

UNDT/2022/027, Kashkinbekov

UNAT Held or UNDT Pronouncements

Whether the Administration provided a valid and fair reason for the contested decision In determining whether a valid and fair reason exists to terminate the Applicant's appointment for unsatisfactory performance, the Tribunal will examine in turn the following issues: i. Whether the Applicant in fact failed to meet the performance standards; ii. Whether he was aware, or could reasonably be expected to have been aware, of the required standards; iii. Whether he was given a fair opportunity to meet the required standards; and iv. Whether termination of appointment is an appropriate action for not meeting the standards in the circumstances. Whether the Applicant failed to meet the performance standards Contrary to the Applicant's assertion, the evidence on record shows that his performance was not viewed positively in the initial months of service. In relation to the first performance shortcoming, i.e., existence and persistence of not bidding by the ICF, the Tribunal finds that the Applicant failed to carry out his functions to implement the revised ICF in accordance with staff regulation 1.3(b) and did not abide by the policy decisions of the Administration and his supervisors as required by staff rule 1.2(a). Turning to the second performance shortcoming, the Tribunal finds that the Applicant's unauthorized engagement with external partners in the Government, claiming that he was representing UNDP, is inconsistent with staff rule 1.2(t). Finally, with respect to the Applicant's third performance shortcoming, the Tribunal considers that the Applicant's refusal to resign from the NPTC, a national entity, despite having been advised by the UNDP Ethics Office that his membership in the NPTC was incompatible with his official functions, is inconsistent with staff regulation 1.2(o) and staff rule 1.2(s). Accordingly, the Applicant's blatant violations of several basic staff obligations under relevant staff rules and regulations, together with his repeated disregard of the instructions of the DRR, the RR, as well as the UNDP Ethics Office, prove that his service was unsatisfactory. Therefore, the Tribunal is satisfied that the Applicant in fact failed to meet the performance standards requested and expected from him. Whether the Applicant was aware, or could reasonably be expected to have been aware, of the required standards There

is no doubt that the Applicant was duly aware of the required standards for the reasons outlined below. Above all, staff members are presumed to know the Staff Regulations and Rules applicable to them and that ignorance of the law cannot be invoked as an excuse (see e.g., Vukasović 2016-UNAT-699, para. 14; Amany 2015-UNAT-521, para. 18). Moreover, the evidence on record shows that the Administration made several efforts (including through the initiation of a PIP) to inform the Applicant of the required standards. In particular, the PIP dated 8 October 2020 made it clear that the Applicant should improve his performance, inter alia, in the area of compliance with the UNDP rules and regulations and standards of conduct. The Applicant was further informed of relevant standards in relation to specific performance standards by RR, and/or the UNDP Ethics Office. Accordingly, the Tribunal can only conclude that the Applicant was aware, or at least could reasonably be expected to have been aware, of the required standards. Whether the Applicant was given a fair opportunity to meet the required standards Under the PMD Policy, before a staff member's appointment is terminated for unsatisfactory service, a PIP is to be put in place to give the staff member an opportunity to improve on identified issues. Having reviewed the parties' submissions and the evidence on record, the Tribunal considers that the Administration undertook a PIP that is in full accord with the relevant provisions of the PMD Policy. It is then up to the Applicant to prove that the PIP suffers from procedural irregularities or that the content of the PIP, including the identified performance shortcomings, is not correct. The Applicant alleges that the procedures to impose a PIP on him were never followed and that the reasons for it were vague and imprecise. To support his claim, he specifically argues that he had no mid-term discussion with the DRR and that the PIP, which was unilaterally imposed for quasi-disciplinary purposes, was clearly aimed at sanctioning the Applicant for his "communication style" with his supervisors. The Tribunal is not convinced by the Applicant's submissions for the following reasons. First, the Tribunal finds no merit in the Applicant's argument that he had no mid-term discussion with the DRR. Given the Applicant's delay in completing his performance goals, there was no basis against which to assess his performance at the mid-term review. However, his supervisor attempted to hold such a review in July 2020. The PIP shows that a performance management discussion between the Applicant and his supervisor was held on 23 July 2020. Furthermore, a mid-term review is not an essential requirement for the initiation of a PIP. Second, contrary to the Applicant's allegation, the Administration provided precise reasons for imposing a PIP, as evidenced by the Note and the PIP itself, which clearly identify the Applicant's performance shortcomings. Also, the Applicant

does not provide any evidence to show that the information contained in the Note or the PIP is inaccurate. Third, the Tribunal is not persuaded by the Applicant's assertion that the PIP was aimed at sanctioning him or that it had a quasi-disciplinary intent. The Applicant clearly misinterpreted the nature and purpose of the PIP, which is "a tool that aims to facilitate the required improvement in the performance of a staff member" under para. 46 of the PMD Policy. The Note shows that during the meeting of 5 October 2020, the Applicant was informed of the purpose of the PIP and that he confirmed to have correctly understood the issues raised during the meeting. Finally, contrary to the Applicant's assertion, the PIP was not imposed unilaterally. The evidence on record shows that, although the Applicant resisted the DRR's initial attempts to set up a meeting to discuss the initiation of the PIP (by cancelling and postponing the meetings for that purpose on several occasions during September 2020), on 5 October 2020, the Applicant attended a meeting during which the DRR explained to him the PIP process and outlined the key actions to be undertaken. The Applicant was also advised of how his progress would be tracked, including the required periodic check-in meetings involving the DRR and the Applicant. However, after the initial PIP meeting held on 5 October 2020, the Applicant blatantly refused to participate in any further PIP related meetings and rebuffed the efforts of the DRR and RR to engage with him in this respect. The Applicant's lack of involvement in the PIP process cannot result in PMD procedures not being followed. Accordingly, the Tribunal is satisfied that the Applicant was given a fair opportunity to meet the required standards. Whether termination of appointment is an appropriate action for not meeting the standards Under para. 49 of the PMD Policy, if the staff member refuses to comply with the PIP, the appointment of such staff member may be terminated. The evidence on record shows that the Applicant refused to comply with the PIP. Indeed, the Applicant was given many opportunities to participate in the PIP process and was provided with every facility to be able to do so, including being informed on multiple occasions that his participation in the meetings was his "sole function" at that time. However, after the initial PIP meeting, the Applicant neither attended any further check-in meetings scheduled on 19 October, 2 November and 16 November 2020, nor did he engage in the PIP process in any other way. Furthermore, the Applicant has provided no explanation for his failure to participate or comply with the PIP process. He repeatedly rejected the PIP process as, to use his own words, "irrelevant". Therefore, the Applicant refused to comply with the PIP, and this alone could warrant the termination of his appointment under para. 49 of the PMD Policy. Moreover, there is evidence that the Applicant was performing his official duties in a way that was

