



**Before:** Judge Sun Xiangzhuang

**Registry:** Geneva

**Registrar:** René M. Vargas M.

AWAD

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Alister Cumming, UNICEF

Chinonyelum Esther Uwazie, UNICEF

## **Introduction**

1. The Applicant, a former Planning and Monitoring Specialist at the United Nations Children's Funds ("UNICEF"), Cambodia Country Office ("CCO"), contests the decision not to renew his fixed-term appointment ("FTA") beyond 31 January 2022 due to unsatisfactory service.

2. For the reasons set out below, the Tribunal rejects the application in its entirety.

## **Facts and procedural history**

3. On 25 February 2021, the Applicant's supervisor, the Deputy Representative, Programme, CCO, completed the Applicant's 2020 Performance Evaluation Report ("PER"), giving him an overall rating of "solid achievement" while detailing several areas for improvement.

4. Following several exchanges about performance between the Applicant, his supervisor, and Representatives of Human Resources ("HR"), the Applicant was placed under a Performance Improvement Plan ("PIP") on 2 August 2021 for three months.

5. On 15 November 2021, the Applicant's supervisor concluded the PIP assessment. He indicated, *inter alia*, that while the Applicant met the overall timelines for completion of actions, the quality of his deliverables was not satisfactory.

6. On 3 December 2021, the Applicant rebutted the PIP outcome. In his rebuttal statement, the Applicant challenged the validity of the outcome of the PIP evaluation and the process followed. He also affirmed that his supervisor was motivated by bias against him, and questioned the negative ratings on his deliverables as well as the denials on his request for mediation.

7. On 7 January 2022, an external rebuttal reviewer issued a rebuttal report determining, *inter alia*, that the objectives of the PIP were in line with the work programme and expected outcomes, that the Applicant had regular performance evaluation meetings with his supervisor during the PIP, that the final evaluation properly reflected the Applicant's actions and deliverables, and that there was no evidence that the Applicant's supervisor was motivated by bias against him. As a result, the reviewer concluded that the PIP outcome was supported by the facts and should not be changed.
8. On 11 January 2022, the acting Director, Division of Human Resources ("DHR"), UNICEF, endorsed the rebuttal report.
9. By letter dated 18 January 2022, the Applicant was informed that his FTA would not be renewed due to unsatisfactory service. This was later confirmed by a separation from service notice dated 21 January 2022.
10. On 31 January 2022, the Applicant separated from service.
11. On 16 March 2022, the Applicant requested management evaluation of the decision not to renew his FTA.
12. By letter dated 29 April 2022, the Deputy Executive Director, UNICEF, upheld the decision not to renew the Applicant's FTA.
13. On 25 July 2022, the Applicant filed the instant application.
14. On 2 September 2022, in line with the Tribunal's instructions on the correct format of the annexes to the reply, the Respondent filed a revised reply, which substituted his initial submission of 31 August 2022.
15. By Order No. 78 (GVA/2023) of 18 July 2023, the Tribunal decided that the matter could be determined on the papers, and requested the parties to file closing submissions.
16. On 24 and 31 July 2023, the Applicant and the Respondent respectively filed their closing submission.

## Consideration

*Whether the application is receivable*

17. The Respondent claims that a part of the application is not receivable *ratione materiae* as it challenges the placement of the Applicant in a PIP and the outcome of that process.

18. Secs. 4.8 and 6.1 of Administrative Instruction in Performance Management (CF/AI/2011-001/Amend 2) (“Performance Policy”) at UNICEF read as follows:

4.8 The initiation or extension of a PIP is not subject to rebuttal or appeal, however the outcome of the PIP can be rebutted pursuant to paragraph 5.3.

...

6.1 The final performance ratings and/or comments resulting either from a PER or PIP that has not been rebutted or after rebuttal, are not subject to appeal. However, where a staff member or former staff member has grounds to believe that the procedure followed under this policy was improper, he/she may challenge an administrative decision that stem[s] from the appraisal in accordance with UN Staff Rule 11.2 and CF/AI/2010-008 on Appeals.

