UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2021/047
Judgment No.: UNDT/2022/072
Date: 29 July 2022
Original: English

Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

AL MASRI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Shubha Suresh Naik, OSLA

Counsel for the Respondent:
Elizabeth Brown, UNHCR
Zuzana Kovalova, UNHCR

Background and Procedural History

1. The Applicant is a former staff member of the United Nations High Commissioner for Refugees ("UNHCR") serving as a Senior Supply Assistant (G-5) at the Middle East and North Africa ("MENA") Bureau in Jordan.

2. On 28 June 2021, he filed an application with the United Nations Dispute Tribunal in Nairobi challenging the Respondent's decision not to renew his fixed-term appointment ("FTA") on the grounds of performance issues ("the contested decision").

3. The Respondent filed his reply to the application on 29 July 2021.

4. On 7 June 2022, the Tribunal directed the parties to file their closing submissions by 14 June 2022 which they did.

Summary of the relevant facts

5. The Applicant first joined UNHCR as a Senior Supply Assistant (G-5) in Amman, Jordan in 2014 for a period of seven months. He was subsequently rehired on 10 July 2016 as a Senior Supply Assistant (G-5) at MENA Bureau in Jordan.[1]

6. From 10 July 2016 until 15 October 2019, he had four Electronic Performance Appraisal Documents ("ePADs") with three different supervisors and three different reviewing officers.[2]

7. On 16 October 2019, the Applicant started working as a Supply Associate (G-6) at UNHCR Country Office in Jordan. On 2 July 2020, he was informed by the Talent Development and Performance Section ("TDPS') that since he had been away on leave for three months, as per policy, he would have to create short ePADs, covering the period 16 October 2019 to 29 February 2020 and another one from 1 June 20 to 31

[1] Reply, para. 2.
[2] *Ibid.*

December 2020 and that the full year ePAD created by him was cancelled.[3]

8. On 13 August 2020, his short ePAD covering the period 16 October 2019 to 29 February 2020 was finalised and he was given a rating of 'partially meets expectations'.[4] On 7 September 2020, the Applicant filed a rebuttal of his 16 October 2019 to 29 February 2020 ePAD.[5]

9. On 20 December 2020, the Applicant was informed that his fixed-term appointment which expired on 31 December 2020 would not be renewed due to performance reasons.[6] The stated reason was that he had performance shortcomings which his manager was not able to formally record in UNHCR's Management Systems Renewal Project ("MSRP") since he did not initiate an ePAD for the period 1 June 2020 until 31 December 2020 despite several requests to do so.

10. On 30 December 2020, the Applicant sought management evaluation of the contested decision.[7]

11. On 26 March 2021, the UNHCR Deputy High Commissioner issued the management evaluation[8] in which it was, *inter alia,* concluded that:

> a. There was substantial contemporaneous documentation on the file that showed that the concerns about the Applicant's performance had been brought to his attention in a timely and transparent manner.
>
> b. The operation should have administratively extended his contract monthly to complete either the offline evaluation or the rebuttal process concerning his previous negative performance appraisal, before implementing the separation decision.

[3] Application, Annex 1.
[4] *Ibid.,* at para 16.
[5] *Ibid.,* at Annex 5.
[6] *Ibid.,* Annex 7.
[7] *Ibid.,* Annex 8.
[8] *Ibid.,* Annex 10.

c. In recognition of this procedural shortcoming, it was decided to award the Applicant compensation in the amount of three months' net base salary.

