
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/009

Judgment No.: UNDT/2014/110

Date: 6 August 2014

Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

WEERASOORIYA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Yamuna Balasuriya

Counsel for Respondent:

Andreas Ruckriegel, UNFPA

The Panel reviewed the new post profiles, the present job description and the IPP as well as the latest performance record and PAR history.

...the Panel decided to conditionally confirm you in the post of

Outputs”; “Not Proficient” for the section “Core Competencies”; “Developing Proficiency” for the section “Functional Competencies”; and “Partially Achieved Output” for the section “Development Outputs”.

2008 PAD

13. On 11 April 2008 and 3 July 2008, the Applicant and her supervisor, respectively, finalized the Performance Planning for her PAD for the 2008 performance period. The mid-year progress review was signed off by both of them on 13 and 14 October 2008, with both their comments. On 6 and 9 April 2009, they signed off on the year-end appraisal. The Applicant was provided with the overall ratings of “Did Not Achieve Outputs” for the section “Work Plan Outputs”; “Not Proficient” for the section “Core Competencies”; “Developing Proficiency” for the section “Functional Competencies”; and “Did Not Achieve Outputs” for the section “Development Outputs”.

14. On 11 July 2009, the Applicant filed a rebuttal of her 2008 PAD. On 16 February 2010, the Rebuttal Panel issued its report which stated:

A. Decision

...the supervisor’s overall ratings for workplan outputs and on core and functional competencies have been substantiated mainly through feedback provided by the multiple reports and discussions between [the Direction for Human Resources] and Management of the Asia and Pacific Division. In light of this information the Rebuttal Panel decided that:

The Overall rating for workplan outputs is maintained as ”Did Not Achieve” the Overall Rating for core competencies is maintained as “Not Proficient” and the Overall rating for Functional competencies as “Developing Proficiency”.

...

D. Conclusion

1. ...the Rebuttal Panel is of the opinion that the Overall Ratings of the PAD are well substantiated.

...

4. The Overall Ratings made by the supervisor are maintained by the rebuttal panel.

Separation from service

15. On 16 March 2010, the Director of the Division for Human Resources (“DDHR”) prepared a document entitled “Determination of Unsatisfactory Performance” regarding the Applicant’s service with UNFPA. The memorandum included a review of the applicable policies; the Applicant’s performance appraisals for the years 1996 through 2008; the rebuttals against the 2004 and 2008 performance appraisals; the procedures followed in preparing the 2004 through 2008 performance appraisals and the following final determination:

I. Applicable policy provision:

1. The UNFPA Separation policy of 25 July 2006, para. 10.3.7, provides:

...the Director, DHR, may determine that the performance of any staff member is “unsatisfactory” if the staff member received combined performance ratings as follows:

- (a) Performance is appraised *in two consecutive intervals* as not achieved/non proficient regarding at least one combined performance rating;
- (b) Performance is appraised in *three consecutive intervals* as partially achieved/developing proficiency regarding at least one combined performance rating.

II. Does the staff member fall within the scope of para. 10.3.7 of the UNFPA Separation policy?

2. Since the promulgation of the UNFPA Separation policy of 25 July 2006, [the Applicant’s] performance has been appraised in PAD by her supervisors as follows:

For 2006: (i) partially achieved outputs; (ii) developing core competency proficiency; (iii) developing functional competency proficiency;

For 2007: (i) partially achieved outputs; (ii) not proficient in core competency; (iii) developing functional competency proficiency;

For 2008: (i) did not achieve outputs; (ii) not proficient in core competency; (iii) developing functional competency proficiency.

performance was unsatisfactory and had, on 1 April 2010, recommended the Applicant's termination from service. As required, this recommendation was referred to the CRB who, on 4 June 2010, endorsed the DDHR's recommendation. This memorandum attached the DDHR's 16 March 2010, 1 April 2010 and 4 June 2010 memoranda.

19. On 29 June 2010, the Applicant sent a letter to the Executive Director, UNFPA in response to a request that she provide any observations regarding the recommendation that her appointment be terminated.

20. On 15 July 2010, the Executive Director addressed a letter to the Applicant entitled "Termination of your permanent appointment" where he concluded that the Applicant's appointment was being terminated subject to the conditions stipulated in the letter.

21. On 23 July 2010, the Applicant was called into a meeting with the Chief, Security Advisor, United Nations Department for Safety and Security and a Representative of UNFPA for the purpose of providing her the 15 July 2010 termination letter. Prior to the meeting, the Applicant informed the participants that her lawyer had advised her to only participate in the meeting if it was being recorded. Due to the conditions set by the Applicant, the meeting ended with the Applicant "refus[ing] to accept the letter or have any further discussion ...". That same day, the DDHR sent an email to the Applicant whereby he stated that "UNFPA will count Friday, 23 July 2010, as the day on which [she received the Executive Director's letter dated 15 July 2010]". The email included a scanned copy of the letter.

22. On 20 September 2010, the Applicant addressed a letter to the Secretary-General of the United Nations requesting management evaluation of the decision to separate her from service. This letter was transmitted to the Executive Director, UNFPA three days later.

Consideration

Receivability

30. The Applicant is contesting the 15 July 2010 administrative decision, notified to her on 23 July 2010, to terminate her permanent appointment for unsatisfactory service. The Applicant requested management evaluation on 20 September 2010, within 60 days from the date of notification of the decision. The Applicant received a response upholding the decision on 27 October 2010. Upon being granted an extension of time to file her application in response to her 24 January 2011 request for extension, the Applicant filed her appeal on 15 February 2011.

