



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2021/013

Judgment No.: UNDT/2022/027

Date: 23 March 2022

Original: English

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**Before:** Judge Teresa Bravo

**Registry:** Geneva

**Registrar:** René M. Vargas M.

KASHKINBEKOV

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

George G. Irving

**Counsel for Respondent:**

Angela Arroyo, UNDP

## **Introduction**

1. By application filed on 2 March 2021, the Applicant, a former staff member of the United Nations Development Programme (“UNDP”) in Nur-Sultan, contests the decision to terminate his fixed-term appointment for unsatisfactory performance (“contested decision”).

## **Facts and procedural background**

2. On 9 January 2020, the Applicant joined UNDP Kazakhstan on a one-year fixed-term appointment as Programme Specialist/Head of the Sustainable Development and Urbanization Unit (“SDU”), at the NO-C level.

3. On 13 March 2020, the Deputy Resident Representative (“DRR”), UNDP Kazakhstan, provided the Applicant with model performance goals, which he needed to put into the Performance Management and Development (“PMD”) system.

4. On 20 March 2020, the Applicant wrote to the DRR regarding alleged improper influence by SDU staff in a procurement exercise for an SDU project. The Applicant cancelled and re-issued the tender.

5. On 13 April 2020, the Applicant was advised by the UNDP Ethics Office that his membership in the National Public Trust Council (“NPTC”), a local government body, was incompatible with his status as a staff member. In this context, the Applicant was informed that he should “decline [his] nomination [to be a member of] and withdraw from the NPTC”.

6. On 24 April 2020, the Applicant notified the DRR of alleged possible preferential treatment of vendors in connection with an on-going audit.

7. On 6 May 2020, the Applicant raised concerns with the DRR over the role and performance of the Programme Coordinator.

8. On 17 July 2020, the DRR asked staff under his supervision, including the Applicant, to “please plan for next week PMD discussions, which will result in goal approvals and also mid-term review adjustments if needed.” The DRR wrote separately to the Applicant reminding him that he still had “not received the updated performance goals according to [his] request.”

9. On 20 July 2020, the Applicant again raised his concerns over procurement practices in the Country Office with the DRR and the Resident Representative (“RR”), UNDP Kazakhstan.

10. On 23 July 2020, the DRR and the Applicant met to discuss the Applicant’s PMD and to approve his PMD goals. On the same day, the DRR alerted the Applicant that the goals still had not been properly entered in the PMD system and the Applicant’s further action was required. The Applicant did not send the PMD goals for the DRR’s approval until 21 September 2020 after multiple reminders.

11. On 17 September 2020, a meeting was held between the Applicant and the DRR, in which the Applicant allegedly sought the intervention of the DRR and the RR regarding the management of the Global Environment Facility (“GEF”) project.

12. By email dated 18 September 2020, the DRR made it clear that “[their] meeting was not meant to be a negotiation for the interim measures during the review process but to clarify [the Applicant’s] engagement [while the DRR works directly with the GEF funded project managers] and discuss possible implications on [his terms of reference (“TOR”)”].

13. In September 2020, the DRR tried to schedule a meeting to discuss the necessity of commencing a performance improvement plan (“PIP”) to address concerns with the Applicant’s work performance. The meeting was rescheduled by the Applicant on at least four occasions. By email dated 29 September 2020, a Human Resources Associate wrote the following to the Applicant:

This is to take note of your postponing the meeting [between you] and [the] DRR related to the individual performance.

Taking note of this, the country office is initiating a performance improvement plan in line [with] the UNDP rules and regulations.

All the efforts were made to have the meeting scheduled. This is the third and last attempt to hold the meeting. Please schedule it at 16.00 of local time on 30 September 2020. During the meeting, performance issues will be stated and you will be required [to] go through a performance improvement plan. Please, kindly familiarize yourself with the process ahead of time.

14. Following another rescheduling of the meeting, on 5 October 2020, the DRR, along with a Human Resources Business Partnering Specialist for the Regional Bureau for Europe and Central Asia (“RBEC”), Office of Human Resources (“OHR”) representative, met with the Applicant to discuss the initiation of the PIP to address concerns with his work performance. The PIP was due to commence on 8 October 2020 and continue through 8 January 2021, with regular check-ins during that period to assess the Applicant’s progress in accordance with the UNDP PMD Policy.