19. Based on the above, the initiation of a PIP and the final performance ratings and/or comments resulting from it after rebuttal are not subject to appeal.

20. Notwithstanding, even if the above were allowed, the Applicant never requested management evaluation of the decision to initiate a PIP or of its outcome. Pursuant to staff rule 11.2(a), a staff member wishing to contest an administrative decision shall, as a first step, submit to the Secretary-General, in writing, a request for a management evaluation of the contested administrative decision. It is settled case law that requesting management evaluation is a mandatory first step for access to the internal justice system (*Olowo-Okello* 2019-UNAT-967, para. 25). Absence of it renders it impossible for the Dispute Tribunal to exercise its jurisdiction.

21. Accordingly, the Tribunal finds that the application is not receivable *ratione materiae* in respect of the decision to place the Applicant in a PIP and of the outcome of that process.

22. The application is receivable insofar as it challenges the decision not to renew the Applicant's appointment based on unsatisfactory service.

*Legal framework and scope of judicial review*

23. It is an established principle of law that, under staff regulation 4.5(c) and staff rule 4.13(c), an FTA carries no expectancy of renewal, legal or otherwise.

24. The Administration is, nevertheless, required to state the reasons for a non-renewal to ensure that the Tribunal can judicially review the validity of the decision, and this reason must be lawful and supported by the facts (*Islam* 2011-UNAT-115, paras. 29-32; *Obdeijn* 2012-UNAT-201, paras. 33-39; *Nouinou* 2019-UNAT-902, para. 50; *He* 2018-UNAT-825, para. 46).

25. In this context, non-renewal decisions can be challenged on the grounds that the staff member had a legitimate expectation of renewal, that there was a relevant procedural irregularity, or that the decision was arbitrary or motivated by bias, prejudice, or improper motive (*Obdeijn*, para. 33; *Ahmed* 2011-UNAT-153, para. 45-46; *Frechon* 2011-UNAT-132, para. 44).

26. The United Nations Appeals Tribunal has held that it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to it. Nor is it the role of the Dispute Tribunal to substitute its own decision for that of the Secretary-General (*Kule Kongba* 2018-UNAT-849, para. 27).

27. In cases of unsatisfactory performance, the Administration must provide sufficient proof of said poor performance on the basis of a procedurally fair assessment or appraisal establishing the staff member's shortcomings and the reasons for them (*Sarwar* 2017-UNAT-757, para 71-72).

28. It is clear from the foregoing that the Dispute Tribunal is mandated to review decisions related to non-renewal of appointments, including in cases of poor performance, but that said review is limited in scope in that it can only examine whether the decision was unlawful and/or tainted by bias or ulterior motives.

29. In light of the above, and after a careful review of the case and the evidence on record, the Tribunal identifies the following legal issues for determination:

- a. Whether the Applicant's performance was evaluated in a fair and objective manner;
- b. Whether the contested decision was tainted by bias or improper motives; and
- c. Whether the Applicant is entitled to any remedies.

*Whether the Applicant's performance was evaluated in a fair and objective manner*

30. The Applicant disputes the assertion that he had performance shortcomings and seeks to rely on the fact that he was given a "solid achievement" rating in his 2020 PER. In this regard, he contends that the decision not to renew his FTA was unlawful and based on a vitiated performance appraisal.

31. In addition, the Applicant submits that there were significant procedural irregularities during the PIP that violated UNICEF guidelines, which would render unlawful the process and its outcome.

32. The Respondent submits, however, that there were no procedural irregularities and that, regardless of the overall rating given to the Applicant in his 2020 PER, he was properly made aware of his performance shortcomings, which were highlighted and detailed not only in his PER, but also during email and in-person exchanges between the Applicant and his supervisor. The Respondent also advances that the Applicant was given time, support and opportunity to improve his performance through the initiation of a PIP, but his performance did not improve.

