2016, the CEO of the UNJSPF informed the Applicant that there were insufficient grounds to warrant a fact-finding investigation into her harassment complaint. The Applicant did not

request management evaluation of this decision within the statutory time limits and the decision was therefore final.

... On 30 June 2016, the Applicant signed her performance evaluation form. She did not submit a written explanatory statement, in accordance with section 6.2 of ST/AI/2010/4/Rev.1, to express her disagreement with her performance rating.

3. The Applicant further added a list of other facts, including by repeating some of those already stated in the amended application. Among the listed facts, the Applicant stated that (emphasis omitted):

... On 18 May 2016, the Applicant was called into an unscheduled meeting with [the FRO and the SRO], in which she was informed (by the SRO) of the non-renewal of her contract. Initially, [the SRO] stated that “[she] had served [her] purpose” and “The Fund no longer needs additional staff.” The Applicant replied that her assertion was contrary to the severe backlog of work at the Pension Fund and asked for further explanation of the decision. The Applicant was informed by [the SRO] that there were two reasons for the decision taken by her and [the FRO, namely that the Applicant was not renewed because (a) her absenteeism from the job and (b) her work was inconsistent.]

... On 30 June 2016, the Applicant signed her performance evaluation form. The Applicant submitted a written self-assessment and work log in disagreement with the review, which was signed by the first and second reporting officers. The signed performance appraisal by the Applicant does not imply admission of agreement as per ST/AI/2010/4/Rev.1.

Procedural history

4. On 22 September 2016, the Applicant filed the initial application contesting her non-renewal.

5. On 23 September 2016, the Registry acknowledged receipt of the application and transmitted it to the Respondent in accordance with art. 8.4 of the Rules of Procedure of the Dispute Tribunal, instructing him to submit his reply within 30 calendar days, that is, no later than 24 October 2016, pursuant to art. 10 of the Rules of Procedure.

6. On 26 September 2016, the Applicant filed a motion to amend the application, and also submitted the amended application with annexes.
7. On 28 September 2016, the case was assigned to Judge Ebrahim-Carstens.
8. By Order No. 227 (NY/2016) dated 29 September 2016, the Tribunal granted leave for the Applicant's motion to amend the application and extended the time limit for the Respondent to file the reply to 28 October 2016.
9. On 28 October 2016, the Respondent filed his reply, in which he claims that the non-renewal of the Applicant's temporary appointment was lawful and that the application is therefore without merit.
10. By Order No. 178 (NY/2017) dated 30 August 2017, the Tribunal provided the following orders, noting, *inter alia*, that it was not clear to what extent the parties agreed or disagreed on certain facts set out in their respective submissions:

... By **5:00 p.m. on Friday, 29 September 2017**, the parties are to file a jointly signed statement providing, under separate headings, the following information:

- a. A consolidated list of agreed and contested facts in chronological order, making clear reference to the relevant and specific dates, manner of notification or transmittal of information, and the documentary evidence, if any, relied upon to support the agreed or contested fact (clearly referencing the appropriate annex to the application or reply as, for example, A/1 or R/1);
- b. A list of any further documents which each of the parties request to produce, or request the opposing party to produce, and the relevance thereof;
- c. Whether they request an oral hearing to address the merits of the application and, if so:
 - i. A list of the witnesses that each party proposes to call; and
 - ii. A brief summary of the issue(s) to be addressed by each witness.

d. If the parties would be willing to enter into negotiations on resolving the case amicably either through the assistance of the Office of the Ombudsman and Mediation Services or *inter partes*;

e. Where there is a disagreement over a fact or statement, the joint statement shall identify the parties' respective positions thereon.

11. On 29 September 2017, the parties filed a jointly-signed submission in response to Order No. 178 (NY/2017) in which they outlined a consolidated list of agreed and contested facts and noted that there was “no scope for an informal settlement in the present case”. The Respondent objected to a range of facts listed by the Applicant, submitting, in essence, that, to the Respondent’s prejudice, the Applicant had had “ample opportunity, in both the original application and the amended application filed pursuant to Order No. 227 (NY/2016), to set out the facts upon which she relied” and instead now sought “to introduce new facts and arguments”. The Applicant provided a list of further documents which she wished to rely on and appended these documents to the jointly-signed submission to which the Respondent also objected as “their introduction at this late stage would cause prejudice to the Respondent”. None of the parties wished an oral hearing to take place.