31. The present case meets all of the receivability requirements identified in art. 8 of the Dispute Tribunal's Statute.

Applicable law

32.

Section 2

Purpose

2.1 The purpose of the Performance Appraisal System (PAS) is to improve the delivery of programmes mandated by the General Assembly by optimizing performance at all levels. The PAS will achieve this by:

- a) Promoting the desired culture of high performance and continuous learning;
- b) Empowering managers and holding them responsible and accountable for managing and motivating their staff;
- c) Encouraging a high level of staff participation in the planning, delivery and evaluation of work;
- d) Recognizing successful performance and addressing

...

Section 8

Mid-point performance review

...

8.3 As soon as a performance shortcoming is identified, the first reporting officer should discuss the situation with the staff member and take steps to rectify the situation, such as the development of a performance improvement plan, in consultation with the staff member.

Section 9

Appraising performance

9.1 At the end of the performance year, the first reporting officer and the staff member shall meet to discuss the overall performance during the reporting period. The first reporting officer appraises the extent to which the staff member has achieved the performance expectations as agreed in the work planning phase.

9.2 Prior to the appraisal meeting between the first reporting officer and the staff member, the staff member should review the manner in which he or she has carried out the work plan defined at the beginning of the performance year. The staff member may provide a self-appraisal as a basis for the discussion. The self-appraisal should provide a brief summary of the major accomplishments, and may include additional work activities, such as participation on a task force or focal point for a project. The staff member may also comment on the supervision received during the performance year.

...

9.4 Appraisals are reviewed by the second reporting officer, who may make comments, as appropriate. Finalized appraisals are signed by the first reporting officer, the second reporting officer and the staff member. The staff member's signature is an acknowledgement that the appraisal has been received, and is without prejudice to the right of the staff member to initiate a rebuttal process in accordance with section 14.

...

Section 10

Rating system

...

10.3 Staff who have not fully met performance expectations should be given one of the following two ratings:

- Partially meets performance expectations;

Section 15

Rebuttal process

15.1 Staff members who disagree with the performance rating given at the end of the performance year may, within 30 days of signing the completed performance appraisal form, submit to their Executive Office at Headquarters, or to the Chief of Administration elsewhere, a written rebuttal statement setting forth briefly the specific reasons why a higher rating should have been given. Staff members having received the rating of “consistently exceeds performance expectations” may not initiate a rebuttal. The rebuttal statement shall contain the names of the three individuals, one from each of the three groups identified in section 14.1, whom the staff member has selected to serve on the rebuttal panel. A copy of the rebuttal statement shall be placed in the staff member’s official status file.

15.2 After receiving a copy of the rebuttal statement, the head of department or office, or his or her representative, shall promptly prepare and submit to the rebuttal panel a brief written statement in reply to the rebuttal statement submitted by the staff member. A copy of the reply to the rebuttal statement shall be given to the staff member and placed in his or her official status file. Unless geographical location makes it impractical, the panel shall hear the staff member, the first and second reporting officers and, at the discretion of the panel, other staff members who may have information relevant to

Section 16

Performance Appraisal System and salary increments

...

16.4 One annual rating of “partially meets performance expectations” may justify the withholding of a salary increment, provided it is documented that, during the corresponding performance year, a performance improvement plan was put into place, in accordance with section 8.3, but that the staff member’s performance failed to rise to a level that would justify a rating of “fully successful performance”.

16.5 Two consecutive annual ratings of “partially meets performance expectations” shall

United Nations Joint Staff Pension Fund, the terms of those Regulations and Rules shall prevail over the terms of this policy.

Section 4

Types of separation

4.1 Separation is the consequence of any one of the following circumstances:

- (a) Expiration of an appointment for a fixed term;
- (b) Resignation;
- (c) Retirement;
- (d) Abandonment of post;
- (e) Death;
- (f) Termination of appointment:
 - (i) Following abolition of post or reduction of staff;
 - (ii) For reasons of unsatisfactory performance;
 - (iii) For reasons of health;
 - (iv) Following disciplinary action; and
 - (v) Following agreed termination in the interest of the Organization.

4.2 Below, the circumstances that may result in separation are addressed separately.

...

Section 7

Retirement

7.1 Staff Rule 109.6 provides that the “retirement under article 28 of the United Nations Joint Staff Pension Fund Regulations shall not be regarded as a termination within the meaning of the Staff Regulations and Rules”.

7.2 Age of retirement: As provided in Staff Regulation 9.5, “staff members shall not be retained in actual service beyond the age of sixty

7.5 Under Staff Regulation 9.5, the executive Director may, in the interest of UNFPA and subject to his/her discretion, extend a staff member's service in exceptional cases beyond the age of 60 or 62 years, as the case may be.

7.6 Early retirement: Article 29 of the Regulations of the UN Joint Staff Pension Fund provides that an early retirement benefit shall be payable to a participant who is at least 55 but less than the normal retirement age and whose contributory service was five years or longer.

7.6 Notification: Staff members who are retiring should be notified of their impending separation from service *at least one month* in advance.

7.7 Re-employment following retirement: For the rules pertaining to re-employment of retirees, refer to the UNFPA policy on Employment of Retirees.

...