15. On the same day, the Applicant wrote to the UNDP Administrator alleging that the DRR’s “work attitude and pressure on all SDU team [raise] concerns, uncertainty, and unpredictability” and requested an investigation.

16. On 6 October 2020, a draft PIP was shared with the Applicant, and he was invited to provide comments. The Applicant did not provide any comments.

17. On 8 October 2020, the PIP was finalized and sent to the Applicant for his signature, but the Applicant declined to sign it. Later that day, the DRR wrote to the Applicant directly to share the PIP and informed him that the next meeting to check progress on the PIP was scheduled for 19 October 2020.

18. The PIP was put in place to address serious work performance failings identified by the DRR and the RR and discussed with the Applicant on numerous occasions during the initial 10 months of his employment with UNDP Kazakhstan.

19. One concern addressed in the PIP arose in the context of the revised Internal Control Framework (“ICF”), which was put in place by UNDP Kazakhstan in agreement with RBEC to mitigate risks identified by the audit of the UNDP GEF fund. In response to the RR’s email sharing the revised ICF with all staff, the Applicant wrote on 29 September 2020 to all staff in UNDP Kazakhstan that the revised ICF was “[o]fficially rejected by SDU” allegedly because “[i]t was not discussed and agreed with Head and SDU Team” and wrote to his subordinates in the SDU team that “none is allowed to [implement the ICF]”.

20. Another concern that the PIP sought to address was the Applicant’s refusal to adhere to the advice of the UNDP Ethics Office, provided to him on 13 April 2020, that he should “withdraw from the NPTC”. Notwithstanding the Ethics Office’s recommendation, the Applicant became a member of the NPTC. Prior to the initiation of the PIP, the DRR and Human Resources followed-up with the Applicant on his membership in the NPTC on multiple occasions but the Applicant refused to provide any explanation or evidence of his resignation.

21. In addition to identifying the performance concerns, the PIP outlined the actions required to show improvement during the PIP period.

22. By letter dated 13 October 2020, the RR notified the Applicant of the temporary reassignment of his functions in the context of the special measures for the UNDP oversight of the GEF funded projects, including his removal from any role in the GEF funded projects. The RR clarified, *inter alia*, that such changes would “ensure the integrity and independence of the review process through an external dedicated capacity for the GEF portfolio management and through a closer control by the [Country Office] Senior Management in the oversight over the GEF portfolio”.

23. On the same day, the Applicant replied that the instruction was “[r]ejected since it violates existing contract, TOR, and Unit operation modality”.

24. On 16 October 2020, the Applicant again wrote to the UNDP Administrator raising issues in connection with the GEF audit of SDU projects and asked him to start an appropriate investigation, and to put the “temporary” measures on hold, allowing him to work on all existing and new projects and initiatives.

25. On the same date, the DRR instructed him to attend a PIP meeting or face administrative consequences.

26. On 19 October 2020, the first PIP check-in meeting was held. The Applicant did not attend the meeting, despite efforts made by the DRR to reach out to him at the meeting time. Although he did not attend the meeting, the DRR assessed the Applicant’s progress in the PIP, determining that there had been no progress and that all of the issues addressed in the PIP remained without improvement. The progress report was sent to the Applicant on 22 October 2020.

27. On 24 October 2020, the Applicant submitted a complaint of possible misconduct by the DRR to the UNDP Office of Audit and Investigations (“OAI”).

28. By an Inter-Office Memorandum dated 28 October 2020, the RR asked the Applicant to provide “an explanatory note on [his] involvement with the [NPTC]”. The memorandum recalled that the Applicant had been asked to provide evidence of his resignation from the NPTC by 13 October 2020, and the numerous communications and reminders to that effect based on the advice of the Ethics Office of 13 April 2020 that the Applicant’s participation in the NPTC was incompatible with his status as a UNDP staff member. It further identified the fact that not only had the Applicant not provided evidence of his resignation, but he had participated in a meeting of the NPTC on 22 October 2020 and made a statement to the press about his involvement with the NPTC without authorization of UNDP.

29. On the same day, the Applicant replied as follows to the RR: “Rejected. No more violation of my contract and [TOR], official UNDP documents, will be allowed. Reported to OAI. Investigation is starting.” The Applicant did not otherwise provide evidence of his resignation or any explanation related to his involvement in the NPTC.

