Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

BEAUDRY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Bart Willemsen, OSLA

Counsel for respondent:
Susan Maddox, ALU

Introduction

1. The applicant's fixed-term contract appointment as an international staff member at the P-4 level with the United Nations Stabilization Mission in Haiti (MINUSTAH) was not renewed. The decision not to renew the contract, which expired on 31 October 2008, was made by the Chief of Mission Support (the CMS) on 23 July 2008.

2. The applicant contends that this decision was illegal since it was prompted by an ulterior motive, namely her supervisor's ill-motivation towards her. Secondly, the applicant submits that the respondent has violated her due process rights by failing to give her a waiver of the time limit to submit her rebuttal statement for her electronic performance appraisal system (e-PAS) evaluation.

Background

3. On 21 June 2007 the applicant took up a post as a Training Officer with MINUSTAH and was appointed Chief of the Integrated Mission Training Centre (IMTC). She headed a training unit team of several international and local UN staff members. Her immediate supervisor and first reporting officer for her e-PAS evaluation was the Chief of Mission Administrative Services (the CAS), whose superior was the CMS, who also functioned as the applicant's second reporting officer. The applicant had previously worked for the UN in a similar position in Burundi from 2004 to 2007, part of the time with the CAS as her supervisor. At trial, the applicant explained that upon assuming her position, her predecessor informed her that the team was divided into cliques, a situation which the applicant immediately recognized when she started her work.

4. In July 2007 the CAS asked the applicant to see her to report complaints about her made by a team member. Several other team members also sought interviews with the CAS to make other complaints. The applicant asked the CAS to require the complaints to be made in writing so that she could defend herself. On 17 July four

team members made their written complaint to the CAS about the applicant's management of the unit, making reference to various incidents. The CAS passed this document on to the applicant, asking for a response. On 23 July the applicant sent a detailed response to the CAS and other officials who, it seems, had been dealing with some of the complainants. The applicant described the difficult personal relationships that had developed in the unit and pointed out, quite rightly, that a number of the complaints were trivial, and that the other complaints amounted simply to criticisms of what were legitimate management decisions within her area of responsibilities. She asked "that the truth be put forward and that the mission restores my authority". It is not necessary and I do not intend to set out in detail the lengthy history of complaints made about the applicant by her staff. They appear never to have been finally settled. They were not, I accept, made directly to the applicant, although she was aware of the dysfunctional situation.

5. The CMS joined MINUSTAH in September 2007 and on 10 October the applicant met him for the first time. According to the CMS, none of the problems within the applicant's team were discussed during this meeting, which merely concerned the tasks of the IMTC. However, on 28 November 2007, three of the team members requested the CMS and CAS to meet with them on a confidential basis on 1 December 2007, a Saturday. The staff members had requested to meet on a Saturday, claiming they feared retaliation from the applicant should she discover that they had complained about her. In his "note to the file" the CMS said that the staff "bitterly complained" about "the inhumane and unprofessional treatment that they receive[d]" from the applicant, including "daily humiliations". The CMS rightly advised the staff to put their complaints into writing. According to the applicant, she only heard about the meeting later the same month through a colleague unrelated to the events and her team. Be that as it may, on 7 December the CMS and the CAS visited the facilities of the IMCT to meet with the applicant and her team members to discuss the internal problems of the team. The applicant made two conference rooms available so the CMS and CAS could meet with the staff in confidence. They also met with the applicant. The CMS said in testimony that the applicant's attitude was

defensive, contending that the team members who were complaining were the wrongdoers. The CMS testified that he suggested to the applicant that she should change her attitude. Certainly the substance of the applicant's evidence was that she regarded the complaints as unjustified and resented the apparent willingness of the CMS and the CAS to listen to them in her absence. She believed that these staff members should have been directed to speak directly with her and given clearly to understand that she (the applicant) had the full support of the CMS and the CAS. It was not reasonable for her to insist simply on unqualified support. However, in fairness, it was scarcely useful for the CMS and the CAS to have met with the staff members as they did in the offices of the IMTC and not discuss the complaints in detail with the applicant, sharing potential methods of settling the particular problems in a positive way and then following up what had been achieved. It was also wrong to give her the impression that the complaints were all legitimate. To suggest that she should simply change her attitude was not to manage, it was to abrogate management. Furthermore, it is undisputed that the applicant inherited a dysfunctional unit and to proceed on the basis that the continuing problems were her responsibility alone was unfairly and, indeed, irrationally to overlook this significant factor.