Section 10

10.1 General information and procedures:

10.1.1 Definition: Termination within the meaning of the Staff Regulations is defined as a "separation from service initiated by the "Executive Director of UNFPA" "other than retirement ... or summary dismissal for serious misconduct" (Staff Rule 109.1(b)). Termination, therefore, is an action to end the permanent appointment of a staff member prior to reaching the normal age of retirement or the fixed term appointment of a staff member prior to the date of expiration as stipulated either in the Letter of appointment or in a subsequent personnel action.

10.1.2 Approval by the Executive Director for terminations of

subsequent approval of the termination of appointment by the Executive Director under section 10.1.2 (above) if applicable.

....

10.3 Termination following unsatisfactory performance:

10.3.1 A staff member's performance (in terms of either quantity or quality, or both) may be low or deteriorate to an extent that his/her service proves unsatisfactory and, as a result, his/her continued service with UNFP A is placed in question.

Regulatory framework:

10.3.2 Fixed-term appointment: The fixed-term appointment of a staff member, whose service is unsatisfactory, may be terminated (Staff Regulation 9.1(b)). Such termination may be imposed at any time

10.3.7 Determination regarding unsatisfactory performance:

Performance appraisals are made by supervisors in regular intervals. Such performance appraisals include one combined performance rating *each* for (1) “work plan output”, (2) “core competency proficiency” and (3) “functional competency proficiency”. For purposes of this policy, the Director, DHR, may determine that the performance of any staff member is “unsatisfactory” if the staff member received combined performance ratings as follows:

- (a) Performance is appraised in *two consecutive intervals* as not achieved/non proficient regarding at least one combined performance rating;
- (b) Performance is appraised in *three consecutive intervals* as partially achieved/developing proficiency regarding at least one combined performance rating

10.3.8 Following receipt of poor performance ratings in any performance interval, a formal performance improvement plan is required under the PAD system (see the PAD Guide Book). Furthermore, it is the responsibility of supervisors to identify performance deficits in the mid-year review process.

10.3.9 Should the staff member concerned have initiated a rebuttal proceeding under the terms of the UNFPA Policy on Performance Appraisal Rebuttal, the Director, DHR, should not make any determination regarding “unsatisfactory” performance before the rebuttal proceeding is completed.

10.3.10. If a staff member fails or refuses to participate in the PAD, he/she may be admonished. However, failure or refusal to participate in the PAD does not provide an avenue to circumvent the processes contained in this policy as they relate to determinations of unsatisfactory performance. Therefore, in such cases the supervisor retains the right and the obligation to render a written evaluation/appraisal of the staff member. This is accomplished equally in the PAD.

Exceptionally severe cases of unsatisfactory performance:

10.3.11. In exceptional cases, it may occur that a staff member's performance of one or several official acts, tasks, projects or similar undertakings is categorically below the standard of performance expected from the staff member, making it plainly unreasonable to provide the staff member with the privilege of an opportunity for improvement. A departure of this kind from the standards of performance must be exceptionally egregious or severe. In such a case, a determination by the Executive Director that the staff member's service is “unsatisfactory” may be justified immediately.

10.3.12. The Executive Director will see to it that the facts underlying the official act(s), task(s), project(s) or similar undertaking(s) have been established before he/she takes a final decision regarding the termination of the appointment.

Additional actions available to the supervisor:

10.3.13. In addition to terms and mechanisms contained in the PAD, the supervisor, when confronted either with one act or with a phase of sub-standard or deteriorating professional performance, may consider the following steps in order to (i) put the relevant staff member on notice that a lack of meaningful improvement might result in the termination of his/her appointment and (ii) assist the staff member in improving his/her performance:

(a) The concerned staff member may be given one or several verbal reminders or warnings by the supervisor, identifying the professional area(s) in relation to which the performance has lapsed from the required standards;

(b) The supervisor may notify the staff member in writing of his/her shortcomings and request that he/she bring his/her performance up to the standard expected and required. There are no formal requirements for such notification. It may be made by any appropriate means or means customary at the duty station, including memoranda standat yinyi. in wr2e,memorae” 8means3-4.8((e)-5

change or termination of a mandate, and in accordance with the standards of the Charter;

(c) If the Secretary-General terminates an appointment, the staff member shall be given such notice and such indemnity payment as may be applicable under the Staff Regulations and Staff Rules. Payments of termination indemnity shall be made by the Secretary-General in accordance with the rates and conditions specified in annex III to the present Regulations;

(d) The Secretary-General may, where the circumstances warrant and he or she considers it justified, pay to a staff member whose appointment has been terminated, provided that the termination is not contested, a termination indemnity payment not more than 50 per cent higher than that which would otherwise be payable under the Staff Regulations.

Rule 9.6

Termination

Definitions

(a) A termination within the meaning of the Staff Regulations and Staff Rules is a separation from service initiated by the Secretary-General.

(b) Separation as a result of resignation, abandonment of post, expiration of appointment, retirement or death shall not be regarded as a termination within the meaning of the Staff Rules.

Reasons for termination

(c) 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:

- (i) Abolition of posts or reduction of staff;
- (ii) Unsatisfactory service;
- (iii) If the staff member is, for reasons of health, incapacitated for further service;
- (iv) Disciplinary reasons in accordance with staff rule 10.2 (a) (viii) and (ix);
- (v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should,

consideration the impact of the performance evaluations from 2004-2005 upon the Applicant's performance in 2006, the Tribunal will further analyze the Applicant's PAD reports since she was appointed as Assistant Representative.