Parties' submissions

The Applicant

12. The Applicant's case is summarized below.

a. Where unsatisfactory service is the ground for non-renewal of an appointment, then the ePAD is required to be finalised as per the extant UNHCR Policy on Performance management.

b. The decision not to renew his contract was taken before the two ePADS were finalised. A finalised ePAD is one which if rebutted has gone through the process of rebuttal and the decision of the rebuttal panel has been given on the rating. In his case, none of the contentious ePADs were finalised.

c. The first ePAD covering the period 16 October 2019 to 29 February 2020 with rating 'partially meets expectation' had been rebutted by the Applicant and the rebuttal panel only came out with its decision in December 2021. The second ePAD covering the period from 1 June 2020 to 31 December 2020 was not completed or even initiated before the non-renewal decision was taken.

d. The management evaluation decision emphasised that the non-renewal was not based on the short ePAD but on the subsequent one. The management evaluation characterised the fault for non-completion of the second ePAD on the Applicant's delay in setting out the objectives and initiating the ePADS, due to which the performance issues could not be reflected in the ePAD. If that indeed was the case and the Administration was contemplating non-renewal on performance grounds it defies why they did not initiate an offline evaluation, like they finally did after issuing the notice of non-renewal.

e. The Administration was equally complacent in the completion of the ePADs because they knew about the difficulties faced by the Applicant with his reporting lines as well the technical issues faced by him leading to the delay. Whatever may be the case, the ePADs as they stood were not finalised when the decision was made in December 2020 to not renew the Applicant's contract and therefore it was erroneous and highly irregular for the Administration to not renew the Applicant's contract on non-finalised ePADs.

f. For the first time in the Respondent's reply, the previous ePADs comments (since 2016) have been included to indicate that the Applicant was aware of the performance issues. Neither the reference to the non-renewal letter dated 20 December 2020, the Administration's comments to management evaluation, nor the management evaluation decision talk of these previous performance issues. This was a last-minute attempt made by the Respondent to show that the Applicant was aware of the performance issues wherein they failed to produce contemporaneous documents indicating performance issues. The evidence that these old ePADs from 2016 were not relevant to the final decision to not renew is indicated from the fact that the Applicant despite these evaluations was promoted and joined the new office from a G-5 grade to a G-6 grade. It would be arcane that the Applicant was promoted whilst the Administration was concerned about his performance all those years right from 2016.

g. No productive steps were taken by the Applicant's supervisor to provide assistance, if Administration considered his performance was lacking. The Respondent claims that this is a contradictory stand since the Applicant claims he was not aware that his performance was lacking. It is not a contradictory stand, it is the Administration which has been claiming all along that the Applicant's performance was lacking (from far back in 2016) however, they have failed to show any support/remedial measures they took to assist him to improve his performance.

h. A serious procedural error was made when the Administration did not extend the Applicant's appointment when the ePAD was being rebutted. The Applicant had rebutted his ePAD for the period 16 October 2019 to 29 February 2020 and, therefore, the Administration should have extended his contract until such time as when the rebuttal process would be over. The management evaluation attempted to remedy the situation by granting three months' net base salary compensation. Whilst deciding on the compensation the management evaluation apparently considered the Applicant's own fault in not initiating the ePAD as well as referred to paragraph 14 of the Policy of FTAs which provides an extension of maximum of six months of contract extension for performance improvement to reach to three months' compensation. This formula devised by Respondent was highly arbitrary, erroneous and devoid of reason because:

i. Extension of contract is an automatic action when an ePAD is rebutted and it has no consequence that staff member has delayed an ePAD.

ii. Punishing a staff member for a mistake of the Administration is unfair and Respondent has taken an irrelevant factor into consideration.

iii. The management evaluation and the Respondent erroneously refer to paragraph 14 of the UNHCR Fixed-Term Appointments policy that limits contract extension to six months. Paragraph 14 is to be considered when contract extension is granted to improve performance and not in the case where a staff member rebuts an ePAD. Paragraph 4.6.13 of UNHCR/CHP/2014/12/Rev.1 (Policy on Performance Management) makes no restriction on the length of extension of contract because it is understood that the rebuttal process sometimes takes time as seen from the Applicant's case itself. The Applicant filed for rebuttal of his ePAD in Aug 2020 and the rebuttal panel decision came out after more than a year, in December 2021.