12. On 1 January 2019, the present case was reassigned to the undersigned Judge.

13. By Order No. 5 (NY/2019) dated 8 January 2019, para. 9, the Tribunal made the following observations:

9. Based on the parties’ submissions, the Tribunal observes that the parties appear to agree that the Applicant’s temporary appointment was not renewed due to alleged performance deficits. In light thereof, on a preliminary basis and without prejudice to any subsequent findings, the Tribunal identifies the issues of the case as follows:

a. Whether a supervisor is obliged to provide guidance and feedback to a staff member on a temporary contract during the course of the appointment and not simply at its expiry and,

in the affirmative, if the Applicant's supervisor(s) did so in the present case;

b. If the non-renewal of the Applicant was tainted by ulterior motives.

The Tribunal then made the following orders, paras. 13-17:

... Upon the request of the parties, no oral hearing is to be held in the present case which shall be determined on the papers before the Tribunal;

... The Applicant's request to file additional written documentation, as appended to the jointly-signed submission of 29 September 2017, is granted;

... By **4:00 p.m. on Monday, 21 January 2019**, the Applicant is to file her closing submissions based solely on the documentation and submissions already before the Tribunal. This statement is not to be longer than five pages using Times New Roman, font size 12, with 1.5 line spacing;

... By **4:00 p.m. on Monday, 4 February 2019**, the Respondent is to file his closing submissions in response to the Applicant's closing submissions. This statement is not to be longer than five pages using Times New Roman, font size 12, with 1.5 line spacing;

... By **4:00 p.m. on Friday, 8 February 2019**, the Applicant is to file her comments, if any, to the Respondent's closing submission. This statement is not to be longer than two pages using Times New Roman, font size 12, with 1.5 line spacing.

14. The parties thereafter duly filed their closing statements as per Order No. 5 (NY/2019).

Consideration

Scope of the case

15. According to the Appeals Tribunal, the Dispute Tribunal has "the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review. As such, the Dispute Tribunal may consider the application as a whole, including the relief or remedies requested by the

staff member, in determining the contested or impugned decisions to be reviewed” (see *Fasanella* 2017-UNAT-765, para. 20).

16. The Tribunal observes that the parties agree that the Applicant’s performance was rated as “does not meet performance expectations” at the end of her temporary appointment and that her FRO provided this as a main reason for not renewing this appointment.

17. In their closing statements, neither party objected to the Tribunal’s preliminary outline of the principal issues of the case as per Order No. 5 (NY/2019), which was made without prejudice to any subsequent findings (see above). However, in the Applicant’s closing statement, she “reaffirms that she does not agree that her performance was deficient”. The Tribunal notes that, as part of the present case, the Applicant has not appealed her performance appraisal and that it is therefore deemed to be factual. In line herewith, it follows from the agreed facts that, on 30 June 2016, the Applicant signed her performance evaluation form and that she did not submit a written explanatory statement to express her disagreement with the performance rating in accordance with sec. 6.2 of ST/AI/2010/4/Rev.1, although the Applicant also contends that she “submitted a written self-assessment and work log in disagreement with the review”. Nevertheless, it is trite law that a reason provided for a non-renewal decision must, like any other administrative decision, be supported by relevant and reliable facts (see, for instance, the Appeals Tribunal in *Islam* 2011-UNAT-115, paras. 29-32). As both parties have made submissions on this matter in their closing statements, the Tribunal will therefore review this question as a separate issue. Also, as both parties made submissions on whether the Applicant was properly trained for undertaking her tasks, this will also be assessed.

18. Accordingly, the Tribunal defines the principal issues of the present case as follows:

- a. Was the reason for the non-renewal of the Applicant's temporary appointment appropriately based on relevant and reliable facts with regard to her alleged performance shortcomings?
- b. Is a supervisor obliged to provide guidance, feedback and training to a staff member on a temporary contract during the course of the appointment and, in the affirmative, if the Applicant's supervisor(s) did so in the present case?
- c. Was the non-renewal of the Applicant tainted by ulterior motives?

The judicial review and burden of proof

19. From the onset, the Tribunal notes that its judicial review is limited as the Dispute Tribunal is not to replace the decision-maker by assessing the correctness of the contested decision but, depending on the parties' claims, rather to assess (a) the legality of the decision, (b) the appropriateness on how it was reached, and/or (c) whether the Administration acted properly within its discretionary powers. As stated by the Appeals Tribunal in *Sanwidi* 2010-UNAT-084:

38. [A]dministrative tribunals worldwide keep evolving legal principles to help them control abuse of discretionary powers. There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion

...

40. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters

have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

20. In line herewith, the Appeals Tribunal has stated that the elements the Dispute Tribunal has to considered in non-renewal cases are the following (see, *He* 2016-UNAT-686):

39. Our jurisprudence holds that a fixed-term appointment has no expectation of renewal. Nevertheless, an administrative decision not to renew a fixed-term appointment can be challenged as being unreasonable on the grounds that the Administration has not acted fairly, justly or transparently, or was motivated by bias, prejudice or improper motive against the staff member. The staff member carries the overall burden of proof to show that such factors played a role in the administrative decision. [footnote omitted] Such a challenge invariably will give rise to difficult factual disputes. The mental state of the decision-maker usually will be placed in issue and will have to be proved on the basis of circumstantial evidence and inference drawn from that evidence.