30. By email dated 30 October 2020, OAI informed the Applicant that “for the most part, the allegations [he] reported do not constitute misconduct but rather issues that relate more to performance and would therefore be within the purview of Senior Management to deal with”. Regarding the alleged misconduct, OAI requested the Applicant to provide the following information:

- a. What misconduct was reported to the DRR that he did not follow-up on;
- b. Whether the Applicant or anyone else in the office reported the alleged misconduct to OAI; and
- c. Any proof the Applicant may have that the DRR did not take action upon receiving the allegations.

31. On 1 November 2020, the Applicant replied to OAI’s email without providing precise information as requested.

32. On 2 November 2020, the Applicant contacted the Ombudsman’s office.

33. On 2 November 2020, a second PIP check-in meeting was held. The Applicant was informed that his participation in the meeting was a mandatory part of the PIP process. He was sent a reminder of the meeting prior to its commencement and was called at the time of the meeting but he did not answer and was not otherwise reachable. He did not provide any reason for his absence from the office or for his lack of availability for the meeting. Despite his absence, the DRR assessed the Applicant’s progress in the PIP and determined that there had been no progress and that all the issues addressed in the PIP remained without improvement. That progress report was shared with the Applicant by email dated 4 November 2020.

34. On 6 November 2020, the RR issued a written reprimand to the Applicant in respect to his failure to provide an explanation of his continued involvement with the NPTC. The reprimand outlined that under the UN Staff Regulations and Rules, staff members may not engage in outside activities unless authorized to do so and

noted the Applicant's failure to reply to the RR's 28 October 2020 memo instructing the Applicant to provide an explanatory note on his involvement with the NPTC. That same day, on 6 November 2020, the Applicant replied to the reprimand as follows: "Good day Irrelevant Replied in previous comms". The Applicant did not provide any further comments, nor did he take any actions to provide an explanation about his involvement with the NPTC.

35. By email dated 6 November 2020, the OAI informed the Applicant that:

Based on [his] response, OAI cannot follow-up on [his] complaint. Please provide precise information as requested from [him] below. Otherwise, OAI will not open a case for assessment in respect of [his] complaint.

36. On 9 November 2020, the Applicant contacted the UNDP Ethics Office. The Ethics Office concluded that most of the issues raised were managerial matters that did not fall within its mandate.

37. On 12 November 2020, the Applicant was sent an invitation to another PIP progress meeting that was scheduled to be held on 16 November 2020. That same day, the Applicant declined the meeting invitation without any explanation.

38. On 13 November 2020, the RR issued a written reprimand concerning the Applicant's failure to resign from the NPTC. He was invited to provide written comments. That same day, he replied to the reprimand, stating: "Irrelevant as before".

39. By letter dated 16 November 2020, the RR instructed the Applicant to attend the PIP progress meeting that was scheduled for 16 November 2020. The letter further informed him that:

Preparing for and attending this PIP progress meeting, which is an important and necessary part of the performance review process, will be [his] sole function. [He] must attend all future PIP progress meetings. If [the Applicant does] not attend this meeting, [he] will be forced to conclude that [the Applicant does] not intend to attend any PIP meetings in connection with [his] performance evaluation under the policy. Please note that failure to attend the meetings may



result in administrative consequences. These consequences can include separation from service.

40. The same day, the Applicant replied to this instruction stating: “Irrelevant as before”.

41. On 16 November 2020, the PIP check-in meeting was held, and the Applicant failed to attend.

42. On 17 November 2020, the RR issued a written reprimand to the Applicant for his actions on 12 October 2020 of undertaking an unauthorized activity outside the office by engaging with high level officials without authorization, and for misrepresenting his absence from the office by claiming it was due to sickness. That same day, the Applicant replied to the reprimand, stating only: “Irrelevant as before”.

43. On 19 November 2020, the DRR wrote to the Applicant regarding his activities of 17 to 20 November 2020, during which it came to the Management’s attention that the Applicant was engaged in unauthorized travel and activities in which the Applicant was purporting to represent UNDP without authorization. The Applicant was instructed to join a meeting with the DRR and RR later that same day to discuss the matter. The Applicant did not attend the meeting.

44. By letter dated 20 November 2020, the Assistant Administrator and Director, Bureau for Management Services, UNDP, informed the Applicant of the decision to terminate his fixed-term appointment “on the basis of non-compliance with [his PIP], as well as for disregarding the standards of conduct expected of a UN staff member”.