i. Contrary to the Respondent's contention, it is not the Applicant who delayed the second ePAD process. Active steps were taken by the Applicant upon joining the new office to change the ePAD period and initiate new ePADs. It was not only in June 2020 that there was confusion in creating the ePADs but right from December 2019, when the Applicant sought clarification from various authorities on how to proceed with the ePADs due to calculation of period of the ePADs, his Special Leave Without Pay ("SLWOP') break, and subsequently on whether two ePADS could be simultaneously started and kept active, and reporting lines. The technical issues were resolved by July 2020, however, there was a disagreement on the new ePADs with respect to the objectives particularly in the light that in August 2020, his supervisor rated him as 'partially meets expectation'. It is natural in the circumstances that a staff member would seek clarity on what was expected of him, where he went wrong in the previous cycle and what support would be provided to him going forward.

j. The email annexures and the meetings annexures submitted by the Respondent do not indicate that any of these issues were addressed. Even a meeting held on 7 July 2020 with the Representative was turned around and shown in the non-renewal letter as a meeting to discuss performance issues whereas the minutes of the meeting have no indication of the same. There was a breakdown of trust which the Administration failed to address. In the month of October 2020, the Applicant contracted COVID-19 and was on sick leave and after a few days in the office in November 20 he again went on sick leave due to long term COVID symptoms. Upon his return, within two weeks he was served with the non-renewal notice.

k. The Applicant's contract was not renewed within one year of joining a new office, no evidence of his performance deficiencies was noted except in the short ePAD. Even if there were deficiencies no remedial measures were instituted by way of performance improvement plans, extra training, guidance, or support. On the contrary, the Applicant, right from joining the office, faced

a hostile and unsupportive work environment which he complained about as evidenced, not only to his unit head but also the Representative. The Applicant had also sought the assistance of the Ombudsman's office. In conclusion, the Administration failed to meet the standard of review for non-renewal based on performance issues.

13. The Applicant requests the following reliefs:

a. Rescission of the contested decision and reinstatement or in the alternative, compensation.

b. To cover the United Nations Joint Staff Fund ("UNJSPF") payments of at least three months as the Applicant was just three months shy of completing five years for being entitled to withdrawal settlement.

c. Compensation for loss of insurance which resulted in the Applicant incurring medical bills for the miscarriage of his wife in January 2020 and medical expenses for self.

d. Compensation on grounds on moral damage.

e. To ensure an employment reference with a neutral record.

The Respondent

14. The Respondent's case is summarized below.

a. The reason for the Applicant's separation was his unsatisfactory performance.

i. The Applicant's performance from 16 October 2019 to 29 February 2020 was evaluated as "partially meets expectations". The evaluation shows a pattern of under-performance consistently flagged by his previous supervisors in another UNHCR office. The Rebuttal Panel rejected the Applicant's rebuttal and upheld the rating given by

his supervisor, albeit after his separation.

ii. Despite numerous requests, the Applicant never initiated his online ePAD for the subsequent period from 1 June to 31 December 2020, thus essentially preventing his supervisor from recording the evaluation in the official online format. The Applicant's under-performance was ultimately recorded in an alternative offline format.

b. The Applicant's separation was an appropriate action.

i. The evidence clearly demonstrates that the Applicant was aware of his performance shortcomings which were discussed, among others, during weekly meetings with his supervisor, by repeated instructions to create his ePAD and perform regular tasks, and, ultimately, through the offline evaluation conducted due to the Applicant's refusal to engage in the formal online process.

ii. The Applicant's supervisor was unable to formally record the Applicant's performance shortcomings in the official format because the Applicant wilfully ignored and failed to cooperate in or even to initiate the process. There is evidence of over 10 written reminders and at least four scheduled meetings in the period from 1 June to 13 September 2020. These requests remained largely unanswered by the Applicant.

iii. During the meeting of 13 September 2020, the Applicant insisted that he would create the 2020 ePAD only when his 2019 ePAD was discussed and finalised. The Respondent maintains that the Applicant had sufficient time, opportunity, and managerial support to initiate his 2020 ePAD, but he did not take any steps to do so. Accordingly, the Respondent maintains that the absence of a formal online ePAD is attributable to the Applicant.