6. On 17 December 2007 the applicant met for about twenty-five minutes with the CMS again to discuss the problems of the IMCT team. The CMS informed the applicant of the confidential meeting with three of her team members on 1 December 2007. The applicant described CMS's attitude at the meeting as "rude" and impatient. The applicant complained that the CAS was going behind her back by arranging to meet with staff in this way. This complaint was unjustifiable; it was not unreasonable in itself for the CAS to have met the staff confidentially but, having consented to be involved, the CAS should have taken up the issues in a constructive way. What occurred in respect of counseling at the meeting is not clear but, whatever was said, I do not think that either the CMS or the applicant found the meeting productive. The CMS' evidence did not suggest that he made any useful or practical suggestions as to what should be done. My impression of his attitude towards the problems in the IMTC, gathered from his evidence, is that he just saw it as a nuisance

and was not inclined to deal with it seriously. After the meeting he told the CAS to follow-up with the applicant.

7. While the applicant stated that she and the CAS met two or three times only, according to the latter they held several informal meetings in connection with the situation in IMTC but no records were made. In addition, in her testimony, the applicant explained that she sent a message to the CMS on 29 December 2007 indicating that she had not received any feedback following her request for assistance.

8. On 25 January 2008 the applicant met with the CAS for a midterm performance appraisal. According to the applicant, the CAS had said that the applicant was not managing staff "in an acceptable manner" to which the applicant replied that the meetings of the CMS and the CAS in December with her team had "totally undermined [the applicant's] leadership and authority within the section". In an interoffice memorandum of 28 January 2008 from the CAS to the applicant, referring to this meeting (and other similar meetings), CAS stressed that the applicant as a supervisor "bears particular responsibility for ensuring a harmonious workplace" and that the CAS had "received several complaints in the last six months from your supervisees, and even now continue[s] to do so". The CAS continued, "My expectation was that the situation would improve. However, this does not seem to be the case" and stated, "By this memo, you are requested to make all efforts to improve the staff management of your section. Should you require any guidance, I will be available". The CAS stated the situation would be reviewed again at the end of April 2008. In my opinion, it was for the CAS to make specific arrangements to manage the problem, including constructing with the applicant a work plan that attempted to resolve the specific issues. Some of them concerned complaints about the way the applicant interacted with staff, in respect of apparently inappropriate remarks, and direction could have been given about these, although, perhaps, little could be done except to ask the applicant not to make such comments. On the other hand, the reaction of the staff seems to have been rather overdone in respect of decisions that apparently were well within the management responsibilities of the applicant.

Certainly, the applicant appears to have rejected the CAS' suggestion of mediation as undermining her authority, but a proposal could have been formulated that dealt with the mode and objectives of such an exercise which took this issue into account. But the CAS appeared to be content with muddling through with ineffectual nostrums that gave no leadership, a position that, in turn, seems to have been accepted by the CMS.

9. On 7 February 2008 the applicant sent a detailed memorandum that explained the position from her point of view, accepting at the same time that she had responsibilities as supervisor to address the problems with staff. It is fair to comment that the position as she described it showed that she had, indeed, attempted in a reasonable way to deal with some issues but that several members of the team were simply recalcitrant and not amenable to conciliatory approaches. This memorandum, however, did not propose a constructive way forward.

10. The applicant testified that, also on 7 February 2008, she requested assistance from the Chief of the Office of Internal Oversight Services (OIOS) to investigate the situation in her section. He referred her for advice from the Chief of Conduct and Discipline and, on 12 February, the applicant met with him and was promised that he would look into the matter. At trial, the applicant explained that she wanted an investigation into the problems of the IMTC based on her feeling harassed in her office.