39. A PAD report is comprised of three parts: (a) Performance Planning (prepared at the beginning of each new performance appraisal period) comprised of (i) the Individual Work Plan Outputs/Revisions; (ii) the Development Plan and Outputs/Revisions; and (iii) the Career Aspirations; (b) Mid-year Progress review (prepared half-way); and (c) Year-End Appraisal.

2004 PAD

40. The performance planning part of the 2004 PAD report was finalized by the Applicant on 1 September 2004 and in section (ii), she identified the individual work plan outputs and activities as follows: "1. Expand understanding of linkages in health, gender and poverty: follow on-line course, participate in seminars and discussions on

performance, the MRG concluded that the staff member did not appear to take the feedback she has received over the past two years as seriously as warranted and did not make a sufficient effort to recognize and address her shortfalls” and recommended a maximum six-month contract extension at which point they would be able to decide whether to extend the Applicant’s appointment or take further actions. The Applicant submitted a statement of rebuttal against this PAD report and, on 8 May 2006, the Rebuttal Panel’s report was sent to the Applicant. By letter dated 29 September 2006, the Applicant was provided with the Panel’s 8 September 2006 report which superseded the 8 May 2006 report.

43. The Rebuttal Panel maintained the performance ratings from the 2004 PAD report and recommended that the part from the MRG’s original recommendation regarding the maximum appointment extension be stricken and that only the requirement that the Applicant be provided with “a performance improvement plan to end December 2005, at which time the staff member should be reassessed by the MRG, be maintained. The MRG can then make the determination whether the staff member’s conditional confirmation as Assistant Representative be extended or other action be taken”.

44. The Tribunal makes the following observations regarding the Applicant’s 2004 PAD report following the PAD’s review and amendments thereto.

45. The Applicant was appointed as Assistant Representative on 17 October 2003. As results from the 26 September 2003 Note to file by the UNFPA Representative regarding the job matching exercise, the panel decided to assign the Applicant to the position of Assistant Representative and that her performance and suitability for this position should be examined after one year as per the guidelines.

46. In the following documents “Mid-year PAR and Feed-back from the Matching exercise” of 23 October 2003 and “Results of Job Matching Exercise” of 30 October 2003 signed by the same UNFPA Representative, was included the mention that the Applicant was “conditionally confirmed to the post Assistant

Representative”. The Tribunal observes that the word “conditionally” was not used expressly by the Panel, but it was added later by the UNFPA Representative. The Applicant continued to work after she was assigned as Assistant Representative, on a permanent contract as before and she did not receive and sign a new letter of appointment specifying the conditional and/or temporary nature of this position. This aspect is confirmed in the contested decision in the following terms: “I also have considered the fact that you hold not merely a fixed term but a permanent appointment”.

47. As results from the letter received by the Applicant on 29 September 2006, the Review Panel stated that it had reviewed the Applicant’s 2004 PAD report and the MRG’s comments contained therein. In section 2 of their report, the Panel identifies the “Process” they followed in the evaluation of the Applicant’s PAD, namely that they reviewed the Applicant’s “PARs from 2002 and 2003, notes to file, and 2003 mid-year PAR review”. Consequently, the Tribunal considers that this means that the Rebuttal Panel’s decision was also based on these documents, and not solely on the Applicant’s professional performance as Assistant Representative.

48. In accordance with art. 3.1 of the United Nations Secretariat ST/AI/2002/3 (Performance management and development system), which the Tribunal finds applicable in the present case, a staff member’s performance cycle shall be annual and runs from 1 April. Section 3.2 includes an exception with regard to staff members who take up new duties upon recruitment, transfer or assignment in the course of the performance year in the sense that, an individual work plan shall be established at that point and will run through the end of the performance year in April of the following year if such a period lasts six months or more.

49. The Applicant was assigned to the post of Assistant Representative on 17 October 2003, in the middle of the 2003 performance year. The UNFPA Representative established an individual work plan for the Applicant at that time, as recommended by the Panel and carried out a mid-point review. Considering that the Applicant started her new duties on 17 October 2003 and the end of the

real chance to follow an improvement plan and based on it to improve her performance.

2005 PAD

56. The second evaluation of the Applicant's performance was made by the same supervisor and the Applicant got the same ratings as in her 2004 PAD report: "Partially Achieved Outputs" for the se

66. The year-end appraisal ratings reflect a clear progress in the section developmental outputs, from partially achieved to fully achieved. Even if this rating is not countable for PAD purposes, the Applicant's real efforts to improve her work are not reflected in the supervisor's final comments which state that:

2006 has been a particularly disappointing year in terms of performance of the [the Applicant]. This is mainly because [the Applicant] made little effort to address her shortfalls and has reached a level of complacency in her work and performance that is disturbing. She has not made use of the opportunities provided to her over the years to develop her skills and competencies and instead has shown great resistance to change. She has decided to disregard the feedback and advice of her supervisor and considers it to be biased. Hence, she had freed herself from being accountable for her performance and tends to follow her own work agenda, instead of making an effort to respond to the priorities and needs of the country office. Moreover, there is an increasing lack of transparency in the manner in which she works. Her attitude has negatively impacted the efficiency and the effectiveness of the country office, including the environment for team work. In the view of the lack of progress demonstrated by the [Applicant] over the years, the prospects of her meeting the requirements of the [Assistant Representative] post are poor.

67. ovit Reprcant] over14114 of petD of 15-11-07

past few years, she had processed rebuttals and the outcome of the 2005 rebuttal was still pending in DHR.