iv. As a result, the office had to resort to an alternative offline process with comparable safeguards. The Applicant was given an opportunity, which he ignored, to provide his self-evaluation. Nevertheless, the office shared with him the offline evaluation and gave him the opportunity to provide his comments. His comments were placed on his file. The Applicant did not request the office to submit his offline evaluation to the Rebuttal Panel.

v. Despite the Applicant's failure to cooperate in not only the online but also the alternative offline process, the office nevertheless decided to finalise the Applicant's evaluation in an alternative format, albeit after his separation.

vi. In the case of unsatisfactory performance, UNHCR's framework gives the Administration two equal alternatives to either (i) let the FTA expire, or (ii) exceptionally extend the FTA for maximum six months in order to assess performance improvements. The Administration is not obliged to offer a PIP to underperforming staff, or to take other remedial measures before deciding not to renew the FTA due to poor performance.

vii. In the present case, the Representative did not consider it appropriate to use the option to further assess any performance improvements through an exceptional FTA extension for another six months. He decided, within the applicable framework, to proceed with the other option not to renew the Applicant's FTA expiring on 31 December 2020.

c. The Applicant was sufficiently compensated for any procedural irregularities.

i. In response to the Applicant's management evaluation request, the Administration considered that, before implementing his separation,

the Applicant's FTA should have been administratively extended on a monthly basis to complete either the offline evaluation (for June-December 2020) or the ongoing rebuttal (for October 2019-February 2020). The decision took into account the Applicant's non-compliance with his obligations under the Performance Management Policy as well as the fact that, under paragraph 14 of the Policy on the Administration of FTAs, in the absence of a satisfactory performance evaluation, an FTA may only be exceptionally extended for a maximum of six months.

ii. The Applicant received compensation for the procedural irregularity in the separation process in the amount of three months' net base salary.

iii. An award of six months net base salary would be excessive in the particular circumstances of this case, which were presented more fully in the reply. The doctrine of "clean hands" requires that a party claiming equitable relief has itself acted in accordance with equitable principles. The Applicant cannot knowingly fail to comply with his obligations in the performance evaluation process, and then seek compensation for irregularities in that same process. In view of the above, the Respondent maintains that the redress fully compensated the Applicant for the procedural irregularity. In this regard, the Respondent notes that the three months' worth of salary in any way exceeded the amount of salary the Applicant would have received had his contract been administratively extended on a monthly basis until the finalization of his offline evaluation until the end of February 2021.

15. Accordingly, the Respondent submits that the application should be dismissed in its entirety.

Ruling on the Respondent's Motion

16. The Respondent by motion sought leave to submit the Rebuttal Panel's report which was issued after this application was filed. The Tribunal notes that advance notice of intent to submit the report was given by the Respondent in paragraph 30 of the reply, and the Applicant did not raise any objection to the motion. Since there was advance notice of the request, the Applicant has not been taken by surprise by the motion. The reception of the report in evidence does not prejudice the Applicant. The motion to submit the rebuttal report is therefore granted.

Considerations

Legal framework

17. It is an established principle of law that an FTA carries no expectancy of renewal, and that unless the Administration has made an express promise that gives a staff member an expectation that the FTA will be renewed, or unless the Administration has abused its discretion, or was motivated by discriminatory or improper grounds in not extending the appointment, the non-renewal of a staff member's FTA is not unlawful.[9]

18. It is also established that while the non-renewal of an FTA is a distinct administrative decision that is subject to review and appeal,[10] a staff member whose performance was rated as "partially meets performance expectations" has no legitimate expectancy of renewal of his or her FTA.[11] In this regard UNAT has held that it would not be in accord with [staff regulation 1.3(a) and staff rule 1.3(a)] if the Secretary-General was 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

[9] *Ahmed,* 2011-UNAT-153, para. 47.
[10] *Obdeijn* 2012-UNAT-201, para. 31; *Schook* 2012-UNAT-216, para. 27.
[11] *Said* 2015-UNAT-500, para. 41; *Charot* 2017-UNAT-715, para. 47.