11. On 21 March 2008 the applicant met with the Principal Deputy Special Representative of the Secretary-General (PDSRSG) to discuss her problems. He promised that he would examine the issue. On 4 April 2008 the applicant met with the PDSRSG again. From the note of the meeting (prepared by the PDSRSG's Special Assistant) it appears that the PDSRSG informed the applicant that he had discussed the situation with her "supervisors" (assumedly the CMS and the CAS) who "were of the opinion that the situation had escalated beyond the point where the situation could be turned around". He had "advised her that the present situation remains unacceptable regarding her relationship with the staff and that she should not continue to be in charge of the Section". The applicant had "reiterated her contention that the problems only started after senior management spoke with [her team

members] individually encouraging them to write complaints", but the PDSRSG had responded that her supervisors had "not encourage[d] them but merely advised that for them to take action they would need the complaints in writing". The applicant had stated "she had never before encountered such a situation and that she had a good team in UNMIB [meaning ONUB, her previous UN mission in Burundi]". The PDSRSG saw no need for an investigation. PDSRSG advised the applicant "since her supervisors were convinced she could not turn the situation around, they would not be recommending her extension of contract" and that "a reassignment within the mission" was possible. The applicant said in evidence that she felt too "stigmatized" to continue in MINUSTAH. According to the note, the applicant explained that "she was being considered for another post in DPKO [the Department of Peacekeeping Operations] and queried whether she would be supported in this". The PDSRSG responded that "she should await the process" and that the applicant should refrain from actions that could be perceived as "retaliation". The applicant testified that she was shocked at being told that her contract was not to be renewed and queried how this could be done without the inquiry that she sought having been undertaken. The CMS testified that the CAS and he had briefed the PDSRSG in advance of the meeting about the situation in the IMTC, but the PDSRSG was not told that the CMS did not want to renew her. The note may not have been entirely accurate and the views of the PDSRSG may well simply have been predictive.

The applicant's contract is not renewed

12. The applicant testified that she was informed on 26 June 2008 by the CMS that, since she did not get along with her supervisor, the CAS, the applicant needed "to go". Then, on 21 July 2008 the applicant was given the official "Request for extension of appointment of international staff member" containing the CAS' recommendation that the applicant's contract should not be renewed. The applicant signed next to the field "Staff member's acknowledgement", but apart from the date nothing else was written or otherwise stipulated in this part of the form. The form was given to her by a clerk, not by the CAS. On 23 July 2008 CMS approved the recommendation and also signed the form. On 25 July 2008 the applicant met with

the CMS briefly (about temporary accommodation) but did not raise the decision not to renew her. The CMS testified that she told him she was trying to apply for P-5 posts but that there were none suitable on GALAXY (the online UN job site).

13. The CAS testified categorically that her recommendation had nothing to do with any perceived management shortcomings of the applicant and was entirely based on her understanding that the applicant did not wish to have her contract renewed. This conclusion, as I understand it, was based upon the applicant's statements about being unhappy with her work situation and seeking posts in other missions as well as her not expressing any disagreement with the CAS' recommendation when the notice of non-renewal was given to the applicant. This was an insufficient basis for concluding that the applicant did not want to renew her contract. If her consent was, indeed, the basis for the recommendation, it should have been specifically brought to the applicant's attention and her response sought. It is obvious that mere unguarded expressions of disappointment or frustration, even if accompanied by exploration of the possibility of transfer, are insufficient to found an inference that there was no wish to renew the contract and this was far too important a matter to be left to guesswork. The CAS said that, if she had understood that the applicant wished to renew her contract, she would not have recommended non-renewal. However, at no point did she inform the applicant that she regarded her consent to non-renewal as relevant, let alone crucial.

14. The CMS also testified that his decision not to renew the applicant's contract had nothing to do with her management shortcomings. He said, in effect, that had he been aware that she wanted her contract to be renewed he would not have made his decision not to renew as, in his view, agreement of supervisor and staff member was necessary. The CMS said that the applicant had made it clear to him that she did not wish to renew her contract. However, on further questioning it became clear that she had not said this, or anything like it, to him but he had merely inferred it from the applicant's signature of acknowledgment on the non-renewal form, her failure to

protest and his knowledge that she was applying for other jobs. It is obvious that this could not justify the inference he drew. He did not bother to ask her.