45. On 11 December 2020, the Applicant filed a request for management evaluation of the contested decision.

46. By letter dated 19 January 2021, the Applicant was informed of the outcome of his request for management evaluation, which upheld the contested decision to terminate his fixed-term appointment.

47. On 2 March 2021, the Applicant filed the application mentioned in para. 1 above.

48. On 1 April 2021, the Respondent filed his reply.

49. On 13 December 2021, the present case was assigned to the undersigned Judge.

50. By Order No. 25 (GVA/2022) of 23 February 2022, the Tribunal notified the parties that it was ready to adjudicate the case and would be moving forward with its judgment.

### **Parties' submissions**

51. The Applicant's principal contentions are:

- a. The reasons put forward by the Respondent to terminate the Applicant's fixed-term appointment are suspect on several grounds:
  - i. The Applicant's initial months of service were viewed positively;
  - ii. His efforts at maintenance of good relations with the Government was one reason cited for his separation;
  - iii. His membership with the NPTC is based on Presidential appointment and is therefore politically sensitive to resign from such, and his membership was approved by the Administration;
  - iv. Regarding his PMD, the Applicant received no feedback and had no mid-term discussion with the DRR;
  - v. The procedures to impose the PIP were never followed and the reasons for imposing the PIP were vague and imprecise;
  - vi. The PIP was clearly aimed at sanctioning the Applicant for his "communication style" with his supervisors; and
  - vii. The PIP was unilaterally imposed for quasi-disciplinary purposes.

b. The contested decision was improperly motivated and taken as retaliation after he raised allegations of misconduct in respect to his supervisor:

i. The PIP was imposed based on improper motives. By the time the PIP was proposed, the relations between the Applicant and his supervisor had seriously deteriorated, together with the reporting of potential misconduct to the Administrator by the Applicant, making an objective assessment impossible; and

ii. The PIP was aimed at silencing the Applicant.

52. The Respondent's principal contentions are:

a. The decision to terminate the Applicant's fixed-term appointment was lawful:

i. The Applicant refused to comply with the PIP and UNDP was accordingly following its procedures when it proceeded with termination on that basis; and

ii. The Applicant's performance issues were serious and risked harm to UNDP's operations if left unaddressed.

b. The Applicant has not met his burden of proof that the contested decision was motivated by retaliation.

## **Consideration**

### *Scope and standard of judicial review*

53. The present case concerns the decision to terminate the Applicant's fixed-term appointment for unsatisfactory performance.

54. In this respect, the Tribunal recalls that under staff regulation 9.3(a)(ii) and staff rule 9.6(c)(ii), the Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a fixed-term appointment

in accordance with the terms of his or her appointment if the performance of the staff member proves unsatisfactory.

55. Moreover, the Appeals Tribunal has made it clear that 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 this connection, the Appeals Tribunal stated in *Sarwar* 2017-UNAT-757 (para. 72) that:

By “valid” one means that the reason for termination must rest on a reasonable basis and sufficient proof, as a matter of objective fact, that the staff member’s performance falls short. Fairness in relation to the substantive reason goes to the weight or sufficiency of the reason - the issue being whether the deficiency was sufficiently serious to render the continuation of the employment relationship untenable.

56. Nevertheless, 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). In this regard, the Tribunal recalls that 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).

57. In light of the foregoing and having reviewed the parties’ submissions and the evidence on record, the Tribunal defines the issues to be examined in the present case as follows:

- a. Whether the Administration provided a valid and fair reason for the contested decision; and
- b. Whether the contested decision was improperly motivated or retaliatory.

*Whether the Administration provided a valid and fair reason for the contested decision*

58. In the present case, by letter dated 20 November 2020, the Administration informed the Applicant of the contested decision as follows:

Further to attempts by UNDP Kazakhstan’s Senior Management to reach out to you and following your refusal to engage in a Performance Improvement Plan, I would like to inform you that your current Fixed-Term Appointment [...] with UNDP Kazakhstan which expires on 8 January 2021 will be terminated with immediate effect on the basis of noncompliance with your Performance Improvement Plan, as well as for disregarding the standards of conduct expected of a UN Staff Member.

In accordance with UN Staff Rule 9.6 (c) (ii) “The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds: Unsatisfactory service”.

59. The reasons provided by the Administration for the decision to terminate the Applicant’s fixed-term appointment for unsatisfactory performance are, therefore, two-fold:

- a. The Applicant failed to comply with his PIP; and
- b. The Applicant disregarded the standards of conduct expected of a UN staff member.