unlawful or unreasonable or as to violate the due process rights of the staff member in question.[12]

The standard of review in poor performance cases

19. The Administration must provide sufficient proof of incompetence, usually on the basis of a procedurally fair assessment or appraisal establishing the staff member's shortcomings and the reasons for them.[13] It has also been held 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, and the deficiency must be sufficiently serious to render the continuation of the employment relationship untenable.[14]

20. The decision not to renew the Applicant's contract was stated to have been due to his performance shortcomings, which were said to have been documented and discussed with him at various instances, including at the 7 July 2020 meeting, but which could not be formally recorded in the MSRP since he had not initiated an ePAD for the period 1 June 2020 to 31 December 2020 despite several requests to do so.

21. The issues for determination are;

a. Whether the Applicant had performance shortcomings;

b. Whether he was aware or could reasonably be expected to have been aware of the required performance standard;

c. whether he was given a fair opportunity to meet the required standard; and

d. whether the termination of his appointment was an appropriate action for not meeting the standard in the circumstances.

[12] *Ncube*, 2017-UNAT-721, paras. 19 and 20.
[13] *Sarwar*, 2017-UNAT-757, para. 71.
[14] *Ibid*., para. 72.

Whether the Applicant had performance shortcomings

22. The Applicant disputes the assertion that he had performance shortcomings and seeks to rely on the fact that he was promoted and he joined a new office from a G-5 grade to a G-6 grade. He submits that it would be arcane that he was promoted whilst the Administration was concerned about his performance all those years.

23. The Respondent is however positive that the Applicant had performance shortcomings which were documented in his performance evaluation records (Annex R-1). The 2016 ePAD for example bears comments that the Applicant,

> is still having difficulties performing some basic transactions in MSRP and needs frequent coaching. […] does not seem to show considerable progress […] shows difficulty to deal with incoming and outgoing shipment activities, as well as warehouse management practices comprehensively and independently. He does not show significant interest in the SOPs and regulations as a reference for his area of responsibility. […] consumes a lot of his time in the office on personal phone calls despite several reminders. Mohammad frequently comes to office late.
>
> He does not seem to take initiative by himself. Usually, Mohammad waits for me to assign a task. He does not focus on the job sufficiently during the day and requires constant follow-up and reminders for conducting and finalizing the tasks assigned to him. He denotes lack of follow-up in his office emails. […] when he receives a task, he does not take notes and forgets the requirements easily and need to ask about the contents of the task again. In November 2016, I requested Mohammad and his colleague Samer to review 175 PO files that were in the cabinet, in order to detect PO files that were incomplete. This would have meant 5 PO files per day, per person. By mid-February 2017 he had only reviewed 10 PO files despite daily reminders. When asked about the status of a particular task related to his function,
>
> Mohammad has a tendency to reply that he does not know the information or the course of action required, showing little initiative to inquire or look for the information. […] I suggest Mohammad to only focus on the job during the core working hours and to avoid the constant use of the phone for personal purposes. He is encouraged to take notes and establish a checklist for those MSRP transactions associated with his daily activities and functions. He is advised to listen to his line managers' constructive advice and apply them accordingly in order to keep building his professional capacities. Mohammad is requested to

follow up warehouse and office tasks with due diligence.

24. It is noteworthy that the Applicant had "*no problem with the overall rating and the mentioned corrective notes*", in the 2016 ePAD.

25. The Applicant did not comment in the 2017 ePAD evaluation that he had made progress, but that *"[w]hen fully dedicated to tasks, he performs very well […]*", or "*[t]he perception of Mohammad by his new supervisor and senior managers in the office will benefit from analysing and reacting to situations with more calm and a longer-term perspective, and always be concentrated and dedicated to work while at work.*"

26. He similarly did not comment in his 2018 ePAD evaluation that he should follow the schedule of agreed priorities, limit personal phone calls during the office hours, and timely arrive to the office in the mornings. Other comments were that the Applicant,

> […] did not show much interest and commitment to perform the duties, and that this behaviour was due to "difficulty to maintain the expected and required standards to perform two different functions. […] was struggling to understand his new duties […] the load of the year-end activities increased the stress and the tension to complete the daily tasks. […].