15. On 23 September 2008 the applicant requested administrative review of the decision not to renew her contract pursuant to (former) staff rule 311.1 in conjunction with (former) staff rule 111.2(a). In her appeal, she stated that the reasons for her request were her being denied due process as well as the non-renewal decision being "ill-motivated and unjustified" and based on "factors extraneous to [her] actual performance".

16. On 22 October 2008 the applicant submitted a request to the Joint Appeals Board (JAB) for suspension of action of the decision not to renew her appointment. On 31 October the Deputy Secretary-General advised the applicant that she had accepted the recommendation of the JAB not to grant the request for suspension of action. Accordingly, the applicant was separated from service with the Organization on the same day.

17. Following the request for administrative review, Administrative Law Unit (ALU) of the Office of Human Resource Management (OHRM) sought comments from the Field Personnel Division (FPD) of the Department of Field Support (DFS) as to the matters which had been raised by the applicant. These were provided on 19 November 2008 by the Officer-in-Charge (OIC). The comments correctly identified the substance of the applicant's complaint as alleging that the decision not to renew her contract was motivated by a personal vendetta against her by her first and second reporting officers, as evidenced by their criticism of her in the e-PAS. The "management response" was that the performance deficiencies highlighted in the applicant's performance appraisal should have been addressed by a rebuttal panel and, thus, implicitly, that they should be regarded as valid. The response also asserted that the comments made in the appraisal were justified and that the applicant should have been aware of the time limit. The comments did not, however, actually review the decision not to renew the applicant's contract which required, at the least, ascertainment of the actual reasons for the impugned decision. It is clear that the CMS was not asked about this. These comments did not even approach an acceptable

response to the issues in the request for administrative review. It was superficial and unfocused. If the OIC/FPD was too busy to do a proper job, he should have passed it on to someone else.

18. On 4 December 2008 ALU responded to the applicant's request for an administrative review. ALU concluded that "[t]he record does not support your contention that the decision was improper". This response contains a number of errors of reasoning and is far from satisfactory. This was not in any sense a serious attempt to review the decision as envisaged by (former) staff rule 111.2(a). Rather, like many of these exercises, it was not an administrative review at all and amounted merely to a denial that the decision was legally in error. I discuss this issue later in this judgment.

19. The applicant submits that since the CAS testified that she did not reconsider the renewal as the case was now in the hands of the Secretary-General, ie, ALU (which undertook the administrative review), it was incumbent on the CAS to inform ALU that the rationale for the decision had been eliminated. However, the applicant contends that the CAS deliberately withheld this information and the decision of 4 December 2008 demonstrates that OHRM based the decision on the request for administrative review on the applicant's alleged management deficiencies. According to the applicant, the CAS' withholding of the truth was inexcusable. At trial, the CMS was asked why he did not reconsider the question of renewal after he was made aware by the applicant's request for an administrative review that in fact, she did not consent to the non-renewal of her contract. He said that he decided to stand by his decision because of her "lack of the requisite management skills". At first he seemed to assert but then, on further questioning, unequivocally denied that the lack of managerial skills which were described in the e-PAS played any role at this stage. He explained that the lack of the requisite skills upon which he relied was the applicant's ignorance of the rules about the time limit for rebuttal and not approaching the Chief Civilian Personnel Officer (CCPO) within the two months of the impugned decision. I regret to say that, accepting this unlikely explanation as truthful, its mere repetition demonstrates its absurdity as a basis for not extending the

applicant's contract. Certainly, it provides no explanation for not explaining to OHRM the truth about why the contract was not renewed.

The applicant seeks to rebut her e-PAS

20. On 17 June 2008 the applicant signed her e-PAS form for the period 21 June 2007 to 31 March 2008. The applicant received the overall rating of "fully successful performance" which, according to CAS' testimony, was based on the completely satisfactory output level of IMTC (which was also reflected in her narrative overall comments). However, the lowest mark out of four, "unsatisfactory", was given to the applicant's core competency concerning "teamwork" and to her managerial competency in "building trust". Furthermore, the applicant was marked with the next lowest mark, "developing", for her core value concerning "respect for diversity/gender values", for her core competencies in "communication" and "accountability" as well as for her managerial competencies regarding "managing performance", "leadership", "judgment/decision-making" and "empowering others". In the remaining eight evaluation categories regarding core values, core competencies and managerial competencies, she was graded "Fully Competent". Both the CMS and the CAS made very critical comments about her ability to relate to work colleagues but, despite the strength of this language in this respect, were not regarded as sufficiently important to affect the applicant's overall rating. The CMS confirmed this at trial by stating that the applicant's successful achievement of the goals of her unit outweighed her other problems.