60. The Tribunal recalls that “[w]henver 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).

61. Accordingly, 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

62. Staff regulation 1.3, titled "Performance of staff", provides in its relevant part that:

(a) Staff members are accountable to the Secretary-General for the proper discharge of their functions. Staff members are required to uphold the highest standards of efficiency, competence and integrity in the discharge of their functions.

(b) The whole time of staff members shall be at the disposal of the Secretary-General for the performance of official functions.

63. Staff rule 1.3, also titled "Performance of staff", provides in its relevant part that:

(a) Staff members shall be evaluated for their efficiency, competence and integrity through performance appraisal mechanisms that shall assess the staff member's compliance with the standards set out in the Staff Regulations and Rules for purposes of accountability.

64. In the present case, the Tribunal is of the view that contrary to the Applicant's assertion, the evidence on record shows that his performance was not viewed positively in the initial months of service. Indeed, the note concerning the meeting

of 5 October 2020 to initiate the PIP of the Applicant (“the Note”), in which he, his supervisor, and a Human Resources Business Partnering Specialist, RBEC, OHR, participated, clearly documented the Applicant’s performance shortcomings as follows:

- a. Existence and persistence of not bidding by the Internal Control Framework (ICF) and Inter Office Memoranda; and the requests from the Supervisor or Head of Office including on the GEF portfolio review. The Supervisor provided another example of recent cases observed.
- b. Unauthorized actions and meetings undertaken with officials, external partners and representing UNDP without an officially delegated authority from the office management Supervisor or RR.
- c. Engagement in outside activities. The Supervisor referred to the recommendations provided by the Ethics office and staff member’s engagement with [the NPTC].

65. In relation to the first performance shortcoming, i.e., existence and persistence of not bidding by the ICF, the Tribunal recalls that staff rule 1.2(a) provides that “Staff members shall follow the directions and instructions properly issued by the Secretary-General and by their supervisors”. Staff regulation 1.3(b) provides in its relevant part that “The whole time of staff members shall be at the disposal of the Secretary-General for the performance of official functions”.

66. The evidence on record shows that despite the requests of his supervisor and the Head of Office, the Applicant refused to implement the revised ICF—a framework that had been put in place in agreement with RBEC to mitigate risks related to the management of GEF projects—and instructed his subordinates to similarly not implement the revised ICF. The Applicant not only made no efforts to address this concern during the PIP period but, instead, persisted in his refusal to implement the revised ICF and prevented his subordinates from adhering to it. On 5 November 2020, the Applicant even attempted to negotiate with the RR, seemingly stating that he would implement the revised ICF in exchange for a decision to extend his fixed-term appointment by two years.

67. Accordingly, 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).

68. Turning to the second performance shortcoming that concerns the Applicant's unauthorized engagement with external partners in the Government under the auspices that he was representing UNDP, the Tribunal recalls that staff rule 1.2(t) provides in its relevant part that:

Staff members shall not, except in the normal course of official duties or with the prior approval of the Secretary-General, engage in any outside activities that relate to the purpose, activities or interests of the United Nations. Outside activities include but are not limited to:

- (i) Issuing statements to the press, radio or other agencies of public information;
- (ii) Accepting speaking engagements[.]

69. The Tribunal notes that it is undisputed that the Applicant engaged with external partners in the Government without the authorization of the management in the Country Office.

70. Moreover, even after the initiation of the PIP, the Applicant was also absent without authorization from the office to carry out unauthorized government interactions during which he neglected his assigned duties and missed meetings critical to the carrying out of his functions. Indeed, on 12 October 2020, just four days after the PIP commenced, the Applicant engaged in a meeting involving the Parliament of the Republic of Kazakhstan, which was unauthorized. He even used uncertified sick leave to justify his absence from work. However, based on his own description of that meeting, the Applicant was there representing UNDP, stating in his Facebook post that he had "briefed the participants on the UNDP projects in Kazakhstan." Later, on 12 November 2020, the Applicant engaged in a meeting with the Kazakhstan Ministry without prior authorization.



71. On 19 November 2020, the DRR and the RR requested a meeting with the Applicant to discuss yet another instance of unauthorized travel and official engagement with external parties on 17-20 November 2020. The Applicant not only refused to attend that meeting but informed them that he could not make it because he was “heading to meeting with minister”, which amounted to another instance of the very actions the meeting sought to address.