The supervisor reported that he had,

> spoken with Mohammad numerous times to motivate him and see his concerns and tried to boost and clarify his career paths and explore with him the advantages of having a professional development in procurement section to keep him inspired and help him to reach future business goals. But unfortunately, at that time Mohammed was not fully committed and it was difficult to bring any assigned activity to fruition. Mohammed failed to provide support when it was absolutely vital during the year-end activities. Consequently, this adversely affected the workload of the Procurement Officer. […].

27. The Applicant did not respond to the comments in the 1 January – 15 October 2019 ePAD assessment that he "*established a firm filing system and kept the*

procurement files up to date; however, this was not similarly replicated to maintain the procurement tracking sheet updated."

28. The only rebuttal the Applicant made was the statement that he had completed the procurement of visibility vests in four months instead of three weeks, which had been made in the 2016 ePAD. He was therefore fully aware of the existence and nature of all the comments in the various ePADs. It is therefore fair to conclude that he agreed with those evaluations.

29. The other shortcoming was the Applicant's alleged failure to initiate the 2020 ePAD. He asserts that the Administration was complacent in the noncompletion of his ePADs because they were aware about the difficulties he faced with his reporting lines and about the technical issues he faced which led to the delay. This argument does not however overcome the uncontroverted evidence that he failed to even initiate the process, which was the bare minimum he could have done. Initiation must be distinguished from completion of an ePAD and the Applicant's argument that the main delay for "non-finalisation" of the 2020 ePAD was attributable to his supervisor/the Office seems to ignore this crucial point. By failing to initiate or create the 2020 ePAD the Applicant failed to cooperate in the online performance evaluation process.

30. The Tribunal finds that the Applicant had performance shortcomings as evidenced by the 2016 to 2019 ePADs, and by the fact that he failed to initiate the 2020 ePAD.

Whether the Applicant was aware, or could reasonably be expected to have been aware, of the required performance standard

31. The Applicant maintains that no indication was given to him that he was not meeting the standard required from his job or that he had performance issues. The performance evaluation record (Annex R-1), however, shows that even though all ePADs from 2016 to 2019 concluded that his performance successfully met expectations, the three different supervisors and three different reviewing officers consistently recorded various performance shortcomings and areas for improvement.

That the Applicant successfully rebutted aspects of the 2016 ePAD evidences the fact that he was aware of shortcomings which had been highlighted in the evaluation process.

32. While disputing the assertion that his performance shortcomings were discussed at the meeting of 7 July 2020, the Applicant maintains that the meeting was called for him to highlight issues he faced with his supervisors as well the bias he had to endure from his supervisors. Minutes 7, 8 and 9 (Annex 3) indicate that the Applicant,

> [e]xpressed that he is suffering from provocative acts by his current supervisor (example: was asked to edit a document when he was waiting for a response to what he believed to be an important issue he had raised)
>
> 8. Stated his performance was affected due to lack of involvement, lack of clarity and lack of availability to communicate properly.
>
> 9. Expressed that he is spending 70% of his time on how to protect himself against office politics and 30% for work" …

33. All the above concerns are performance related issues, which confirms the fact that the Applicant's performance shortcomings were discussed at that meeting. The concerns raised by the Applicant directly related to some of the identified performance shortcomings including the Applicant having had difficulties in performing some basic transactions in MSRP and his needing frequent coaching, his late coming, his failure to show much interest and commitment in performing of his duties. There can be no doubt that the Applicant's performance shortcomings were discussed at that meeting.

34. Based on information in the various ePADs and on the Applicant's submissions in the 7 July meeting, the Tribunal finds that the Applicant was aware, or could reasonably be expected to have been aware, of the required performance standard.