21. In her own comments, the applicant stated that she needed "to underline [her] disagreement" with the grading of her core values, core competencies and managerial competencies. She referred, *inter alia*, to her considerable experience in multicultural environments, as a trainer, in working in and building teams, and in being a manager; all of which she had applied to her IMTC team. She concluded her comments with the following –

> Based on all the abovementioned issues, and in addition to that I strongly disagree with the comments made by my first and second

> reporting officer who deliberately are jeopardizing my professional career.
>
> I understand that the system does not allow a staff member to rebuttal when receiving "Fully Successful Performance" as an overall rating which seems to me to be inconsistent with the 2 "Unsatisfactory" ratings for Core Competencies and Managerial Competencies and the 7 "Developing" ratings on all the 3 Core Competencies.

It is clear both from the applicant's detailed comments and from these two paragraphs that the applicant was not complaining about her overall rating, but about the particular adverse evaluations and comments and it was in respect of these only that she would have taken rebuttal proceedings, if possible.

22. On 25 September 2008 the applicant submitted a request to the Secretary-General for a waiver (actually an exception) pursuant to (former) staff rule 112.2(b) of the application of the time limit for her to submit a rebuttal statement. The rebuttal statement again made it clear that she was not seeking to rebut the overall rating, but only the evaluations of certain aspects of her core values, core and managerial competencies together with highly critical comments made by her reporting officers. Although she stated that her belief was that she could not seek rebuttal of a rating of "fully successful performance", she was not really seeking to rebut this rating. Her belief that she could not rebut those matters about which she complained was, as I explain below, entirely justified.

23. On 8 October 2008 the CCPO informed the Chief of Operations of FPD/DFS by fax that "the mission does not support … [the] request for an exception to the time limit …". The request was then forwarded to OHRM for a response, but none was ever forthcoming. There is no evidence or at least persuasive evidence that it was in fact acted upon. To the contrary, such evidence as there is indicates that it was not.

24. In the course of its reasons for declining to suspend the non-renewal of the applicant's contract, the JAB noted that the application for rebuttal of the e-PAS was out of time and, in reference to the applicant's assertion that she had misunderstood the position, commented that staff members should inform themselves of the relevant rules. No doubt this is correct but this made it all the more important that the JAB

should have satisfied itself as to the actual nature of the matters of which the applicant complained and considered whether sec 15.1 of ST/AI/2002/3 (as set out below) clearly permitted rebuttal of them. At all events, the JAB in no way purported to determine the request for a waiver, which was not an issue before the JAB, and its comments were not expressed as a finding. The fact that no decision under (former) staff rule 112.2(b) was recorded as having been made is cogent evidence that no evidence of such a decision was produced and strongly suggests that, in fact, there was none.

25. On 21 November 2008 the applicant requested the Assistant Secretary-General (ASG) of OHRM to make a decision on her request for a waiver of the time limit. On 4 December 2008 the applicant received the response to her request for administrative review of the decision not to renew her contract. That response dealt with the e-PAS issue, although this was only of marginal significance to the review being sought. The response stated –

> In relation to your memorandum … [concerning] the waiver of the time limit for submission of the rebuttal of your E-PAS for the period 2007-2008, I note that the Secretary-General's decision and the JAB's recommendation on your request for suspension of action addressed this issue…

This was, inexcusably, completely mistaken. The fact was the JAB made no recommendation on the question of the waiver of the time limit and the Secretary-General, not surprisingly, made no decision about it.

26. Quite reasonably, the applicant then enquired whether the JAB's comment was a decision on her request for an exception. On 5 December 2008 ALU advised the applicant that it had "nothing further to add to the position taken by the JAB on this issue". This was not only discourteous but inappropriate. Indeed, it simply repeated the misleading information conveyed on the previous day.

