

2017-UNAT-757, Sarwar

UNAT Held or UNDT Pronouncements

UNAT held that the UNDT's determination that the decision to terminate the appointment was unlawful on account of the repeated non-compliance with ST/AI/2010/5 was formalistic. While obviously a work plan should be finalized at the beginning of a cycle, UNDT held that there was nothing in ST/AI/2010/5 that held any failure to generate a work plan at the commencement of a cycle to be a procedural flaw resulting axiomatically in any subsequent decision to terminate an appointment being unlawful. Likewise, there is no such consequence for not holding a midpoint review in a timely manner. UNAT held that the use of the non-peremptory words "should" and "usually" confirmed that the provisions of ST/AI/2010/5 in this respect were directory not mandatory. Additionally, ST/AI/2010/5 did not provide for any minimum duration for a performance improvement plan. UNAT held that the question of procedural fairness was whether the staff member had been aware of the required standard and had been given a fair opportunity to meet it. In the present case, UNAT found that the staff member had been acquainted with what was expected of him, was properly assessed in numerous assignments, was afforded an opportunity to improve, and failed to do so in key performance areas, thus demonstrating his unsuitability for the position. UNAT concluded that in the premises, there was no basis for finding the separation decision unlawful and vacated the UNDT judgment.

Decision Contested or Judgment/Order Appealed

The staff member challenged the decision to separate him from service upon the expiration of his extended fixed-term appointment on the grounds of poor performance. With respect to the first performance cycle, UNDT found that the work plan had not been finalized in a timely manner, that it was therefore difficult for the staff member to have clarity about performance expectations, and that any rating would be of questionable validity. With respect to the second performance cycle, UNDT held that the work plan had only been finalized in December 2013, the same

month the midpoint review took place, and the performance improvement plan was approved in February 2014. UNDT held that the repeated non-compliance with the various provisions of ST/AI/2010/5 resulted in the management of the staff member's performance being "so procedurally flawed and fraught with irregularities that it tainted and rendered the decision not to renew his fixed-term appointment unlawful". UNDT ordered rescission of the separation decision and in-lieu compensation in the amount of twelve months' net base salary and USD 5,000 as compensation for non-pecuniary damages.

Legal Principle(s)

The standard of review in poor performance cases does not limit the Tribunals to examining the process by which it was determined that the performance was unsatisfactory. Nor is it correct to contend that UNDT may not reach its own conclusions concerning the performance of a staff member and to suggest that such would be "usurping the role" of the rebuttal panel. Whenever the Secretary-General is called upon to decide if a valid and fair reason exists to terminate an appointment for poor performance, he should consider whether the staff member in fact failed to meet the performance standard and if so whether: i) the staff member was aware, or could reasonably be expected to have been aware, of the required standard; ii) the staff member was given a fair opportunity to meet the required standard; and iii) termination of appointment is an appropriate action for not meeting the standard in the circumstances.

Outcome

Appeal granted

Full judgment

[Full judgment](#)

Applicants/Appellants

Sarwar

Entity

DESA

Case Number(s)

2016-1034

Tribunal

UNAT

Registry

New York

Date of Judgement

14 Jul 2017

President Judge

Judge Murphy

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Performance management

Performance evaluation

Separation from service

Termination of appointment (see also, Termination of appointment)

Standard of review (judicial)

Termination (of appointment)

Unsatisfactory service

Applicable Law

Administrative Instructions

- ST/AI/2010/5

Secretary-General's bulletins

- ST/SGB/2011/10

Staff Regulations

- Regulation 9.3(a)(ii)

Staff Rules

- Rule 9.6(c)

Related Judgments and Orders

UNDT/2016/178