

UNDT/2018/077, Kotanjyan

UNAT Held or UNDT Pronouncements

To determine the legality of the contested decision, the Tribunal examined: Whether the first PIP complied with the applicable rules. The Tribunal found that the duty to inform the Applicant of his shortcomings and to assist him in improving his performance was fulfilled by his supervisors, particularly the FRO. The documentary evidence and the testimonies during the hearing showed that the Applicant was made aware early on and on different occasions of his performance shortcomings and confronted with them. Efforts were also made to clarify the goals to achieve and to provide support to the Applicant. The Tribunal considered that the mid-point review comments of 10 December 2014 from the Applicant's FRO indicated to the Applicant that his performance was in need of improvement, although the tone remained constructive. The Tribunal found that the PIP set four specific goals for the Applicant, with deadline and performance measures, which were in line with his workplan. The Tribunal found no evidence of bad faith or abuse of discretion on the part of the FRO and, consequently, was of the view that setting goals and deadlines remained within the scope of his managerial discretion, which he exercised appropriately. The Tribunal further found no discernible error in the implementation of the first PIP. It appeared that the PIP was prepared by the FRO and presented to the Applicant. There is no evidence that the Applicant was specifically asked for his input or given a real opportunity to comment on the PIP before its implementation, which was set to start immediately. However, the Applicant did provide some oral and written comments which conveyed his categorical refusal to implement a PIP and he made no proposal to adjust it, as he could have possibly done if he deemed that the terms had to be reviewed. The Tribunal stressed that the requirement to consult the staff member in the preparation of a PIP does not entail that the agreement of the concerned staff member is ultimately necessary to implement it, and that the consultation process presupposes cooperation on the part of the staff member and willingness to engage in a constructive dialogue. A staff member cannot block the implementation of a PIP by simply opposing it. In these circumstances, the Tribunal found that while more efforts could have been initially deployed to engage the Applicant in the drafting of the first PIP, it could not be concluded that its implementation was in violation of sec. 10.2 of ST/AI/2010/5, given the lack of cooperation that the Applicant displayed. Whether the duration of the PIPs complied with the requirements of sec. 10 of ST/AI/2010/5 for not renewing the Applicant's FTA. The Applicant held a fixed-term appointment which was due to expire on 2 May 2015 and the Organization, before completing the 2014-2015 performance cycle, decided to implement a PIP for a duration of 2 months and 22 days, in order to align it with the end of the performance cycle on 31 March 2015. A PIP was not formally required at the time, but the FRO decided to implement one in view of the shortcomings that he had already identified, as allowed under sec. 10.1 of ST/AI/2010/5. The Tribunal found the duration reasonable in the circumstances, being close to three months and corresponding with the end of the performance cycle. The FRO subsequently decided to implement a second PIP, which was aimed at giving the Applicant more time to deliver on the expected results. Whether the Administration had a duty to allow the Applicant to complete his second PIP prior to deciding not to renew his FTA and, if so, whether this obligation was fulfilled. The Tribunal found that the difficulties in implementing and completing the second PIP cannot be attributed solely to the Applicant's sick leave but were in large part due to his failure to accept the PIP and to cooperate in its implementation. The Organization gave the Applicant several opportunities to improve his performance and to comply with the PIP, but it was at some point faced with an impasse due to the lack of cooperation and of efforts displayed by the Applicant. The Tribunal concluded that there was no evidence contradicting the conclusion of the FRO that there was no sign of improvement in the Applicant's performance before he went on sick leave. Most importantly, the Applicant did not demonstrate any willingness to take the PIP seriously. He refused to sign both the first and the second PIP and revealed a negligent attitude towards his FRO's attempts to book a meeting with him in May 2015. There is no evidence that the Applicant made any effort to ask for the PIP to be extended during his sick leave or to show willingness

to complete it once his health would improve. In view of the foregoing, the Tribunal found that the decision not to renew the Applicant's appointment beyond 31 December 2015, taken on 22 December 2015, was a legitimate exercise of managerial discretion and did not violate the provisions of ST/AI/2010/5. The Tribunal further found that he was overall not denied procedural fairness.

Decision Contested or Judgment/Order Appealed

Decision not to renew fixed-term appointment ("FTA") beyond 31 December 2015.

Legal Principle(s)

If based on valid reasons and in compliance with procedural requirements, fixed-term appointments may not be renewed (Ahmed 2011-UNAT-153). A non-renewal decision can be challenged on the grounds that the Administration did not act fairly, justly or transparently, or if the decision is motivated by bias, prejudice or improper motive against the staff member. The staff member has the burden of proving that such factors played a role in the administrative decision (Said 2015-UNAT-500; Obdeijn 2012-UNAT-201; Asaad 2010-UNAT-021). Unsatisfactory performance constitutes a legitimate basis for the non-renewal of a staff member's fixed-term appointment (Said 2015-UNAT-500; Morsy 2013-UNAT-298; Ahmed 2011-UNAT-153). A staff member whose performance was rated as "Partially meets performance expectations" has no legitimate expectancy of renewal of his or her contract (Said 2015-UNAT-500; Dzintars 2011-UNAT-175; Jennings 2011-UNAT-184). If the reason not to renew an appointment is related to the staff member's poor performance, the Secretary-General has to present a performance-related justification for the non-renewal decision (Schook 2012-UNAT-216; Das 2014-UNAT-421).

Outcome

Dismissed on merits

Full judgment

[Full judgment](#)

Applicants/Appellants

Kotanjyan

Entity

ECE

Case Number(s)

UNDT/GVA/2016/029

Tribunal

UNDT

Registry

Geneva

Date of Judgement

6 Jul 2018

Duty Judge

Judge Bravo

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Appointment (type)

Fixed-term appointment

Non-renewal

Applicable Law

Administrative Instructions

- ST/AI/2010/5

Related Judgments and Orders

2011-UNAT-153

2015-UNAT-500

2012-UNAT-201

2010-UNAT-021

2013-UNAT-298

2011-UNAT-175

2011-UNAT-184

2012-UNAT-216

2014-UNAT-421

2017-UNAT-757

2012-UNAT-266

2014-UNAT-400

2013-UNAT-286

2015-UNAT-496