27. It seems that counsel for the respondent at the hearing before the JAB had indicated that there had indeed been a decision to refuse the applicant's request for an exception in respect of her rebuttal application. However, such an informal indication is completely inadequate. The staff member is entitled to be informed of

the identity of the decision-maker and the reasons for the decision. It is clear from the correspondence that DPKO had unequivocally referred the matter to OHRM for decision and I am satisfied that the CMS (to whom, in these proceedings, the decision was attributed) did not consider that he had made the final decision but, rather, was indicating his view for the purpose of informing OHRM. Certainly, there was no formality about it and no record made. Accordingly, though no doubt counsel had indicated during the JAB proceedings that the decision had been made, I am not disposed to accept that this was correct, although I do not question that this expressed her belief. I return to this issue later in this judgment.

Legal Instruments

> **ST/AI/2002/3**
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> **Section 10**
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> **Rating system**
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> 10.1 Staff who have met or exceeded performance expectations should be given one of the following three ratings:
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> - Fully successful performance;
> - Frequently exceeds performance expectations;
> - Consistently exceeds performance expectations.
>
> 10.2 These three ratings establish full satisfaction with the work performed and shall be so viewed when staff members having received those ratings are considered for renewal of a fixed-term appointment or selection for a post at the same or a higher level, without prejudice to the principle that such decisions remain within the discretionary authority of the Secretary-General.
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> 10.3 Staff who have not fully met performance expectations should be given one of the following two ratings:
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> - Partially meets performance expectations;
> - Does not meet performance expectations.
>
> 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 section 16.5.

> 10.5 A rating of "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 section 16.6, the non-renewal of a fixed-term contract or termination for unsatisfactory service.
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> **Section 15**
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> **Rebuttal process**
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> 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….

Applicant's submissions

28. The applicant's primary case, in essence, is that the decision of the CMS not to renew the applicant's contract was based on an error of significant fact, namely his mistaken opinion that she consented to the non-renewal. The applicant never consented to the non-renewal of her contract and the evidence did not support any such inference. Contrary to the respondent's submission, both the CMS and the CAS denied that the applicant's management shortcomings as they perceived them and described in her e-PAS played any part in the decision on renewal. At all events, this approach was prohibited by sec 10.2 of ST/AI/2002/3.

29. The applicant's request for an administrative review demonstrated that she did wish to renew her contract (at least by that stage) and, accordingly, the CMS should have reconsidered the impugned decision or at least advised ALU of the reasons for the impugned decision so that a proper administrative review could be undertaken.

30. The respondent also violated the applicant's due process rights by not undertaking a proper administrative review, cf, former staff rule 111.2(a).

31. The CMS was not authorized to determine (as the respondent submitted he did) the applicant's request for an exception in respect of the time limit for her rebuttal under (former) staff rule 112.2(b).

Respondent's submissions

32. The decision not to renew the applicant's fixed-term appointment was proper. The applicant held a 300-series appointment that was granted to staff members for service of limited duration. (Former) staff rule 304.4(a) states that such appointments "carry no expectancy of renewal or of conversion to any other type of appointment". The consistent jurisprudence of the United Nations Administrative Tribunal (UNAT) has been that the holder of an appointment of limited duration has no expectancy of renewal in the absence of countervailing circumstances, eg, an unequivocal indication that an appointment would be renewed (cf, for example, *Seaforth* (2003) UNAT 1163). The record contains no evidence that the applicant had any expectation that her appointment would be renewed beyond its expiration date. Nor is there evidence that the decision taken not to renew her appointment was unfair or otherwise improper.