The Applicant's performance

33. The Applicant had two supervisors during the performance cycle of 2020: the CCO Deputy Representative, Programme, who supervised him during the first half of 2020, and the newly appointed CCO Deputy Representative, Programme, who

supervised him during the second half of 2020. The UNICEF Representative, who joined the CCO mid-2020, acted as the Applicant's second reporting officer.

34. Both supervisors provided their assessment of the Applicant's performance for the period they respectively supervised him, with the second supervisor completing the Applicant's PER. In the PER, the Applicant was given an overall rating of "solid achievement", and, in the comments section, several areas of performance were highlighted in need of development.

35. Specifically, the Applicant was told he needed to be more proactive in his planning, including improving processes for collaboration with other sections and coordination of their inputs in the reports of the Country Office, improving quality assurance of information in reports and other documents, and improving management of staff, such as in planning, delegation, and feedback.

36. During a meeting on 5 May 2021 between the Applicant, his supervisor and an acting HR Manager, the Applicant was informed that, further to his 2020 PER, a PIP would be initiated to improve his performance shortcomings concerning, *inter alia*, quality assurance, planning and coordination, and management of a team. At the time, the Applicant was also informed that the PIP would be initiated for a period of three months, even if he did not consent to it. Subsequent meetings on the same subject followed on 14 May and 2 June 2023.

37. By email dated 2 August 2021, the Applicant received a clean version of the PIP and was informed that the PIP would run from that moment until 1 November 2021.

38. In the Tribunal's view, the PIP provided sufficient information on the Applicant's job requirements. It explained in detail the Applicant's shortcomings and the remedial actions that were required of him. It also gave the Applicant specific tasks in relation to the areas of concern, each with a respective timeline, and established the metrics to be used to measure his progress.

39. After the PIP was initiated, the Applicant's performance was closely monitored and documented by his supervisor through bi-weekly check-in meetings. The supervisor provided the Applicant and the HR Manager with the meeting notes after each meeting.

40. When the PIP ended, however, the Applicant's supervisor assessed that he had failed to improve his performance. The Applicant sought a rebuttal of the PIP outcome, which was subsequently upheld by an independent rebuttal reviewer.

41. Following the rebuttal, the acting Director, DHR, endorsed the rebuttal review report and later informed the Applicant of the decision not to renew his FTA due to unsatisfactory service.

The lawfulness of the decision

42. The relevant parts of the Performance Policy of UNICEF read as follows:

*Performance improvement plan (PIP)*

...

4.8 The initiation or extension of a PIP is not subject to rebuttal or appeal, however the outcome of the PIP can be rebutted pursuant to paragraph 5.3.

4.9 Depending on the outcome of the PIP, the following options apply:

...

- c) If, in the supervisor's opinion, the staff member has failed to improve his/her performance, and has not reached the desired outcome (as per paragraph 4.5) the PIP will be closed, a final report provided to the staff member and the supervisor will recommend to the Director, DHR (footnote omitted) through the relevant Head of Office (footnote omitted) and Regional/Division Director the separation of the staff member for unsatisfactory service, either by non-renewal (i.e. expiration of appointment) or termination of appointment in accordance with UN Staff Regulation 9.3, and Staff Rules 9.6 (h) and 9.7.



4.10 Appointment may only be terminated or let expire for unsatisfactory service if the staff member has been put on a PIP and given an opportunity to improve his/her performance in accordance with this section.

...

*PIP rebuttal*

5.3 A staff member can initiate a PIP rebuttal process if he/she does not agree with the supervisor's conclusion that his/her performance did not improve (as per paragraph 4.9(c)) during the PIP, and he/she already attempted to resolve the disagreements using the remedies described in paragraph 5.1 prior to submitting a rebuttal request.

43. It is settled case law that performance appraisals fall within the scope of administrative matters that are under the discretionary authority of the Secretary-General. As stated in the seminal case of *Sanwidi* 2010-UNAT-084, para. 40:

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal 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.