69. The Applicant's supervisor, as in 2004, once again made comments that were unrelated to the Applicant's 2006 performance, but rather to lack of progress "over the years", and the MRG was informed about the unsatisfactory performance during the last four years.

2007 PAD

70. The 2007 PAD report covers the period 1 April 2007 to 31 March 2008.

71. In the document entitled "Determination on Unsatisfactory Performance" dated 16 March 2010, the DDHR noted that "[the] 2007 PAD was completed, but carries no finalization date. Upon inquiry, the Learning and Career Management Branch informed [him] that this is due to the fact that the [Applicant] failed to click on 'finalize' in the PAD platform. As a result the supervisor could not click on 'finalize' either, given that the PAD programme source code prevented the supervisor from doing so prior the finalization by the staff member. [He] was further advised that this anomaly in the PAD programme source code has since then been rectified to permit a supervisor to click on 'finalize' even if the staff member forgot or refused to do so. Given, however, that the staff member and the supervisor completed the substantive PAD evaluation process in its entirety, [he] found that the absence of the click on finalize by the staff member (and as a consequence by her supervisor) is merely a slip caused by a computer programme phenomenon with no substantive consequences to the validity of the content of the PAD".

72. The Tribunal makes the following observations.

73.

attempt to finalize it by 7 September, due to [the supervisor's] reassignment and end of duty in Colombo effective 14 September". It is unclear if this section was completed by Ms. LB between 8 and 13 September 2007, before her departure in accordance with sec. 7.4 of ST/AI/2002/3 or from New York as affirmed by the Applicant. The last section "Year-end appraisal" was finalized by the new supervisor, Mr. LK. Since the Applicant functioned as an Officer in Charge, Representative, UNFPA from January 2008 to the end of April 2008, it results that her supervisor left in December 2007 and it is unclear when the Applicant's supervisor finalized the PAD report.

74. In accordance with sec. 9.4 of ST/AI/2002/3, the finalized appraisals are signed by the reporting officer(s

2008 PAD

76. This PAD report covers the period of 1 April 2008 to 31 March 2009. The Applicant acted as Officer- in-Charge from January to end of April 2008.

77. The Tribunal makes the following observations.

78. The section “Performance planning” was finalized by the Applicant on 11 April 2008 and by the supervisor on 3 July 2008. The new UNFPA Representative

81. The Applicant submitted a rebuttal to

85. The Rebuttal Panel concluded that the Applicant's poor performance was a "function of mismatch between the SM [staff member] and the post. This mismatch was documented early by the DHR and validated by the observations and assessments of two Representatives and the mission of December 2008 of the DHR advisor. This assignment as OIC [Officer-in-Charge] accentuated the vulnerability of both SM and the staff of the office".

86. The Rebuttal Panel decided on 16 February 2010 that the overall rate for work plan outputs was to be maintained as "did not achieve", the overall rating for core competencies was to be maintained as "not proficient", the overall rating for functional competencies as "developing proficiency" and the overall rating for development outputs as " did not achieve".

87. The Applicant's new supervisor, Ms. LC, was informed before her arrival in

Separation decision

95. The Applicant's permanent contract was terminated for unsatisfactory service. The decision was taken on 15 July 2010 and was notified to the Applicant by email on 23 July 2010 after she refused to accept service of the letter of termination handed out to her, on the grounds that there was no audio-recording of her meeting with the Country Representative.

96. The Tribunal will analyze the legality of this decision in accordance with the UNFPA Separation Policy and the United Nations Staff Regulation and Rules, taking into consideration that art. 3 of the UNFPA's Policies and Procedures Manual, Human Resources Separation Policy, states: "[s]hould the terms of this policy contravene any terms contained in the United Nations Staff Regulations, Staff Rules or the Regulations of the United Nations Joint Staff Pension Fund, the terms of those Regulations and Rules shall prevail over the terms of this policy". The Tribunal underlines that UNAT held in *Valimarki-Erk* 2012-UNAT-276 that "Staff Regulations [and Rules] embody the conditions of service and the basic rights and duties and obligations of United Nations staff members. They are supplemented by the administrative issuances in application of and consistent with, the said Regulations and Rules".

97. On 1 April 2010, the DDHR, determined that the Applicant's performance was unsatisfactory and recommended that her appointment be terminated for unsatisfactory service. On the same day, the DDHR addressed a request to the CRB Chairperson, for them to review his recommendation. On 4 June 2010, the CRB endorsed the recommendation of the Applicant's termination for unsatisfactory performance. On 21 June 2010, the Applicant received documents relating to her termination and, on 29 June 2010, she sent her observations to the Executive Director. On 15 July 2010, the contested decision was issued.

98. UNFPA's Personnel Policies and Procedure Manual (arts. 10.3.3 to 10.3.6) states that a permanent appointment may be terminated for unsatisfactory service and

103. The DDHR evaluated the Applicant's unsatisfactory performances over three consecutive intervals from 2006 to 2008.

104. In 2006, the Applicant's ratings were as follows: (1) work-plan output: partially achieved; (2) core competency proficiency: developing proficiency; (3) functional competency: developing proficiency.

105. In 2007, the ratings were as follows: (1) work-plan output: partially achieved; (2) core competency proficiency: not proficient; (3) functional competency: developing proficiency.

106. In 2008, the ratings were the following: (1) work-plan output: did not achieve outputs; (2) core competencies: developing proficiency; (3) functional competency: developing proficiency.