72. Accordingly, 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).

73. Finally, with respect to the Applicant’s third performance shortcoming, i.e., his refusal to resign from the NPTC, a national entity, the Tribunal recalls that staff regulation 1.2(o) and staff rule 1.2(s) provide that “[s]taff members shall not engage in any outside occupation or employment, whether remunerated or not, without the approval of the Secretary-General”.

74. Contrary to the Applicant’s assertion that his membership with the NPTC was approved by the Administration, the evidence on record shows that he was advised in March 2020 that only the UNDP Ethics Office could approve such participation. On 13 April 2020, the UNDP Ethics Office clearly informed the Applicant that his service as a member of the NPTC would be in service of a government entity and that it would be inappropriate for him to accept the nomination while employed by the UNDP. The Applicant was therefore advised to decline the nomination. On that basis, the Applicant should have never accepted to become a member of NPTC. In the months that followed the Ethics Office’s advice, the Applicant was given ample opportunities to resign from the NPTC and provide an explanation about his failure to resign, but he failed to do so.

75. Furthermore, the Tribunal is of the view that the alleged politically sensitive nature of the Applicant’s membership with the NPTC cannot be invoked to justify his continued participation in the NPTC. Indeed, in line with his obligations as an independent and impartial international civil servant, the Applicant cannot serve

with government-owned or controlled entities such as the NPTC, which was created and chaired by the President of Kazakhstan.

76. Therefore, the Tribunal considers that the Applicant's refusal to resign from the NPTC, 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).

77. In light of the foregoing, the Tribunal finds that 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

78. Having reviewed the parties' submissions, the Tribunal finds that there is no doubt that the Applicant was duly aware of the required standards for the reasons outlined below.

79. Above all, the Tribunal recalls that 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).

80. 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. He was explicitly required, *inter alia*, to:

- a. Change his communication style with his supervisor and the Country Office Senior Management, and demonstrate evidence of abiding by guidance and instructions;
- b. Familiarize himself with and follow the instructions of the ICF, inter-office memoranda and email requests; and
- c. Stop undertaking unauthorized actions and meetings with external partners, including participating in meetings on behalf of UNDP but without prior authorization and agreement by the RR or the DRR (e.g., bilateral senior level meetings with the Government and donor partners).

81. In relation to the implementation of the revised ICF, the RR also explicitly informed the Applicant, by email dated 9 November 2020, that pursuant to the Staff Rules and Regulations governing his contract and TOR, the Applicant had to abide by the policy decisions of the Administration and his supervisors, and that it was not up to him to determine whether an action is consistent with his contract or TOR, or when to abide or not by policy decisions.

82. Turning to the Applicant's unauthorized engagement with external partners in the Government, on 17 November 2020, the RR also explicitly reprimanded the Applicant for undertaking an unauthorized activity outside the office on 12 October 2020, by engaging with high level officials without authorization and misrepresenting that his absence from the office was due to sickness. He further clearly informed the Applicant that:

[His] conduct displayed, and the subsequent responses are not in line with what is expected from [him] as a UNDP Staff Member. [He] must ensure that when [he engages] in such activities [he receives] appropriate authorization. [...] [He is] obliged to demonstrate integrity in all manner of [his] official activities, including in the context of official requests for leave.

83. With respect to the Applicant's involvement with the NPTC, by email dated 13 April 2020, the UNDP Ethics Office explicitly informed the Applicant that:

[I]n line with their obligations of independence, impartiality, and loyalty to the UN, UNDP staff members cannot serve with government-owned or controlled entities; here, the NPTC is a national entity created and chaired by the President. [His] service as a member would be in service of a government entity. Pursuant to their obligation of independence, UNDP staff members furthermore cannot accept nominations from government authorities to serve with an external or affiliated entity. In accordance with [his] obligations as an independent and impartial international civil servant, [the Ethics Office thus considers] that it would be inappropriate for [him] to accept a nomination by the NPTC and to serve as a member for [the] NTPC, while employed by UNDP.

84. Accordingly, the Applicant was recommended to politely decline his nomination and to withdraw from the NPTC and received Ethics guidance on outside activities from the UNDP Ethics Office. He was subsequently reminded to resign from the NPTC on numerous occasions, including by the DRR, on 8 June, 22 June, 23 June and 17 July 2020.