Whether the applicant was given a fair opportunity to meet the required standard

35. The Applicant maintains that no steps were taken by his supervisors and reviewing officers to institute a Performance Improvement Plan ("PIP") and to provide

training or any other remedial measures so that he could improve on his performance. The Respondent, however, rightly argues that under the UNHCR's framework, the creation of a PIP is a possible, but not a mandatory step to address underperformance.

36. Section 4.6.4 of UNHCR/HCP/2014/12/Rev.1 (Revised Policy on Performance Management) provides that following the discussion of performance issues in accordance with section 4.6.2, the supervisor and the supervisee **may** (emphasis added) agree to establish a performance improvement plan for a period of at least three months and no more than six months. Clearly, the creation of a PIP to address underperformance is not mandatory.

37. The Tribunal agrees with the Respondent that offering a PIP to the Applicant or affording him an opportunity to improve over the course of another appointment or other remedial measures before deciding not to renew his contract due to poor performance was only optional. The Administration was not legally obligated to pursue that line.

38. Moreover, the Tribunal does not agree with the implied suggestion that the only fair opportunity which could be availed to the Applicant was the institution of a PIP and training. The other obvious intervention (and which was pursued) was through conducting transparent discussions with the Applicant while reminding him of his obligations and allowing him time to deal with his performance shortcomings. The fact that the Applicant was retained and even promoted, rather than being viewed as having been based on his good performance, must be taken as having been an opportunity for him to improve. His being retained over time and his promotion were therefore in spite of his performance shortcomings and not because of good performance.

39. The Tribunal finds that the Applicant was given a fair opportunity to meet the required standard, and that the Administration did not err by not availing him more opportunities to improve considering the totality of circumstances in this case.[15]

[15] *Charot, op cit.*, para 50.

Whether termination of the Applicant's appointment was an appropriate action for not meeting the standard in the circumstances

40. Relying on sections 4.6.3 and 4.6.12 of UNHCR/AI/2015/3/Rev.1 (Revised Policy on Performance Management), the Applicant submits that since the ePADs had not been finalized (the first ePAD covering the period 16 October 19 to 29 February 20 was still under rebuttal and the ePAD for the period 1 June 2020 to 31 December 20 had not been completed), his contract should have been renewed until the finalization of his ePADs. He therefore maintains that the decision not to renew his contract was irregular.

41. On the other hand, the Respondent relies on section 14 of UNHCR/HCP/2015/9 (Policy on the Administration of Fixed-Term Appointments) ("the FTA Policy") to justify the non-renewal decision. Section 14, provides that a recommendation by the staff member's manager supported by a performance appraisal with an overall rating of "successfully meets performance expectations" or higher is required for a renewal, and that if a staff member does not have the required rating for a renewal, the manager may recommend to let the FTA expire or to exceptionally extend it for up to six months in order to assess performance improvements.

42. Section 14 does not support the decision not to renew a contract before the ePADs are finalized. The Applicant's complaint that the non-renewal decision was irregular since his ePADs had not been completed is therefore valid.

43. That the ePAD has since been completed and the "partially meets expectation" rating upheld by the rebuttal panel, the section 14 provision that the manager may recommend to let the FTA expire where a staff member does not have the required rating for a renewal (of the FTA) comes into play.

44. It is recognized that the non-renewal decision was irregular at the time it was made. But factors such as that the Applicant failed to initiate the ePAD in spite of repeated reminders and substantially contributed to the occurrence of the irregularity cannot be ignored. That the reasons which formed the basis for the decision have since

been upheld, and that the Applicant was compensated in the management evaluation for the procedural irregularities constrain the Tribunal to stop at making a finding that the non-renewal decision was irregularly made. Remedies such as a recission order, reinstatement of the Applicant and compensation are not tenable under the circumstances of this case.