107. The Tribunal considers that in the present case the contested administrative decision to separate the Applicant for unsatisfactory service is unlawful for the following reasons.

108. Firstly, the requirement of three consecutive intervals of poor performance was not respected. Article 10.3.7 of the UNFPA Human Resources Manual concerning the determination of unsatisfactory performance states:

Performance appraisals are made by supervisors in regular intervals. Such performance appraisals include one combined performance rating *each* for (1) "work plan output", (2) "core competency proficiency" and (3) "functional competency proficiency".

For purposes of this policy, the Director, DHR, may determine that the performance of any staff member is "unsatisfactory" if the staff member received combined performance ratings as follows:

- (a) Performance is appraised in *two consecutive intervals* as not achieved/non proficient regarding at least one combined performance rating;
- (b) Performance is appraised in *three consecutive intervals* as partially achieved/developing proficiency regarding at least one combined performance rating

109.

116. The Tribunal finds that since the administrative decision to terminate the Applicant's permanent contract for unsatisfactory service was not taken by the Executive Director before the 4 May 2010 finalization of her 2009 PAD report, but only on 15 July 2010, a new procedure should have been initiated by the DDHR, based on the new period of reference which was to be considered in accordance with the UNFPA Human Resources Manual for the 2008 and 2009 cycles (art.10.3.7 (a) or for the 2007, 2008 and 2009 cycles (art. 10.3.7(b)).

117. In the contested decision, the Executive Director, in reference to the Applicant having stated that her 2009 PAD report demonstrated that her performance was improving, indicated that “[w]hile neither the determination by the Director, DHR, of unsatisfactory performance on [the Applicant's] part, his subsequent recommendation of termination of appointment, the review by the UNFPA CRB nor this administrative decision is based on your 2009 performance appraisal, I am compelled to conclude that it corroborates your poor performance”. Further, as part of his 17 March 2011 reply, the Respondent stated that the administrative decision “was neither explicitly nor by reference based on the Applicant's performance appraisal for 2009”.

118. The Tribunal concludes that the separation decision was not based, as legally required, on the last three consecutive intervals and is unlawful.

119. Secondly, the Applicant's complaint of discrimination and abuse of power, and her rebuttal of the 2009 PAD report were not resolved before the separation decision was issued.

120. The Applicant stated in her 29 June 2010 response to the 1 June 2010 letter from the Office of the Executive Director that: “[s]ince 2008, the Representative of UNFPA in Sri Lanka has deliberately pursued a course of action that is both unfair and discriminatory towards [the Applicant] ... [t]here is a clear pattern of discrimination against [her] The Representative/UNFPA charged [her] with unauthorized vehicle deviations ... [for an alleged prejudice] of 171 USD”.

The investigation started on 4 September 2008 and ended in February 2010, when the charges were dropped by the DDHR.

121. In the PAD report for 2009, which was finalized on 4 May 2010, the Representative wrote the following comment under Values/Guiding Principles within Core Competencies: “in connection with the elsewhere mentioned fraud investigation the [Applicant] demonstrated clear unethical behavior by lying and twisting the facts, particularly targeted against her supervisor who had brought the issue to the attention of [the United Nations Headquarters]. Her unethical behavior included gaining unauthorized access to and use of confidential information related to other staff members, including the Representative”.

122. The Applicant affirmed that her supervisor abused her power because, despite the fact that the DDHR decided to close the disciplinary case in February 2010, the Representative mentioned it in the 2009 PAD report. The supervisor used in her comments confidential information submitted by the Applicant as part of her defense during the disciplinary process (which she should not have had access to) and she was manifestly biased by taking out her anger in the PAD report, which constitutes retaliation and abuse of authority.

123. The Tribunal finds that the Applicant’s response of 29 June 2010 to the notice of termination, dated 11 June 2010, not only contained the Applicant’s observations regarding the proposed measure to terminate her contract for unsatisfactory performance, but also consisted of a complaint of abuse of power and harassment against her supervisor for the period 2008 - 2009 and a rebuttal of the 2009 PAD report.

124. The Executive Director totally ignored the Applicant’s allegations and instead of following the procedures to resolve the complaint of abuse of power and harassment and transmit the rebuttal to the Rebuttal Panel, she continued the termination procedure and used the Applicant’s statements filed in response to her notice of termination and some of the elements from her 2009 PAD report, which

officially was not part of the termination procedure against her. The Tribunal finds that until a rebuttal process is finalized, ratings are not definitive and an administrative measure based on it cannot be taken against the staff member.

125. The Tribunal recalls that, as held in *Das* 2014-UNAT-421, “an effective rebuttal mechanism is an integral part of the performance evaluation process”.

126. Thirdly, the Tribunal also finds that there were incompatibilities between the UNFPA Policies and Procedure Manual (2006) and the United Nations Secretariat policy ST/AI/2002/3 implementing Staff Regulations and Rules regarding appraisal of staff.

127. On 20 March 2002, the Under-Secretary-General for Management in the United Nations Secretariat, for the purpose of establishing a Performance Appraisal System in accordance with former staff rule 101.3(a), promulgated ST/AI/2002/3 (Performance Appraisal System), which states that staff members shall be evaluated for their efficiency, competence and integrity through performance appraisal mechanism that shall assess the staff member’s compliance with the standards set out in the Staff Regulations and Rules for purposes of accountability.

128. The Tribunal underlines the following provisions from this document.

129. Section 10.3 states that staff who have not fully met the performance expectations should be given one of the following two ratings: partially meet performance expectations or does not meet performance expectations.