85. Furthermore, by written reprimand dated 6 November 2020, the RR explicitly informed the Applicant that “under the Staff Regulations and Rules, staff members may not engage in outside activities whether remunerated or not unless authorized, and this prohibition extends specifically to government employment given the status of staff members as international civil servants” and reminded him of the UNDP Ethics Office’s consideration that his membership with the NPTC was incompatible with his status as a staff member. In that reprimand, the RR also reminded the Applicant of his obligation as a staff member to follow the instructions of his supervisor. In addition, on 13 November 2020, the RR issued to the Applicant another reprimand for his failure to resign from the NPTC, reiterating the relevant standards.

86. In light of the above, 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

87. 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.

88. Section VIII of the PMD Policy, titled "Addressing performance that is not fully satisfactory", sets forth the rules and procedures to be followed in implementing a PIP and provides in its relevant part that:

45. If the supervisor considers that the supervisee's continued performance may result in a not fully satisfactory performance review, the supervisor should notify the supervisee in writing of the performance shortcomings, discuss expected improvements and timelines, work with the supervisee on the creation of a Performance Improvement Plan (PIP), and inform the supervisee of the consequences of non-compliance, as per this Policy. Prior to notifying the supervisee of the need to create a PIP, approval from the supervisor or the Head of Office must be obtained.

46. A Performance Improvement Plan (PIP) is a tool that aims to facilitate the required improvement in the performance of a staff member. It serves to record: (1) identified shortcomings and improvements to be achieved, (2) actions to be taken to fully meet the requirements of the job and performance objectives, (3) timelines; as well as (4) support to be provided, (5) outcomes of periodic check-ins, and (6) the final review of the PIP implementation.

47. The creation of a PIP should be initiated by the supervisors and finalized within ten working days from the supervisor's notification of the need to create a PIP. If the supervisor and the supervisee are unable to agree on the terms of the PIP, or the supervisee refuses to participate in the PIP discussions, a decision on the terms of the PIP will be made by the supervisor or the Head of Office.

48. PIPs are generally of 3 months each and there could be more than one within a performance year. It is important to ensure that agreed support is provided to the supervisee during the PIP implementation.

[...]

50. Notifications, key performance-related shortcomings, performance improvement needs, remedial measures and timelines should be properly recorded in the on-line PMD tool and other documents such as emails and notes to file, as appropriate.

89. 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.

90. 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.

91. 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.

92. The Tribunal is not convinced by the Applicant's submissions for the following reasons.

93. First, the Tribunal finds no merit in the Applicant's argument that he had no mid-term discussion with the DRR. Notably, under para. 18 of the PMD Policy, a new UNDP staff member, with an initial appointment of one year or less, should have their first performance goals confirmed and recorded in the on-line PMD tool within the first two months of the appointment with UNDP. The evidence on record shows that the Applicant did not initiate his performance goals in the system until 18 September 2020, that is six months after he was asked to do so with the model performance goals provided to him on 13 March 2020. Notably, on 17 July 2020 and 23 July 2020, the Applicant's supervisor reminded him that his performance goals still had not been properly entered in the PMD system. 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.

94. Furthermore, a mid-term review is not an essential requirement for the initiation of a PIP. Indeed, under para. 45 of the PMD Policy, a PIP may be initiated when “the supervisor considers that the supervisee’s continued performance may result in a not fully satisfactory performance review”.

95. Second, contrary to the Applicant’s allegation, the Tribunal is satisfied that 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.

96. 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.

97. Finally, contrary to the Applicant’s assertion, the Tribunal finds that 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.

98. 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 Tribunal is of the view that the Applicant's lack of involvement in the PIP process cannot result in PMD procedures not being followed.

99. 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

100. The Administration decided to terminate the Applicant's fixed-term appointment for unsatisfactory performance on the following grounds:

- a. His failure to comply with his PIP; and
- b. His disregard of the standards of conduct expected of a UN staff member.

*The Applicant's failure to comply with his PIP*

101. Para. 49 of the PMD Policy provides in its relevant part that:

If improvement in performance is not achieved in line with the established expectations and within the established timeline set in the two consecutive PIP(s), or if the staff member refuses to comply with the PIP, the appointment of such staff member may be terminated or not renewed, in accordance with the applicable UN Staff Regulations and Rules and UNDP policies.

102. 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.

103. 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.