21. Unless otherwise stated by the law or jurisprudence, the regular standard of proof is the preponderance of the evidence before the Dispute Tribunal (see, for instance, *Azzouni* 2010-UNAT-081, *Charles* 2013-UNAT-284 and *Nwuke* 2015-UNAT-506).

Was the non-renewal of the Applicant's temporary appointment appropriately based on relevant and reliable facts with regard to her alleged performance shortcomings?

22. The Applicant, in essence, submits that her performance was not deficient as expressed in her performance assessment and that, as a matter of fact, the reason provided for her non-renewal was therefore incorrect. Contrary to the Respondent's contentions, the Applicant argues that some "reports" (although not clear what these reports were) only showed a fraction of the work completed by Benefits Assistants, that they only reflected "withdraw cases" and that they did not reflect the many hours

dedicated to data entry, email correspondence, her liaising with member organizations to obtain documentation, as well as the inherent difficulties she encountered with the slow performance of the new “V3 system”.

23. Various technical issues also prevented the Applicant from undertaking her task(s), which the Applicant had addressed in an email to her FRO. The Applicant explains that during a meeting with the FRO, she was forced to estimate how many cases she could complete in a week and that she had informed the FRO that, under optimal conditions, she could complete approximately 15 to 20 cases a week and that the FRO had stated that 80 cases a month would be assigned to her to be “reviewed/processed systematically before the end of the month”.

24. The FRO subsequently assigned 101 cases to the Applicant for March 2016 and 172 cases for April 2016. The FRO therefore had unrealistic and contradictory expectations of the Applicant, which formed the basis of her assertion of the Applicant’s alleged poor performance.

25. The Applicant submits that, on the contrary, she was an engaged and productive member of her team despite the various impediments facing her and her colleagues’ workflow on numerous occasions, which was reflected by weekly meeting minutes.

26. Also, the Applicant informed the FRO and her team of her inability to gain access to a vital interface system for several weeks. Ultimately, the Applicant was proactive in solving the problem and shared her solution with the FRO and colleagues.

27. The Applicant also informed the FRO about an issue with updating employment record(s) and that she was experiencing a “slow connection” and “no communication from IT”, which demonstrates a concerted effort on the part of the Applicant to solve problems she encountered and bring them to the FRO’s attention, including the ongoing work impediments she and her colleagues were experiencing.

28. The Respondent submits that a temporary appointment does not carry any expectancy of renewal, irrespective of length of service in accordance with staff regulation 4.5(b) and staff rule 4.12(c). In this regard, the Applicant's performance was unsatisfactory. As such, poor performance may lawfully be the basis for the non-renewal of an appointment.

29. The Tribunal observes that ST/AI/2010/4/Rev.1, sec. 6.1 directs a first reporting officer on how to undertake a performance appraisal for a staff member on a temporary appointment, namely that, "At the end of the temporary appointment, regardless of duration, the programme manager shall issue a performance evaluation on a standard performance evaluation form for staff members holding temporary appointments". Section 6.1 further states that, "The form should state what was expected of the staff member and whether the staff member and the supervisor discussed those expectations. Signed hard copies of the standard performance evaluation form shall be included in the official status file of the staff member concerned".

30. In the beginning of the Applicant's performance evaluation form, under the heading "workplan", the goals, related action(s) and success criteria of each of her tasks were outlined in detail as follows:

Goal: Comprehension of Participation and Client Orientation

Related Action(s):

1. Determine eligibility of participants, in accordance with the provisions of the rules and regulations of the Fund, to include establishing beginning contributory service date.
2. Undertake necessary research, to enroll, update and modify case files to ensure accurate eligibility determinations and complete documentation.
- [3. Is missing in the original]
4. Provide information to individual participants, retirees, and beneficiaries, with respect to participation and other benefit options.

5. Liaise with member organizations of the Pension Fund, communicating pertinent rules and regulations of the Fund, in order to maintain accurate case files with respect to participation and benefit options.

Success Criteria: Completion of training with assigned unit members. Demonstration of comprehensive knowledge of participation in accordance with the rules and regulations of the Fund. Technical comprehension of PENSYS and V3 Prod. Technical comprehension of available United Nations HR Systems, to include UNICEF SAP, UNDP Atlas, Nucleus, FSS and IMIS. Effectively communicate the provisions of the rules and regulations of the Pension Fund to individual participants and member organizations. [The Tribunal notes that no explanation is provided for the technical acronyms]

Goal: Comprehension of Withdraw Settlement Review and Calculations

Related Action(s):

1. Review withdraw settlement case files, undertake necessary research to complete documentation and determine necessary follow-up with the participant and/or organization.
2. Calculation of withdraw settlements for participants with under 5 years of contributory service.
3. Calculation of withdraw settlements for participants with over 5 years of contributory service.
4. Calculate estimates of future benefit options for eligible participants.
5. Calculate priority or urgent withdraw settlements as assigned.