130. In accordance with sec. 10.4, these two ratings indicate the existence of shortcomings or development needs which may call for a specific remedial plan. A rating of “partially meets performance expectations” may justify the withholding of a within-grade increment, particularly if the same rating is given for a second consecutive year, as further clarified in sec. 16.5. Section 10.5 states that a rating that does not meet performance expectations “may lead to a number of administrative actions such as transfer to a different post or function, the withholding of a within-

grade increment as further clarified in sec. 16.6, the non-renewal of a fixed term contract or termination for unsatisfactory service”.

131. Section 16.4 states that “one annual rating of partially meets performance expectations may justify the withholding of a salary increment, provided that it is documented that during the corresponding performance year, a performance improvement plan was put into place in accordance with section 8.3, but that the staff member’s performance failed to rise to a level that would justify a rating of “fully successful performance”. Sections 16.5 and 16.6 further state that two consecutive annual ratings of “partially meets performance expectations” shall normally lead to the withholding of a salary increment and one rating of “does not meet performance expectations” shall normally lead to the withholding of a salary increment.

132. Article 10.3.13 of the UNFPA’s Policies and Procedure Manual, Human Resources Separation Policy adopted on 25 July 2006 (applicable in the present case), provide the supervisor with additional actions for the purpose of putting a staff member on notice that a lack of meaningful improvement in their performance might result in the termination of their appointment and assist the staff member in improving her performance such as: (a) one or several reminders or warnings by the supervisor identifying the professional area(s) in relation to which then performance has lapsed from the required standards; (b) a notification in writing (e.g., note to file, memorandum) of his/her shortcomings and request that the staff member bring his/her performance up to the standard expected and required within a specific time frame (for example three months); (c) considering and documenting staff coaching and/or training and/or contacting the Chief, Learning and Career Management branch, DHR for guidance or requiring the staff member to do so and a specific action specific to the MRG in case a staff member’s performance is assessed as not having achieved/not proficient or partially achieved/developing proficiency: to withhold within salary increment.

133. Further, in accordance with art. 10.3.14, the supervisor should keep records or evidence of poor performance and of her interventions and make them available to

the DDHR, as and when required. Article. 10.3.15 provides the MRG with an additional action, namely if a staff member's performance is assessed as a not achieved/not proficient or partially achieved/developing proficiency, the MRG may

136. The Tribunal considers that arts. 10.3.13 to 10.3.15 of the UNFPA Policies and Procedures, Manual contravene the ones in ST/AI/2002/3 for the following reasons:

- a. There are no mention regarding the legal measure to transfer the staff member to a different post or function; and
- b. The provisions regarding the measure to withhold a within-grade increment which should normally be decided by the MRG do not include the mention that such a measure can be applied only in the two following circumstances:
 - i. If a rating of partially meets performance expectations is given for a second consecutive year; or
 - ii. If the staff member receives a rating of does not meet performance expectations and the first measure indicated in sec. 10.5, a transfer to a different post or function, was applied

138. DT/200T/203,

146. The Tribunal has no competence to make findings and to decide on such a complaint for abuse of authority and harassment against the Applicant's supervisor, but concludes that the complaint was not properly investigated in accordance with the relevant UNFPA Policy on Harassment, Sexual Harassment and Abuse of Authority and secs. 3.2 and 5.14 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment and abuse of authority) .

147. The Tribunal concludes that from the beginning of the Applicant's appointment as Assistant Representative, her supervisors constantly contributed to the deterioration of her performance by treating her as having been appointed conditionally, not establishing improvement development plans, proposing a separation package in 2005 or early retirement in 2008 before the end of the appraisal cycles, influencing negative observations made by the MRG (chaired by her supervisor), initiating a disciplinary investigation in 2008, and not respecting their mandatory obligations as supervisors to support the Applicant to improve her performances. It is also notable that, despite the shortcomings in the Applicant's performance during the previous periods, UNFPA, as a result of the delayed appointment of a Country Office Representative, decided that the Applicant was to act as Officer-in-Charge for four months, a decision which actually contradicts the negative performance ratings previously established. The Tribunal also observes that the documents filed by the Applicant support the statement that her work was highly appreciated by UNFPA partners and that these positive elements were ignored by the maker of the contested decision.

148. The Tribunal notes that the decision was taken by the Executive Director based on the Applicant's performance during the cycles 2006 to 2008, based on art. 10.3.7 of the relevant UNFPA policy. Even if in the termination decision, the Executive Director made comments that were related to the Applicant's unsatisfactory performance during the previous years, including 2009, she did not exercised the prerogative from art. 10.3.11 to terminate th because she had a severe case of unsatisfactory performance. Such a measure can be

decided immediately by the Executive Director and it has to be related to one or several official acts, tasks, projects or similar undertakings where the staff member had a performance below the expected standard. In such a case, before taking a final decision regarding the termination of the appointment, the Executive Director, in accordance with art. 10.3.12 of the policy has to verify if the facts underlying the official acts, tasks, projects or similar undertakings have been established. In the present case there was no such analysis and it cannot be said that the separation decision was legally taken in accordance with art. 10.3.11.