104. Furthermore, the Tribunal notes that 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”.

105. Therefore, the Tribunal finds that 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.

*The Applicant’s disregard of the standards of conduct expected of a UN staff member*

106. The Tribunal notes that the Respondent has adduced evidence to show that the Applicant’s disregard of the standards of conduct expected of a UN staff member by, *inter alia*, refusing to implement the revised ICF, unauthorized engagement with governmental officials, and refusal to resign from the NPTC was serious and could have created immediate and urgent risks to UNDP’s reputation and operations in Kazakhstan if left unaddressed.

107. First, the Applicant’s actions in refusing to implement the revised ICF—a framework put in place in agreement with RBEC to mitigate risks related to the management of GEF projects—created an immediate risk to UNDP Kazakhstan considering that the GEF funded projects were already under scrutiny by the global GEF audit.

108. Second, contrary to the Applicant’s characterization of his unauthorized engagement with Government officials as “efforts at maintenance of good relations with the Government”, he took positions in respect to Government projects that contradicted the official position of UNDP Kazakhstan and shared information about UNDP’s operations with those external partners during a particular sensitive time for the relationship between UNDP Kazakhstan and the local Government.

109. Additionally, in relation to the Applicant’s refusal to resign from the NPTC, the Tribunal considers that engagement in an unauthorized outside occupation, particularly where that outside occupation involves the local Government, whether remunerated or not, creates a conflict of interest, particularly for a staff member like

the Applicant who was head of the SDU and managed procurements involving Government entities.

110. Therefore, there is evidence that the Applicant was performing his official duties in a way that was dangerous to the Organization's operations and reputation. Moreover, the Applicant 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.

111. Accordingly, the Tribunal finds that the Administration properly terminated the Applicant's fixed-term appointment in accordance with the provisions of the PMD Policy.

112. 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*

113. The Applicant submits that the contested decision was improperly motivated and taken to retaliate against him after he raised allegations of misconduct in respect to his supervisor. To support his claim, the Applicant specifically argues that the PIP was grounded on improper motives because by the time the PIP was proposed, the relations between him and his supervisor had seriously deteriorated, making an objective assessment impossible. The Applicant also alleged that the PIP was aimed at silencing him.

114. In this respect, the Tribunal recalls that 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).

115. In the present case, the Tribunal first notes that 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.

116. Second, 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. Indeed, the Applicant provides no explanation for his blatant refusal to participate in the PIP process or how any alleged retaliatory motive for initiating the PIP affected his ability to do so. Even after the RR, against whom he has not alleged had a retaliatory motive, intervened in a further effort to seek the Applicant's engagement in the PIP process, the Applicant offered no explanation for his refusal to participate in it. Instead, he similarly rebuffed the RR's efforts to seek his engagement by stating that the process was "irrelevant".

117. 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.

118. Third, the Tribunal finds 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 (see paras. 14 and 15 above), 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.

119. 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. Indeed, as previously described, one issue to be addressed by the PIP was the Applicant's continued unauthorized engagement with external partners, including his participation in the NPTC, which he had been advised by the UNDP Ethics Office was not an authorized outside activity.

120. The PIP also sought to address the Applicant's refusal to implement the revised ICF. The revised ICF was implemented by the RR in coordination with RBEC in September 2020 and was to be applied by all staff members in UNDP Kazakhstan. The Applicant fails to demonstrate how these elements of the PIP could possibly be motivated by any alleged retaliation by the DRR.

121. Therefore, the Tribunal finds that the Applicant has not discharged his burden of proving that the contested decision was improperly motivated or retaliatory.

122. 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. In this respect, the Applicant's complaint of misconduct against the DRR was closed by OAI after he failed to provide precise information about the alleged misconduct, even after OAI explained what information was needed and requested that he provide it. Similarly, after a comprehensive review of the concerns raised by the Applicant, the UNDP Ethics Office also closed the Applicant's formal complaint of retaliation concluding that the Applicant's claim did not raise a *prima facie* case of retaliation.

123. Therefore, the Tribunal finds no evidence on record leading to establish that the allegations of misconduct against the DRR were linked to the contested decision. Accordingly, the Tribunal finds that the contested decision was not improperly motivated or retaliatory.

**Conclusion**

124. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

*(Signed)*

Judge Teresa Bravo

Dated this 23<sup>rd</sup> day of March 2022

Entered in the Register on this 23<sup>rd</sup> day of March 2022

*(Signed)*

René M. Vargas M., Registrar, Geneva