Success Criteria: Completion of training with assigned unit members on withdraw settlements, pursuant to Article 31, 8A and 8C, of the rules and regulations of the Pension Fund. Comprehensive review of withdraw settlement case files as assigned, performing follow-up and effectively communicating pertinent rules and regulations of the Fund with the participant and/or member organization. Accurate calculations of withdraw settlement cases, in consultation with assigned auditors and supervisor. Completion of priority or urgent cases within weekly payroll.

Goal: Teamwork and Continuous Learning

Related Action(s):

1. Liaise with senior calculators, auditors and supervisor on exceptional cases.

2. Liaise with client services, records management unit, cashiers unit, and accounts unit as necessary to ensure complete documentation, the accuracy of payment forms and participant account data.
3. Drafting meeting minutes as assigned for weekly staff meetings.
4. Participate in training activities related to the Section's work, including participation in bi-weekly training modules on calculations, prior to system conversion (V3 Go Live), and further training offered as made available. [The Tribunal notes that no explanation is provided for the technical acronym]

Success Criteria: Work collaboratively within team unit to complete cases for payment, to include exceptional and more complex cases for payment. Work collaboratively with other units to ensure complete documentation, accuracy of payment forms, and participant account data. Completion of meeting minutes within 1-2 business days in consultation with supervisor's review. Attend, participate and engage in training activities as assigned.

31. On 30 June 2016, after the expiry of the Applicant's temporary appointment, the form was signed by the FRO, the SRO and the Applicant. In the form, the FRO rated the Applicant's performance during her 12-month temporary appointment with UNJSPF as, "Does not meet performance expectations". In the narrative section, the FRO described the Applicant's performance as follows:

[The Applicant] was appointed on a 12 month [General Temporary Assistance] position on 15 June 2015, as a Benefits Clerk within the Pensions Entitlements Section (PES) since she met the basic qualifications to support the team in anticipation of a backlog of cases resulting from the implementation of the new Integrated Pension Administration System (WAS).

A meeting was held with myself, on 17 June 2015 during which [the Applicant] was briefed on the section's activities, proposed training plan and progression.

[The Applicant] was trained on "Participation" cases as well as "Withdrawal Settlement" cases. These cases are the starting point for all new entrants to PES and are considered to be the most straight forward amongst the various types of cases.

[The Applicant] has been working on these simpler cases for the year and has not been able to progress to higher level cases due to

inconsistency in output and reliability. [The Applicant] has not extended herself to produce more than the minimum set target and for most of the year she has under produced.

Towards the end of her contract, [the Applicant] has shown that she has the ability to fully apply herself, however, for the rest of the year she has not applied herself consistently and has not been able to meet the demands required at this critical time for PES.

Efforts have been made to communicate this inconsistency to [the Applicant] both verbally and in writing. [The Applicant] provided assurances that there will be improvements though these improvements have been very short lived and very soon afterwards, [the Applicant] became inconsistent again.

Due to this inconsistency, [the Applicant] has held herself back since she has not been able to reliably demonstrate that she can assume responsibility for higher level cases.

[The Applicant] also lacks the personal and emotional requirements to meet the day to day demands of working in PES. She is unable to control her emotions when given constructive feedback or when justifiably denied a request. Other areas that have informed [the Applicant's] overall performance rating include:

- Not meeting critical deadlines on a number of occasions and therefore necessitating last minute redistributions of her work amongst the team or to the task force.
- Putting her agenda before that of the section e.g. through citing personal financial needs as a reason for demanding overtime.
- Making strong accusations against colleagues/supervisor only to later reflect and retract comments after the damage has been done.

32. As a point of departure, the Tribunal observes that the Appeals Tribunal has held that the narrative comments must not detract from rating in a performance appraisal (see *Ngokeng* 2014-UNAT-460 as affirmed in *Staedtler* 2015-UNAT-546, para. 40). In the present case, the Tribunal finds that there is an appropriate correlation between the rating and the explanation as, in her comments, the FRO explicitly provides the factual bases for the negative performance rating.

33. If a staff member on a temporary appointment disagrees with the performance rating given at the end of his/her temporary appointment, in accordance with sec. 6.2 of ST/AI/2010/4/Rev.1, s/he may, “within seven calendar days of signing the

completed performance appraisal form, submit a written explanatory statement to the respective Executive Office at Headquarters, or to the Chief of Administration elsewhere” and “[t]he performance evaluation form and the explanatory statement shall become part of the official status file of the staff member.

34. It follows from the case record that the Applicant never submitted such a written explanatory statement to object against the performance rating and that this therefore stands unchallenged. In the 29 September 2017 joint statement, the Applicant submitted that she had instead submitted a written self-assessment and work log in disagreement with the review and that the signed performance appraisal by the Applicant does not imply any admission of agreement as per ST/AI/2010/4/Rev.1.

35. As a matter of principle, the Tribunal finds that there is no legal basis for finding that only because the Applicant did not file a written explanatory statement in protest against the appraisal of her performance as set out in the signed performance evaluation form, she is now barred from questioning the propriety of her performance assessment as a matter of fact in her non-renewal case. Nevertheless, the narrative comments in the assessment remains an important piece of evidence on why the FRO gave the Applicant the negative performance rating—a fact that the Applicant therefore needs to be able to rebut.

36. The Tribunal notes that, according to the Applicant’s workplan, processing different types of cases constituted a major task of her job as a Benefits Assistant. When comparing the Applicant’s submissions with the narrative comments in the performance evaluation form, it appears to be agreed that the Applicant’s work output in terms of processing of reports was not perceived as adequate by the FRO—the Applicant does not deny this but rather submits that the FRO had unrealistic expectations and was hostile to the Applicant, while the Respondent describes the Applicant’s performance as inconsistent in terms of output and reliability. In support of her arguments, the Applicant makes references to a range of different documents

which the Tribunal has accepted in evidence. When reviewing the parties' submissions and the documentation on record, including the Applicant's written correspondence with her sister, the email correspondence relating to the performance appraisal and the performance evaluation form (see *supra*), the Tribunal is left with the impression of an increasingly deteriorating working relationship between the Applicant and the FRO as also demonstrated by the Applicant's complaint under ST/SGB/2008/5 against the FRO. However, by itself, none of this proves that the FRO and the SRO had overstepped their discretionary authority as supervisors when providing the Applicant with a negative performance appraisal, but only that they disagreed about some points in this assessment.

37. Lacking any evidence that shows the contrary, the Tribunal therefore finds that the non-renewal of the Applicant's temporary appointment was appropriately supported by relevant and reliable facts, namely that, as proved by her performance appraisal, her performance did not meet expectations. In this regard, the Tribunal further notes that, in the joint submission of 29 September 2017, the Applicant stated that, "[She] does not request an oral hearing to address the merits of the application. [She] is adamantly opposed to an oral hearing for personal reasons". In conclusion, referring to *He*, the Applicant has failed to prove that UNJSPF did not act fairly, justly or transparently.

38. In the joint submission of 29 September 2017, although not repeated in the closing statement, the Applicant contends that the non-renewal was also based on the SRO alleged finding that "[the Applicant] had served [her] purpose" and that, "The Fund no longer needs additional staff". The Tribunal notes that the Appeals Tribunal has found that, as long as one of the reasons provided for an administrative decision is proper, it does not matter if the other explanations were not (see *Islam*, para. 31). As the non-renewal was appropriately explained by her performance not meeting expectations, the Tribunal sees no reason to further examine any of additional claims.

Is a supervisor obliged to provide guidance, feedback and training to a staff member on a temporary contract during the course of the appointment and, in the affirmative, did the Applicant's supervisor(s) do so?

39. The Applicant submits that the FRO provided inadequate guidance and feedback throughout her one-year appointment. The Applicant made concerted efforts to address the dysfunction, poor communication and lack of training with the FRO and, in good faith, requested to meet weekly with the FRO to encourage a productive supervisor/employee relationship. In an email dated 2 March 2016, the FRO promised a “weekly progress review” meeting, which she never committed to completing with the Applicant, and the Respondent provided no documentation of any one-on-one meetings between the FRO and the Applicant after her first week of duty. The Applicant contends that, although not under the supervision of the FRO, another Benefits Assistant was provided a more comprehensive training and support for process paid calculation cases and thereby performed, or “throve”, under more effective supervision and communication. In the Applicant’s performance appraisal, issued on 30 June 2016, the FRO confirmed that “Participation” and “Withdrawal Settlements” (Article 31) were “the starting point for all new entrants to PES, but the majority of the training submitted in evidence by the Respondent demonstrates that the Applicant was not provided relevant training for “new entrants to PES”. To the Respondent’s contention that appropriate training was provided to the Applicant and that bi-weekly training sessions were held for the Applicant and her colleagues, the Applicant submits that these trainings were designed to show experienced workers how to calculate advanced cases by hand in case the new “V3” system failed and that the bi-weekly trainings, held in the Summer of 2015, covered retirement benefits, early retirement benefits, residual settlements, and reinstatement of benefits. This did not constitute “appropriate training” for a “new entrant to PES” as per the FRO’s guidelines, although the Applicant attended the training in good faith. The Applicant submits that the FRO intentionally delayed and denied appropriate training to the Applicant and that she did not permit the Applicant to calculate withdraw settlements

until 22 October 2015, over four months after the Applicant's appointment. After over six months, the Applicant was denied training to complete retirement benefits calculations.