149. The Tribunal considers that the reason included in the decision regarding an alleged threat from the Applicant against UNFPA, if her contract was to be terminated, which was considered a “departure from her obligations as an international civil servant” is not legally related to the Applicant’s performance. This was part of the Applicant’s defense regarding the proposal to terminate her contract for specific reasons – unsatisfactory performance, it was taken out of context and used as an accusation against her without providing her with the chance to further comment on this reason for termination. The Executive Director’s findings that the Applicant did not respect her obligations as civil servant cannot be a valid reason for a termination for unsatisfactory service. Such a determination can only represent a justification for a disciplinary sanction.

150. Consequently, the Tribunal will rescind the contested decision of 15 July 2010 to terminate the Applicant’s permanent appointment for unsatisfactory service.

Relief: reinstatement and compensation

151. The Statute of the Dispute Tribunal states, in relevant part:

Article 10

...

5. As part of its judgment, the Dispute Tribunal may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

152. The Tribunal considers that art. 10 of the Statute includes two types of legal remedies. Article 10(a) refers to the rescission of the contested decision or specific performance and to a compensation that the Respondent may elect to pay as an alternative to the rescission. The compensation which is to be determined by the Tribunal when a decision is rescinded reflects the Respondent's right to choose between the rescission or specific performance ordered and the compensation. Consequently, the compensation mentioned in this paragraph represents an alternative remedy and the Tribunal must always establish the amount of it, even if the staff member does not expressly request it because the legal provision uses the expression "[t]he tribunal shall determine an amount of compensation". Article 10 (b) refers to a compensation. The Tribunal considers that the compensation established in accordance with art. 10.5(a), which is mandatory and directly related to the rescission of the decision, is distinct and separate from the compensation which may be ordered based on art. 10.5(b).

153. The Tribunal has the option to order one or both remedies, so

the Applicant by the illegal decision and the material damages produced by the rescinded decision.

158.

163. The Applicant was 56 year-old at the time of the contested decision and she started being employed by UNFPA in 1991. The mandatory retirement age for staff members recruited after 1 January 1990 is 62. The Tribunal notes that in her management evaluation request filed on 20 September 2010 and transmitted to the Executive Director on 23 September 2010, the Applicant stated that she is prepared to enter into early retirement after April 2011.

164. An early retirement is an option which is open to staff members who are 55 years old or older when they wish to separate from service and claim an early retirement benefit from the United Nations Joint Staff Pension Fund and, technically, it is a resignation which must be submitted in writing. A resignation does not involve an employer's approval because it is the staff member's free will to end his/her contract of employment.

165. Taking into consideration the Applicant's free will to be put on early retirement after April 2011, the Tribunal considers that the Applicant is to be reinstated from 24 July 2010 until 31 April 2011 and she is entitled to receive compensation from the Respondent for this period, including net base salary and entitlements, minus the termination indemnity. After 1 May 2011, the Applicant is to be considered retired after 20 years of service and DHR is to prepare within 30 days the necessary documentation, including a letter of appreciation to be sent for the signature of the Executive Director. The Applicant is entitled to receive retroactive pension from 1 May 2011.

166. A staff member whose appointment is to be terminated shall be given a written notice of such a termination. In lieu of the notice period, upon authorization, a staff member may receive a compensation equivalent to salary, applicable post adjustment and allowances corresponding to the relevant notice period at the rate in effect on the last day of service.

167. The Tribunal considers that the implementation of any administrative decision, including a termination decision, is part of the administrative procedure and

a staff member has the right to be treated with respect and dignity until the end of the

171. Based on the particular circumstances in the present case, the Tribunal considers that the judgment itself and the letter of appreciation to be signed by the Executive Director are a sufficient remedy for the moral prejudice caused to the Applicant by the unlawful decision to separate her for unsatisfactory performance and the unusual way of “publicly” announcing it and rejects the claim for moral damages. There is no evidence that shows that the Applicant suffered a moral prejudice as a result of the contested decision which cannot be covered by the legal remedy of rescission and reinstatement until her early retirement.

172. The Tribunal, in accordance with art. 10.5 of the Tribunal’s Statute, establishes the alternative compensation to the rescission of the decision at USD5,000 plus material compensation for the loss of earnings for the period 24 July 2010-31 April 2011 (net base salary and entitlements), minus the termination indemnity (compensation in lieu of notice). The Applicant is to be considered retired after 1 May 2011 and the Respondent is to make the necessary arrangements for the retroactive payment of the pension to the Applicant and for a letter of appreciation to be sent for the Executive Director’s signature.

173. The Tribunal will reject the Applicant’s request for judicial costs of USD1,500 since no evidence was filed in support of this claim.

Conclusion

In the light of the foregoing the Tribunal DECIDES:

174. The application is granted in part.

175. The contested decision from 15 July 2010 is rescinded, the Applicant is reinstated from 15 July 2010 to 31 April 2011 and she is to receive a compensation for her loss of earnings (net-base salary and entitlements) for this period minus the termination indemnity she received. The Respondent is to pay an alternative compensation to the rescission of the decision USD5,000 plus the loss of earnings

(net base salary and entitlements) for the period 24 July 2010 to 31 April 2011, minus the termination indemnity she received.

176. These amounts are to be paid within 60 days from the date the Judgment becomes executable, during which period interest at the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

177. The Applicant is to be considered retired as of 1 May 2011 (early retirement after 20 years of service) and the Respondent is to make all necessary arrangements within 30 days for her to receive her pension awards retroactively as of 1 May 2011, including a letter of appreciation to be sent for the Executive Director's signature.

178. The claims for moral damages and judicial costs are rej.36oTwet4a/[a420 Tc0 o(/e da)4.6(te se)Tj1