



UNITED NATIONS DISPUTE TRIBUNAL





7. The Applicant commenced his appointment on 19 March 2012, and on 15 February 2013, his workplan for the 2012 2013 performance cycle was entered into Inspira, a United Nations website used by staff members for various tasks, including performance management. The Tribunal notes that in accordance with sec. 6.2 of ST/AI/2010/5, workplans are to be prepared

8. On 5 March 2013, the Applicant met with his first reporting officer a midpoint review.

The Tribunal notes that in accordance with sec. 7.2 of ST/AI/2010/5, the FRO should conduct a midpoint review usually six months after the creation of the workplan . The Respondent submits and the Applicant denies that a performance improvement plan was discussed at this meeting. Section 10.1 of ST/AI/2010/5 states that a performance improvement plan is a remedial measure that may be used to proactively assist a staff member when a performance shortcoming is identified. The Tribunal notes that unsigned minutes from the meeting, attached as an annex to the application, state [FRO] noted that [the Applicant] will continue having the support from the branch and that *they will meet again to work on his performance improvement plan*

9. By email dated 22 March 2013, the Applicant sent his FRO a document

the matter. Attached please find the -page document, dated April 2013, set a six-month time frame for improvement. The actions to be taken were listed as attending available in-house and outside trainings and regularly updating his FRO on progress.



Following the meeting we held at 12pm today to discuss the development of your [performance improvement plan], I am















## **Consideration**

### *Receivability and scope of the case*

38. non-renewal of appointment, failure to grant continuing appointment and separation from service request for management evaluation dated 7 November 2014, he requested review of the decision to separate him from service.

39. Article 8 of the Statute of the Dispute Tribunal states that an application shall be receivable only if an applicant has previously submitted the contested administrative decision for management evaluation, where required. Consequently, the Tribunal considers that it only has jurisdiction to

service. To the extent that the Applicant challenges, as a separate administrative decision, the decision not to grant him a continuing appointment, the Tribunal considers that this element of the application is not receivable,

c. Was the decision to separate the Applicant from service improperly motivated or tainted by bias or discrimination?

d. If the decision to separate the Applicant from service was unlawful, what remedies is the Applicant entitled to?

*Did the Applicant have a legitimate expectation that his fixed-term appointment would be renewed?*

41. The Applicant submits that he had a legitimate expectation of renewal of his fixed-term appointment based on the terms of his offer of appointment dated 16 December 2011, specifically the reference to the managed reassignment programme and assignment to a second post/function. He submits that the NCRE programme was designed in

contends that the Applicant was not made any express written promise or given any firm commitment of a continuing appointment.

43. Section 2.1 of ST/AI/2001/7/Rev.1 states that the managed reassignment programme shall be mandatory for staff that have been appointed through the NRCE programme and have completed two years of service. In accordance with sec. 2.4(b), staff members that have not completed two years of service may request early participation in the program provided they approval.

44. The Applicant testified that, following the completion of the First Rebuttal Report on 31 January 2014, he asked to be transferred to another unit.

in fact he who proposed a reassignment or transfer and that the Applicant responded positively. He did not recall exactly when the discussion took place, but thought that it was at some point during the second performance cycle. He stated that he discussed the proposal with the Director, DSPD, DESA, who was open to reassigning the Applicant to another unit of the Division. However, after having consulted with the Office of Human Resources of DESA informed the SRO that it was not advisable to move the Applicant in the middle of a performance cycle. Consequently, no further action was taken. In her oral testimony, the Director, DSPD, DESA, recalled that a discussion took place regarding moving the Applicant and that the advice received from OHRM was that it was not advisable to transfer the Applicant while a rebuttal process was ongoing.





of conversion to any other type of appointment in the Secretariat (see also staff rule 14.3(c)).

47. In the matter of *Obdeijn* UNDT/2011/032 (affirmed in *Obdeijn* 2012-UNAT-201, with variation to compensation), at para. 40 the Tribunal stated:

The practice of inserting disclaimers into fixed-term contracts to the effect that an employee has no expectation of renewal is not conclusive proof that the employee could not reasonably have expected his or her contract to be renewed. What constitutes a reasonable expectation will be a question of fact in each particular case.

48. As the Dispute Tribunal stated in *Ahmed* UNDT/2010/161 (affirmed in *Ahmed* UNAT 2011-UNAT-153), an expectancy of renewal may also be created by countervailing circumstances, such as a violation of due process, arbitrariness or other extraneous motivation on the part of the Administration (paras. 9 and 12).  
legitimate expectation

*Did the Administration*

*Performance Management and Development System?*

49. The reasons given for the decision contested by the Applicant was conveyed in the 30 October 2014 letter from the Director, DSPD, DESA. The



126. When a staff irregularities, that staff member has been denied due process to which he/she is entitled. It is rudimentary that a breach of due process taints decisions that follow from a flawed or irregular process.