44. The Dispute Tribunal must accord deference to the Administration's appraisal of the performance of staff members, and cannot review *de novo* a staff member's appraisal, or place itself in the role of the decision-maker and determine whether it would have renewed the contract based on the performance appraisal (*Said* 2015-UNAT-500, para. 40).

45. In this sense, the primary task of the Tribunal “is to decide whether the preferred and imposed performance standard was not met and to assess whether an adequate evaluation was followed to determine if the staff member failed to meet the required standard. There must be a rational objective connection between the information available and the finding of unsatisfactory work performance” (*Sarwar*, para. 74).

46. In the case at hand, the Tribunal finds that, based on all of the above, there is sufficient documentary evidence showing that ever since the 2020 PER, the Applicant was properly made aware of the performance shortcomings he needed to address and improve. He was placed on a PIP that was structured and designed specifically for him, and he was provided with adequate support and guidance to improve.

47. Having identified, documented, and addressed the Applicant’s performance shortcomings through the applicable rules and the Performance Policy of UNICEF, the decision not to renew his FTA based on unsatisfactory service, taken after the Applicant was found not to have improved his performance despite being given the necessary support, was in full compliance with the applicable rules.

48. The Tribunal highlights that the fact that the Applicant was given a “solid achievement” rating in his 2020 PER is not a sufficient argument to support a claim that he did not have performance shortcomings. Not only the Performance Policy of UNICEF does not require a specific rating to place a staff member on a PIP but, also, established jurisprudence has already determined that a PER does not need to rate a staff member’s performance as “unsatisfactory” to support a non-renewal decision based on poor performance (*Morsy* 2013-UNAT-298, para. 20; *Said*, para. 41).

49. Finally, the alleged procedural irregularities, such as the lack of the Applicant’s signature in the PIP, and the decision not to engage in mediation during the PIP, despite the Applicant’s requests, are not relevant in the determination of the lawfulness of the decision not to renew an appointment due to unsatisfactory service.

50. In fact, the Applicant availed himself of the prescribed avenue to remedy disagreements following a PIP, pursuant to sec. 5.3 of the Performance Policy, namely the rebuttal process. The Applicant's supervisor was not compelled to engage in mediation during the PIP.

51. Accordingly, the Applicant's performance was evaluated in a fair and objective manner, and the contested decision is lawful.

*Whether the contested decision was tainted by bias or improper motives*

52. The Applicant submits that the initiation of a PIP coincided with the period when his contract was due for renewal, and that said timing raises concerns about potential motives to block the renewal of his appointment. He further submits that his supervisor was motivated by bias against him.

53. 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 (*El Sadek* 2019-UNAT-900, para. 54; *Nwuke* 2015-UNAT-506, para. 49; *Kashkinbekov* UNDT/2022/027, para. 114).

54. In addition, the Applicant bears the burden of proving that the discretion not to renew his appointment was not validly exercised (*Hepworth* 2015-UNAT-503, para. 44).

55. In the case at hand, the Applicant's assertions can only amount, at best, to speculation. There is no evidence on record to support that he was given differential treatment, treated unfairly, or that the decision not to renew his FTA was improperly motivated.

56. On the contrary, the evidence points to the Applicant being given every opportunity to improve his performance, and to both his supervisors and HR personnel being invested in helping him improve.

57. Therefore, the Applicant has not discharged his burden of proving that the contested decision was tainted by bias or improper motives.

*Whether the Applicant is entitled to any remedies*

58. Since the contested decision is deemed lawful, the Applicant is not entitled to any remedy.

**Conclusion**

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

*(Signed)*

Judge Sun Xiangzhuang

Dated this 28<sup>th</sup> day of September 2023

Entered in the Register on this 28<sup>th</sup> day of September 2023

*(Signed)*

René M. Vargas M., Registrar, Geneva