33. A corollary to a staff member not having a right to renewal of his or her contract is that the Administration is not required to give a reason for the decision not to renew a staff member (*Seaforth*). Under those circumstances the contract terminates automatically (*Shasha'a* (2001) UNAT 1003, *Mr B* (1990) UNAT 496 and *Shankar* (1989) UNAT 440). However, when the Administration gives a justification for this exercise of discretion, the reason must be supported by the facts (*Handelsman* (1998) UNAT 885). Under such circumstances, the exercise of discretion is examined for consistency between the reason offered and the evidence (*Aertgeerts* (2004) UNAT 1191, paragraph II). In rare cases, UNAT found that a staff member had a right which approached an expectancy of renewal (*Bonder* (2002) UNAT 1052). In relation to claims by staff members that the exercise of discretion by the Administration is tainted by extraneous factors, UNAT has consistently held that the

party alleging improper motives, bad faith, lack of due process has the burden of proving that position.

34. The applicant did not have a right to have her appointment renewed merely because her performance was not the subject of an improvement plan and she received a "fully satisfactory performance" rating. (But there is no submission as to the application of sec 10.2 of ST/AI/2002/3.)

35. Three months before the expiration of her appointment, the applicant was informed that she would not be renewed which the applicant acknowledged, and she gave no indication that she wished to remain.

36. No specific reasons were given to the applicant for the non-renewal of her contract in July 2008. However, the record clearly indicates that the applicant's managerial failings were central to the decision of the CMS and the recommendation by the CAS. Since the applicant seemed willing to leave MINUSTAH and, in view of the fact that staff members are not entitled to renewal, it was in the best interest of the Organization for her not to continue with this mission.

37. In respect of the rebuttal, it is contended, in substance, that waiver of the time limit should not have been granted because the applicant should have made herself aware of the relevant rules. The request was never brought to the attention of ASG/OHRM, since the provisions in ST/AI/2002/3 specify that implementation of the e-PAS system is a departmental matter and the issue was decided by the CMS. The matter had been fully canvassed during the suspension of action hearing and commented upon in the JAB's report.

38. The non-renewal was subject to the proper level of review even if it did not specify the reasons for the non-renewal, since no reason for non-renewal needed be given. By a letter dated 4 December 2008, the applicant was provided with a substantive review of the decision not to renew her appointment which attached DFS' comments on her request (which included information regarding the issues of the applicant's managerial skills and her initial acquiescence to her non-renewal) as well

as a response to her letter to the ASG/OHRM regarding extension of her time-limit for submitting a rebuttal statement.

The nature of the fixed-term contract

39. Before dealing with the decisions of the Administrative Tribunal, I think it is desirable to set out my view of the legal character of a fixed-term contract, starting from first principles. The fundamental attribute of a fixed-term contract is that neither party is obligated to continue in the employment relationship once the term has expired. It follows, that, although there might be a hope on either side that the relationship will continue, this has no legal effect. In order to make this clear, it is explicitly provided that there is no expectation of renewal. This language is designed to exclude what in domestic tribunals is known as "legitimate expectation", in brief, the creation of a legal obligation by virtue of some action of a party that is intended to induce the other party to act in some way in reliance on the action. There has been judicial criticism at a high level of the utility of this term, which is far from precise. However, it is unnecessary to canvas these issues in this case. The notion, which is part both of administrative and general law, certainly expresses a concept of legal obligation and, properly defined or described, can be applied in appropriate cases in the United Nations and, in particular, to employment contracts. However expressed, it is clear that that the mere existence of a fixed-term contract does not create any obligation in the United Nations, either to extend its term, or to enter into a new contract. For that matter, the staff member also is under no similar obligation.

40. This does not mean that the United Nations has no obligations in relation to a decision not to renew a contract. The Organization's rules, regulations and administrative instruments, which form part of the contract, create a range of obligations concerning the making of administrative decisions, including in my view an administrative decision not to renew a fixed-term contract. Thus, a decision in respect of a staff member that is motivated, for example, by personal ill will, racial or sexist prejudice is plainly not lawful and the fact that the decision concerns the renewal of a fixed-term contract does not change its unlawful character. The same is

true, in my opinion, in respect of a decision affected by any irrelevant consideration or mistake of substantial fact or where relevant considerations have been ignored. There is no legal basis for treating decisions not to renew a fixed-term contract differently. This is not to say, of course, that there is a right of renewal. It is simply to apply to the decision concerning renewal the same requirements applying to any other administrative decision which affects a staff member. It is fair to say that, in respect of any such decision, there is a legitimate expectation that it will be arrived at properly, although I prefer the simpler formulation that there is a legal obligation created by the contract of employment that requires decisions to be made in this way.