45. The Applicant's argument that the Administration was equally complacent in the noncompletion of the ePADs because they knew about the technical issues and difficulties he faced with his reporting lines leading to the delay is outright incorrect. It is in evidence that the Applicant was given multiple opportunities for assistance,[16] and that he was guided on how to draft objectives.[17] The Performance Policy was shared with him on 18 June 2020 and multiple email reminders were sent to him over the course of at least four months.[18]

46. The Applicant does not dispute the evidence that he did not respond to most of the written reminders, with a few exceptions, such as the reply of 23 August 2020 in which he wrote that "*[a]s for ePAD, we need to discuss the previous evaluation and the level of collaboration during the previous reporting period. Once the environment is clear and healthy we can discuss the new ePAD*", (Annex R-6) and his response in the 13 September 2020 meeting (Annex R-8). In both responses he conditioned his starting of the 2020 ePAD on the discussion and finalization of the 2019 ePAD, thereby obstructing the performance management process.

47. The Applicant is challenging the quantum of money he was awarded in compensation. In this regard he faults the management evaluation for having considered his failure to initiate the ePAD in determining the quantum of compensation he was awarded. The Tribunal however finds that based on the finding that the Applicant actively prevented the Administration from strictly complying with its policies, his failure to initiate the ePAD was a valid consideration. Allowing him to

[16] Annex R-2, pages 11, 14 and15.
[17] Annex R-3, pages 10, 12 and 18.
[18] See for example Annex 3 to the application and Annex R-5.

benefit from his actions in a substantial manner would have offended the principles of equity and the doctrine of "clean hands".

48. The argument that extension of a contract is an automatic action when an ePAD is rebutted and that it is irrelevant that a staff member delayed an ePAD must have been the basis on which the compensation was paid. It must be emphasized that the compensation was only in recognition of the fact that procedural irregularities were committed in the separation process (i.e., that the decision was implemented before the finalization of the Applicant's online or offline performance evaluation).

49. It was neither contradictory nor erroneous/illegal to have considered factors which surrounded the process in determining the quantum of compensation. The fact that Para 4.6.13 of UNHCR/CHP/2014/12/Rev 1 makes no restriction on the length of extension of contract and that the rebuttal process took a long time to be completed do not justify a higher award than the compensation of three months' net base salary of JOD5,917.75 (approx. USD8,350) (Annex R-17) which was allowed.

Conclusion

50. The totality of circumstances as now known including the nature of performance shortcomings which include that the Applicant,

> did not deliver a single output/task on time […] [S]everal requests to issue POs and receipts for different services […] were sent to Mohammad with no response from his side […] No on-time updates about tasks or about his leave/absence and that made it difficult for us to follow up with him on his tasks. That led to several delays on all his tasks and also lack of delivery to our clients. […] The staff member was always seeking guidance from his supervisor even on minor tasks and did not provide guidance [to clients] himself. […] The staff member missed several […] meetings […] where he was supposed to provide input on his pending tasks and also missed most of the team's weekly meetings. He never made any efforts to update the frame agreement tracker or the monthly Country Financial Report. […]
>
> [H]e needs to work on his time management skills in order to deliver a better quality outcome, he needs to pay attention to details and make sure he properly follows the procurement rules and regulations of

> UNHCR. He should respect the office working hours […], focus on his assigned tasks […] and work on his communication skills […]

support a finding that the termination of the Applicant's appointment was an appropriate action for not meeting the performance standards, and that the amount awarded to him in compensation for procedural irregularities was fair.

51. The Respondent has proved that the Applicant had performance shortcomings of which he was aware or could reasonably be expected to have been aware. The Applicant was given a fair opportunity to meet the required standard. The Tribunal finds that the termination of his appointment was an appropriate action for not meeting the standard. The Administration was entitled not to renew his appointment on the ground of under-performance alone.[19]

52. The Applicant has not shown that the contested decision was motivated by prejudice towards him. He has not shown the existence of some other extraneous factor and therefore failed to discharge the burden of proving improper motivation. The Tribunal finds that the non-renewal constituted a proper exercise of the Secretary-General's discretion.

Judgment

53. The application is rejected in its entirety.

(Signed)
Judge Margaret Tibulya
Dated this 29th day of July 2022

[19] *Ahmed, op cit.*

Entered in the Register on this 29th day of July 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi