

UNDT/2016/178, Sarwar

UNAT Held or UNDT Pronouncements

The UNDT found that the element of the application concerning conversion to permanent appointment was not receivable as the Applicant had not requested management evaluation of this decision. In respect to the receivable elements of the application, the UNDT found that the Applicant had no legitimate expectation of renewal. However, the Tribunal found that the decision not to renew his appointment was unlawful, as it was based on a flawed performance management process. In particular, in the Applicant's first performance cycle, there were significant delays in the implementation of the various stages of the performance management system, as well as unrealistic expectations imposed upon him. Procedural flaws also impacted the second performance cycle. The UNDT ordered rescission of the decision to separate the Applicant from service, or compensation of twelve months' net base pay in the alternative. The Applicant was awarded USD5,000 in non-pecuniary damages.

Decision Contested or Judgment/Order Appealed

The Applicant, who successfully completed the National Competitive Recruitment Examination, contested "non- renewal of appointment, failure to grant continuing appointment and separation from service" on the grounds of performance rated as only partially meeting expectations during a two year probationary period. He submitted that he had a legitimate expectation of renewal and that the decision was procedurally flawed and improperly motivated.

Legal Principle(s)

On procedural irregularity: The management and assessment of the Applicant's performance was procedurally flawed. He was not given a fair opportunity to demonstrate his suitability for the position for which he was recruited, including

through setting clear expectations through promptly agreed and approved workplans; providing documented feedback at the true midpoint of the performance cycles; remedial actions to formally identify, in a timely and specific manner, his areas of weakness; and providing a documented process for him to improve in those areas, with the benefit of appropriate support and guidance. In the present case, the Applicant was a newly recruited staff member in a junior position, struggling to find his way in the Organization. It was ultimately for his supervisors to ensure that they managed his performance in a fair, timely, and well-documented manner. The Tribunal considers that they did not do so, and that this significantly affected the Applicant's ability to demonstrate his suitability and qualifications as a junior professional for the position, including through addressing performance shortcomings and weaknesses. On allegations of improper motives, bias and discrimination: Within the UN with its cultural diversity, feelings of insecurity, discomfort, hurt and loss of confidence can easily arise from daily interactions, misunderstandings and matters that are sometimes lost in translation, cultural differences and nuance, and which often times are unintended. The burden of proving improper motives, such as abuse of authority, discrimination, retaliation or harassment rests with the person making the allegation (Nwuke 2015-UNAT-506, para. 49). The Tribunal finds no direct evidence in the written documentation or oral testimony that the contested decision was improperly motivated or that there was a pattern of behaviour aimed at deliberately marginalizing and harassing the Applicant. On probationary periods: By its nature, a probationary period is one of trial in which it is determined whether a person is capable of carrying out the duties of a post. However, where expectations are both unreasonable and poorly communicated, a staff member's ability to demonstrate their suitability is inevitably affected.

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

Both financial comp. and specific performance

Full judgment

[Full judgment](#)

Applicants/Appellants

Sarwar

Entity

DESA

Case Number(s)

UNDT/NY/2015/3

Tribunal

UNDT

Registry

New York

Date of Judgement

28 Sep 2016

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Discrimination and other improper motives

Non-renewal

Arbitrary or improper motive

Performance management

Performance evaluation

Applicable Law

Administrative Instructions

- ST/AI/2001/7/Rev.1
- ST/AI/2010/5

Staff Rules

- Rule 4.13
- Rule 4.14
- Rule 9.6

UNDT Statute

- Article 10.5