40. The Respondent contends that the Applicant's supervisor communicated with the Applicant on her work goals and performance. At their first meeting, they discussed the Applicant's workplan and her training needs, and she was provided with the appropriate training. The Applicant was involved in staff meetings, where issues regarding the work of the unit were discussed, and the FRO regularly provided guidance and feedback on ongoing work, which is all corroborated by the Applicant's self-evaluation dated 30 June 2016. The Respondent also submits that sec. 1 of ST/AI/2010/5 (Performance Management and Development System) excludes temporary staff members from this system, and that the procedures and rights provided in ST/AI/2010/5 do not apply to the Applicant, for which reason no requirement exists for mid-point reviews or remedial measures in the case of unsatisfactory performance.

41. The Tribunal observes that ST/AI/2010/4/Rev.1 that concerns temporary appointments such as that of the Applicant does not entail any provision on guidance, feedback and training to a staff member on a temporary contract during the course of the appointment. The Tribunal further agrees with the Respondent that sec. 1 of ST/AI/2010/5 does not apply to temporary appointments. However, this does not mean that some of the general principles enshrined in ST/AI/2010/5 do not apply to the Applicant. On the contrary, the general notion of good faith and fair dealing in contractual relationships would entail that, at the beginning of the appointment, a staff member on temporary appointment should be informed by a supervisor about her/his assignments and performance expectations and, if her/his performance is subsequently considered substandard, the supervisor(s) should carry out a minimal amount of remedial actions to bring the relevant staff member's performance up to the expected level (in line herewith, see the Appeals Tribunal in *Soliman* 2017-UNAT-788, para. 35, although dealing with a statutory duty). This would also

appear to be the spirit of ST/AI/2010/4/Rev.1, which in sec. 1.1 provides that the “purpose of a temporary appointment is to enable the Organization to *effectively and expeditiously* manage its short-term staffing needs” (emphasis added).

42. As proof that the Applicant did, in fact, receive adequate guidance, feedback and training, the Respondent refers to her self-assessment in the performance evaluation form in which the Applicant stated as follows:

I joined the Pension Entitlements Section of the United Nations Joint Staff Pension Fund during a critical and demanding time. The Fund was undergoing a transition to a new pension entitlements system, V3 PROD, whilst maintaining service to some 200,000 individuals. The implementation of the system was one of the most significant and wide-reaching exercises ever undertaken by the Fund. Participants of the Fund were experiencing unprecedented waiting periods combined with a notable increase in the inventory of cases waiting to be processed. I joined the fund having benefited from prior experience not only with the United Nations but in determining public assistance eligibility for the State of Michigan. In the midst of heavy training and testing periods, I was brought in to offer temporary relief.

During my initial months with the Fund, I focused on becoming acclimated to office procedure, comprehension of the rules and regulations of the Fund, specifically focusing on participation, and training in the use of the old pension entitlements system, PENSYS, and the new system, V3 PROD. I did this collaboratively, in conjunction with my fellow team members, supervisor, and [name redacted], a senior Benefits Assistant, who was assigned to train me on participation. I attended every available bi-weekly calculation presentation, to better prepare myself for more complex cases in the future. As my fellow team members were also learning, I had to develop a delicate balance of independent learning and teamwork. I focused on developing a strong foundation in determining the eligibility of participants, broadening my knowledge of United Nations System and other member organizations including UNICEF UNDP UN Missions specialized agencies and other entities. I dedicated myself to strengthening my research and understanding of the countless unique employment situations. I became proficient in United Nations technologies, such as IMIS, UNICEF SAP, UNDP Atlas, Nucleus and the Field Support Suite (FSS).

During the first few weeks after the conversion, I remained well-informed of ongoing system updates, workarounds, testing and

error reports to ensure the accuracy of my work on pension existing and new pension cases. I continued to support the office in following up with participants and member organizations for missing separation documents, communicating clearly the rules and regulations of the Fund. It was of utmost importance to me to treat those who had served the United Nations with compassion. I had the opportunity to assist current staff as well as former staff, often in remote regions dealing with emergent situations. I took pride in offering a high standard of client service, prompt, accurate information, while maintaining a high-level of professionalism in representing the Fund.

