

UNDT/2020/007, Andelic

UNAT Held or UNDT Pronouncements

The Applicant timely requested management evaluation of the contested decision and has met the procedural requirements to have this Tribunal adjudicate her case. The application is therefore receivable *ratione materiae*. The Tribunal considered that from provisions in ST/AI/2010/5 and ST/AI/2010/4, derives a general principle to complete performance evaluations before separation applicable also to staff members holding a fixed-term appointment. The Tribunal found that the Organization had to make a balancing exercise of the Applicant's different performance results and could not simply act as if the last satisfactory performance rating did not exist. As such, the failure by the Organization to consider the more recent improvement of the performance by the Applicant infringes its obligation, stressed in Tadonki 2014-UNAT-400, to ensure that performance evaluations are objective, fair and well based. The Tribunal considered that in line with the Organization's duty of care towards its staff members, and consistent with the spirit of the remedial actions provided for in ST/AI/2010/5, the Organization must make every effort to consider in good faith relevant performance information available to it prior to the separation of a staff member when opting not to renew an appointment on grounds of unsatisfactory performance. The Tribunal rescinded the contested decision (non-renewal) and as an alternative to the rescission of the decision, determined that the Respondent may elect to pay the Applicant an amount equivalent to nine months of net base salary at the grade and level held at the time of the separation from service.

Decision Contested or Judgment/Order Appealed

The Applicant contests the non-renewal of her fixed-term appointment beyond 31 December 2017 for reasons related to alleged performance shortcomings.

Legal Principle(s)

The Tribunal has an inherent power to identify what a party is contesting as well as to interpret and comprehend the subject matter of an application (see Massabni 2012-UNAT-238, paras. 3 and 26). According to the UNAT case law (see Sarwar 2017-UNAT-757, para. 87), procedural irregularities in the performance evaluation process do not necessarily result in a subsequent finding of unlawfulness of a contested decision, and “the determination of whether [a staff member] was denied due process or procedural fairness, in the final analysis, must rest upon the nature of any procedural irregularity and its impact”(see also Sarwar 2018-UNAT-868, par. 25, about the right of the staff member to be re-interviewed by the Panel, although in the context of an investigation). The Organization cannot be “forced to renew the appointment of an unqualified staff member merely because there are procedural errors in the evaluation process, provided that the procedural errors are not so serious and substantial as to render the evaluation process unlawful or unreasonable or as to violate the due process rights of the staff member in question” (Ncube 2017-UNAT-721). It is not for the Tribunal to substitute its evaluation of the Applicant’s performance to the one properly carried out by the Organization, as the Tribunal may only assess the lawfulness of the evaluation procedure and not the merit of it. The Dispute Tribunal shall give deference to the decision-maker’s assessment of the staff member’s performance (Said 2015-UNAT-500). It is not the Tribunal’s role to review de novo a staff member’s appraisal or to place itself in the role of the decisionmaker and determine whether it would have renewed the contract based on the performance appraisal (see also Jennings 2011-UNAT-184, particularly para. 24, and Dzintars 2011-UNAT-175). Performance standards generally fall within the prerogative of the Secretary-General and unless the standards are manifestly unfair or irrational, the Tribunal should not substitute its judgment for that of the Secretary-General. Staff regulation 4.5(c) and staff rule 4.13 provide that “[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal”. In Ahmed 2011-UNAT-153, the Appeals Tribunal held that “if based on valid reasons and in compliance with procedural requirements, fixed-term appointments may not be renewed.” As a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal for an employee receiving a satisfactory performance evaluation, a fortiori it does not carry any expectancy for a staff member whose performance was found unsatisfactory. It is well established that unsatisfactory performance constitutes a legitimate basis for the non-renewal of a staff member’s fixed-term appointment (Said, referring to Morsy 2013-UNAT-298 Ahmed). A staff member whose performance was rated as “partially meets performance expectations” has no legitimate expectancy of renewal of his or her

contract (Said, particularly para. 41 Dzintars Jennings, particularly para. 24). However, a non-renewal decision can be challenged on the grounds that the Organization did not act fairly, justly or transparently, or if the decision is motivated by bias, prejudice or improper motive against the staff member. Following Morsy, an administrative decision to not to renew a fixed-term appointment, even one to not to renew based on poor performance, can be challenged on the grounds that the decision was arbitrary, procedurally deficient, or that it resulted from prejudice or some other improper motivation (this was also confirmed in Assad 2010-UNAT-021 Said, para. 34 Assale 2015-UNAT-534, para. 30). The staff member has the burden of proving that such factors played a role in the administrative decision. Nonetheless, it is also well-established that if the reason not to renew an appointment is related to the staff member's poor performance, the Secretary-General must present a performance-related justification for the nonrenewal decision (Obdeijn 2012-UNAT-201 Pirnea 2013-UNAT- 311 Schook 2012-UNAT-216 Das 2014-UNAT-421).

Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Andelic

Entity

UNAMA

Case Number(s)

UNDT/GVA/2018/014

Tribunal

UNDT

Registry

Geneva

Date of Judgement

17 Jan 2020

Duty Judge

Judge Buffa

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Appointment (type)

Non-renewal

Applicable Law

Administrative Instructions

- ST/AI/2010/5

Staff Regulations

- Regulation 4.5(c)
- Regulation 9.3

Staff Rules

- Rule 4.13

UNDT RoP

- Article 13
- Article 14.1

UNDT Statute

- Article 10.2
- Article 10.5(a)
- Article 2
- Article 2.2

Related Judgments and Orders

2012-UNAT-238

2017-UNAT-757

2017-UNAT-721

2015-UNAT-500

2011-UNAT-184

2011-UNAT-175

2011-UNAT-153

2013-UNAT-298

2010-UNAT-021

2015-UNAT-534

2012-UNAT-201

2013-UNAT-311

2012-UNAT-216

2014-UNAT-421