127. It is not the role of the Dispute Tribunal to review de should not place itself in the role of the decision-maker and determine whether it would have renewed the contract, based on the performance appraisal. This is not the role of a reviewing tribunal under the UNDT Statute as was held in *Said*. The role of the Tribunal is to determine whether the proper procedures had been applied. In this case it was not; and a finding based on an irregular procedure cannot be acted upon.

56. ion from service was based on a conclusion that his performance was not satisfactory, the Tribunal will consider the process by which his performance was managed and assessed. It is le to re-assess but rather to examine the process by which it was determined that his performance was unsatisfactory.



a statement of success criteria, performance expectations and behavioural

and finalizing such a workplan in a timely manner, it is difficult for a staff member to have clarity as to the expectations for the performance cycle, and thus the overall

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65. Both the FRO and SRO testified before the Tribunal as to the to them from an early stage that his performance did not meet their expectations. It is therefore surprising that they did not adhere to the timeframes and processes established by ST/AI/2010/5. The midpoint review is a key stage of the performance management system. In accordance should conduct the review after discussing with the staff member their progress towards achieving the goals and results set out in the workplan. While feedback from supervisors is intended to be ongoing, the midpoint review allows for more formal, structured feedback at roughly the midpoint of the performance cycle. Given that the midpoint review was conducted less than a month before the end of the 2012-2013 performance cycle, there was little chance for the Applicant to act on this formal, officially documented feedback.

66. The Tribunal finds that the lack of compliance with the established timelines for performance management in the 2012 2013 performance cycle had a prejudicial effect on the Applicant. It was his first year with the Organization and the first of two years in which he had an opportunity to prove whether he had the requisite skills and qualifications to receive a continuing appointment. Given these circumstances, the expectations on the Applicant should have been promptly and formally agreed in a workplan in the first half of 2012, and any concerns about his performance should have also been formally documented in a midpoint review carried out with sufficient time for the Applicant to respond to the feedback received. This was not done and the Tribunal concludes that the process for managing and evaluating the Appl 2013 was both materially flawed and prejudicial to his interests.



B. Unreasonable or unrealistic expectations

67. In addition to the delays in implementing the various stages of the performance management and development system, the Tribunal also notes with concern, the finding in the First Rebuttal Report that some of the tasks that [the Applicant] was assigned required a level of experience that could simply not be expected from him

68. The rebuttal panel reviewed each of the four goals set out in the 2013 performance cycle and found that there may have been unrealistic expectations placed on the Applicant in respect of three of these goals, as follows:

- a. Note that these two tasks, focused on crucial aspects of a flagship publication, were given to a junior officer who had started his assignment at the United Nations only weeks earlier, with the expectation that this would be delivered

of a P-2 officer, with less than a year of experience, in other parts of  
the



the *very beginning* of the 2013 2014 performance cycle, i.e. in April or May 2013. In the Second Rebuttal Report, the rebuttal panel stated that the late

*possibility* to

(emphasis added). However,

the late initiation of the workplan must be seen in the context of the or-79()-189(the )-187(late)4( )] T

completed until 31 January 2014, there was little time remaining to implement the plan.

77. ST/AI/2010/5 does not provide for a minimum duration for a performance improvement plan, stating only that it may cover up to a six-month period (sec. 10.2)

Conclusion

79. Having considered the evidence, including the testimony of the Applicant and his FRO and SRO, as well as the other witnesses, the



30.





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difficulties experienced in the communication between the parties, which could have affected the Applicant's confidence and application to tasks.

**Relief**

to separate him from service based on his performance evaluations was therefore flawed.

93. By its nature, a probationary period is one of trial in which it is determined whether a person is capable of carrying out the duties of a post. However, where expectations are both unreasonable and poorly inevitably affected.

94. Although the Tribunal has found that the Applicant was not provided with a fair opportunity to demonstrate that his fixed-term appointment should be renewed or converted, the Tribunal is also mindful of the inherent practical difficulties of ordering that the Applicant be reinstated to a position with the Organization in the particular circumstances of this case. The Tribunal notes that the employment relationship may have irreconcilably broken down.

95. The Tribunal considers it appropriate to order the rescission of the decision to separate the Applicant from service, as it was procedurally flawed. In accordance with art. 10.5(a) of the Statute, the Tribunal will set an amount of compensation that the Respondent may elect to pay as an alternative to rescission of the decision. The Tribu





He His dignity, pride and self-  
esteem had been affected. He had difficulty accepting the decision and  
convincing himself and his family that he was not suitable for service with  
the Organization. He also stated that he had difficulty pre

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