During the latter part of 2015, I began working in close connection with [name redacted, Ms. MF], a senior Benefits Assistant, training to review withdraw settlement cases for completion and identifying cases that were ready to process for my team. With [Ms. MF's] guidance, I carefully developed an organized and methodical review process, isolating areas of the pension history requiring further analysis and research, including those cases which required follow-up with participants and liaising with member organizations. I learned to effectively communicate the rules and regulations to the participant and member organizations, to ensure they were well-informed, received a high standard of client services and that each pension record had complete documentation.

Once I had successfully gained comprehension of reviewing withdraw settlement cases for review, I began training with [Ms. MF] to calculate withdraw settlements for participants of the Fund who had qualifying contributory service of under 5 years, pursuant to Article 31/8A of the rules and regulations of the Fund. While undergoing further training, I focused on complet[ing] withdraw settlement cases accurately and ensuring a comprehensive review of the case file. I maintained a dedication to learning about the nuances of each calculation, including determining the accuracy of the duration of the contributory service, while taking into account breaks in service and leave without pay periods, reported contributions, salary rates, local salary rate conversion, partial month calculations and interest. I ensured cases with discrepancies over the Fund's threshold, were further reviewed for discrepancies, undertaking necessary research, liaising with the member organization and in partnership with my team and other UNJSPF units as necessary. Calculating withdraw settlements in the new pension entitlement system, V3 PROD, often required calculators not rely on the system, I prided myself in knowing how to manually complete the calculation before me and ensuring the system was functioning within standards. I ensured that salary and interest rates pulled in were accurate.

At the start of 2016, in consultation with my supervisor, I began to focus on more complex withdraw settlements for participants with more than 5 years of contributory service, pursuant to Article 31/8C. While continuing my training, I focused on knowledge retention, organizing my work queue, planning and prioritizing my workload, in conjunction with my supervisor, ensuring that urgent cases were completed within the weekly pay cycle. Our Team was learning to cope with the new pension entitlement system during weekly meetings, coping with system downtime and slowness, errors and recommending improvements to the development of ongoing updates. The Pension Entitlement Section and our Team were establishing new processing expectations and capabilities under the new system.

I established benchmarks for myself early in the New Year, aiming to complete a review of at least 60 cases a month. I focused on maintaining consistency of my work output and maintaining beneficial relationships with my team members, who aided me in my continuous learning. I excelled in working collaboratively with senior calculators and auditors on my team and it was an honor to work with them. I was further benefited by returning retirees, who advised [me] quite wisely that after decades with the Fund, they were still learning. It was with this breath that I dedicated myself to the Fund, my Team and most importantly the hard working current and former staff of the United Nations System. Through this support system, I was able to achieve over 60 case reviews a month (Annex 1 refers).

Following increasing system reliability in March 2016, our team, in consultation with our supervisor, established a goal to review of 80 cases a month. In my remaining months with the Fund, I focused on increasing my output and fulfilling ad hoc assignments associated with year-end discrepancies, registering new entrants to the Fund, and aiding in reaching a benchmark for the backlog of cases with the Fund. During this time, I was able to successfully and steadily increase my output.

In my last 6 months with the Fund, I was able to serve over 500 clients, assisting successfully in reducing the backlog of cases with the fund. Though difficulties arose, I prided myself in maintaining a collegial spirit with my Team, representing the fund with integrity and professionalism and effectively prioritize my work through maintaining a thoroughly organized work plan. I leave the Fund with an appreciation for the nuances of this organization, in appreciation for those who guided me in my development, and the benefit of solidifying my core values and competencies.

43. The Tribunal agrees with the Respondent that it follows from the Applicant's self-appraisal that she herself indicated that she had received guidance, feedback and training from her colleagues and the FRO. It also follows from the Applicant's submissions and the evidence on record that at least one meeting was held between the Applicant and the FRO regarding her performance, that this meeting apparently concerned the number of cases which the Applicant was supposed to process as the FRO wanted for her to do more, and that the FRO had set a goal of 80 cases per month. The fact that the Applicant and the FRO then held diametrically different opinions about the standard of her performance, which the Applicant seems to have found satisfactory while the FRO thought the opposite, is an entirely different and unrelated matter.

44. The Tribunal therefore finds that, based on the evidence on record, it appears that the Applicant did receive the required guidance, feedback and training for her to undertake the job as a Benefits Assistant with UNJSPF on a temporary appointment. With reference to *He, supra*, the Applicant therefore has not proved that UNJSPF failed to act fairly, justly or transparently in this regard.

Was the non-renewal decision tainted by ulterior motives?