dangerous to the Organization's operations and reputation. The Applicant also repeatedly disregarded the instructions of the DRR, the RR, as well as the UNDP Ethics Office, thus showing that he had no intention to carry out his functions in accordance with the standards of conduct expected of a UN staff member. This enhanced the need for the Applicant to improve and overcome his performance deficiencies and made his refusal to participate in the PIP more significant and serious. Accordingly, the Administration properly terminated the Applicant's fixed-term appointment in accordance with the provisions of the PMD Policy. In light of the foregoing, the Tribunal concludes that the Administration provided a valid and fair reason to terminate the Applicant's appointment for unsatisfactory performance. Whether the contested decision was improperly motivated or retaliatory The Applicant did not present any evidence showing that the contested decision was a result of his reporting of potential misconduct against his supervisor. Furthermore, the decision-maker of the contested decision was not his supervisor but the Assistant Administrator and Director, Bureau for Management Services, UNDP, against whom the Applicant has not alleged an improper motive. The Applicant has not even alleged that the basis for the termination of his appointment—his refusal to participate in the PIP—was improperly motivated or retaliatory. There is also no merit in the Applicant's claim that the PIP was put in place to "silence him". On the contrary, the evidence on record shows that the PIP process offered the Applicant ample opportunities, through meetings and in writing, to formally document his views, including on the necessity of the PIP. The Applicant, however, chose not to participate in any part of that process and has offered no explanation for his choice. There is no merit in the Applicant's assertion that the PIP was imposed based on improper motives of his supervisor. While the Applicant seeks to suggest that the PIP was motivated by his complaint against his supervisor, based on the fact that the date of his email complaining about his supervisor and the date of meeting to initiate his PIP were the same, the evidence on record shows that the DRR had tried for weeks prior to 5 October 2020 to hold a meeting with the Applicant to discuss the initiation of a PIP but the Applicant cancelled or postponed those meetings. Moreover, the most significant issues in the PIP stem from concerns raised by stakeholders other than the DRR, which arose prior to the Applicant's 5 and 24 October 2020 complaints against the DRR. Therefore, the Applicant has not discharged his burden of proving that the contested decision was improperly motivated or retaliatory. Without prejudice to the fact that the Applicant bears the burden of proving such allegations, the Tribunal further notes that the Applicant's concerns or complaints have been considered by the relevant parties in UNDP and

were found not to have any merit. Therefore, no evidence on record leading to establish that the allegations of misconduct against the DRR were linked to the contested decision. Accordingly, the contested decision was not improperly motivated or retaliatory. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

Decision Contested or Judgment/Order Appealed

The Applicant contests the decision to terminate his fixed-term appointment for unsatisfactory performance.

Legal Principle(s)

In case of termination of an appointment on the grounds of unsatisfactory performance, the Administration is required to provide a valid and fair reason. In examining the validity of the Administration's exercise of discretion, the Tribunal's scope of review is limited to determining whether the exercise of such discretion is legal, rational, reasonable and procedurally correct to avoid unfairness, unlawfulness or arbitrariness (see, e.g., Abusondous 2018-UNAT-812, para. 12). It is not its role "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" (see Sanwidi 2010 UNAT 084, para. 40). 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 (see Sarwar, para. 73). The burden of proving improper motives, such as abuse of authority, discrimination, retaliation or harassment rests with the person making the allegation (see, e.g., El Sadek 2019-UNAT-900, para. 54; Nwuke UNAT-2015-506, para. 49).

Outcome

Dismissed on merits

Full judgment

[Full judgment](#)

Applicants/Appellants

Kashkinbekov

Entity

UNDP

Case Number(s)

UNDT/GVA/2021/13

Tribunal

UNDT

Registry

Geneva

Date of Judgement

23 Mar 2022

Duty Judge

Judge Bravo

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Termination (of appointment)

Unsatisfactory service

Applicable Law

Other UN issuances (guidelines, policies etc.)

- UNDP Performance Management and Development Policy

Staff Regulations

- Regulation 1.2(o)
- Regulation 1.3
- Regulation 9.3(a)(ii)

Staff Rules

- Rule 1.2(a)
- Rule 1.2(s)
- Rule 1.2(t)
- Rule 1.3
- Rule 9.6(c)(ii)

Related Judgments and Orders

2017-UNAT-757

2018-UNAT-812

2010-UNAT-084

2016-UNAT-699

2015-UNAT-521

2019-UNAT-900