45. The Applicant contends that, on 23 May 2016, pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), she filed a complaint of discrimination, harassment, and abuse of authority against the FRO. The Applicant felt it imperative to file a formal complaint after her complaints in September 2015 to the FRO and the SRO and, in December 2015, to the Deputy Chief, UNJSPF, Officer-in-Charge at the time of the incident, went unaddressed, resulting in an increasingly hostile work environment which culminated in the non-renewal of her contract.

46. Pursuant to ST/SGB/2008/5, sec. 5.3(g), managers and supervisors have to take prompt and concrete action in response to reports and allegations of prohibited

conduct. Failure to take action may be considered as a breach of duty. Referring to the performance appraisal dated 30 June 2016 in which the FRO stated “[o]ther areas that have informed [the Applicant’s] overall performance rating include ... making strong accusations against colleagues/supervisor only to later reflect and retract comments after the damage has been done”, the Applicant asserts that this shows that the FRO held a “distinct” bias against the Applicant because of her complaints against the latter and that these complaints and concerns were never retracted or changed, nor were they duly addressed by the FRO, the SRO or the UNJSPF Deputy Chief. Rather, the FRO ultimately utilized this as a reason to rate the Applicant’s overall performance rating poorly due to her “making strong accusations”, of which the FRO stated that “damage had been done” to her.

47. The Applicant argues that her performance appraisal conflicts with the initial reasoning for the non-renewal of her contract. On 18 May 2016, the SRO informed the Applicant that “[she] had served [her] purpose” and that “[t]he Fund no longer needs additional staff”. The Applicant asserts that this was contrary to the later claims of performance deficiency, which were made only after the Applicant had filed a formal complaint on 23 May 2016 pursuant to ST/SGB/2008/5 on discrimination, harassment, and abuse of authority against the FRO. The Applicant submits that the SRO’s 18 May 2016 remarks imply a need to reduce staff due to a lowered workload at the Fund. This is in conflict with emails sent to the Applicant on 20 April 2016, by which she was denied crucial training by the FRO, who stated, “I have discussed your request with [the SRO], and since we still have a heavy backlog of cases, the priority for [the Pension Entitlement Section] is to deal with the backlog”. On 27 June 2016, in an email to the SRO, the Applicant expressed her willingness “to undergo...[a] performance evaluation”. She further expressed concern of being subjected to further “maltreatment” by the FRO and wished to not “have further contact” with her.

48. As per ST/AI/2010/5, managers should be held “responsible and accountable to managing their staff” and in “addressing underperformance” do so in “a fair and equitable manner”. The Applicant requested the SRO to ensure her that review be

“done in fairness and objectively”. The SRO in response wrote, “That you are implying that you would only attend ‘as long as it is done in fairness and objectively’ is [a] statement that we cannot accept”. The Applicant asserts that this sentiment clearly shows an intention to not act in “a fair and equitable manner”.

49. The Respondent contends that UNJSPF applied the correct procedures to evaluate the Applicant’s performance and that she has not meet her burden of establishing that the decision not to renew her appointment was tainted by extraneous considerations. The Respondent further denies that the decision not to renew the Applicant’s appointment was taken because of alleged prohibited conduct against her from her supervisor.

50. The Applicant filed a complaint under ST/SGB/2008/5 and, on 17 June 2016, the CEO wrote to the Applicant, informing her that there were insufficient grounds to a warrant a fact-finding investigation under ST/SGB/2008/5 and that her complaint was closed. The Applicant did not request management evaluation of this decision within the statutory time limits and that decision is therefore final.

51. The Tribunal reiterates that, while the Applicant has the onus to prove that a decision maker’s determination was tainted by ulterior motives, “[t]he mental state of the decision-maker ... will have to be proved on the basis of circumstantial evidence and inference drawn from that evidence” (see *He, supra*).

52. To prove the FRO’s ulterior motives, the Applicant has filed a string of emails between the Applicant and some other persons, in particular her sister, in which the Applicant complained about how she was treated by the FRO and described how that made her feel very bad. While these emails give an impression of the Applicant’s emotional state at the given moment, they are not corroborated by any other evidence. In contrast, it follows from the case record that the Applicant’s complaint against the FRO under ST/SGB/2008/5 was later dismissed after a preliminary review by the CEO. As also stated above, while undoubtedly the working relationship between the

Applicant and the FRO was not good, this does not by itself prove that the decision not to renew the Applicant's temporary appointment was influenced by ulterior motives and no direct or circumstantial evidence on record supports any such inference.

53. On the balance of evidence, referring to *He, supra*, the Tribunal therefore finds that the Applicant has not been able to establish that the non-renewal was motivated by bias, prejudice or improper motive.

Conclusion

54. In light of the above, the application is rejected.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 7th day of March 2019

Entered in the Register on this 7th day of March 2019

(Signed)

Nerea Suero Fontecha, Registrar