41. It has been said that there is no obligation on the Administration to give a reason for not renewing a contract. With all respect, this cannot be correct, since it ignores the right of the staff member to have sought administrative review under the superseded internal justice system, and management evaluation under the current system. It is basic to the functioning of the internal justice system that a staff member is entitled, first, to know of the decision and, second, to know how it was reached, since otherwise the staff member's rights are illusory. These rights cannot depend upon the accidental provision of reasons for decision, which depend upon the decision-maker's sense of *noblesse oblige*. The system is one of legal rights and obligations and not one of favour and supplication. It follows that, where staff members ask to be informed as to the reasons for a decision affecting them, these must be provided in sufficient detail to enable a decision to be made as to whether to seek management evaluation (or administrative review in the former system). It is not for the Administration, by not providing the reasons, to evade the internal system of justice. To act in this way would be to breach its contract with the staff member in question.

42. Although it is true that, theoretically, a fixed-term contract could be permitted to expire without any decision on the part of the Administration, the fact is that decisions are always made and, obviously, for a reason: the question is scarcely left to chance; the decision-maker does not toss a coin. It also follows, of course, that the

reasons for any such decision should be recorded when the decision is made in such a way as to avoid the risk of *ex post facto* rationalization. This, also, is a contractual obligation.

43. Where a staff member has not requested the reasons for non-renewal of a fixed-term contract but has sought a management evaluation (or administrative review) of the decision, that evaluation (or review) must necessarily take into account the reasons for the decision, although the Administration is not bound by them. And, of course, the response must candidly inform the staff member of the original reasons, as well as any additional ones, justifying the evaluation so that the staff member is placed in a proper position to decide whether or not to exercise the rights of appeal to the Tribunal (or formerly the JAB).

44. These legal obligations are not imposed pursuant to any suppositions about desirable management policy. They are derived directly from the existence of the staff member's right to access the internal justice system and are necessarily to be implied by its creation. Nor do they in any way suggest that there is any obligation in the Administration to extend a fixed-term contract beyond its term. I should add, however, that there may well be circumstances in which there has been given to the staff member a representation, whether express or implied, that a further term would be granted in certain events. Where this happens, and the staff member relies upon the representation, it may well be that the Administration would be bound by its representation.

45. I now turn to the judgments of the Administrative Tribunal. In *Seaforth*, the Administrative Tribunal said –

> The Tribunal first addresses the Applicant's claim that he had a reasonable expectancy to a renewal of his temporary appointment. The Tribunal notes, first and foremost, that there is no legal expectancy to renewal with respect to any fixed-term contract, even where the employee has demonstrated efficient or exceptional performance. (See Judgments No. 440, *Shankar* (1989); and, No. 1049, *Handling* (2002).) This is true even when the employee has enjoyed a lengthy term of service. (See Judgments; No. 466,

> *Monteiro-Ajavon* (1989); and No. 496, *Mr. B*. (1990).) That there is no such expectancy of renewal is expressly stated on the face of every contract for a fixed term. Where there are countervailing circumstances, however, including, for example, abuse of discretion or a promise or agreement to renew, a reasonable expectancy of renewal may be created. (See Judgment No. 885, *Handelsman* (1998)).
>
> …
>
> (V) "… The Respondent's exercise of his discretionary power in not extending a … [fixed term] contract must not be tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness or other extraneous factors." (See *Handelsman*, ibid., para. III.)

Whilst this statement of principle differs in verbiage from the one I propose above, it seems to me that it is conceptually identical. The phrase "arbitrariness or other extraneous factors" in the second paragraph is, to my understanding, a reference (in other words) to the requirement to consider all significant relevant factors, disregard all irrelevant ones, and make no significant error of fact (this last requirement being conventionally added to the others but amounting in substance to taking into account an irrelevancy). (I note that the respondent cited *Seaforth* as authority for the submission that "the Administration is not required to give a reason for the decision not to renew a staff member". However, there is no discussion of this issue in the judgment. The reasons for the non-renewal were in fact disclosed and analysed in the judgment.)

46. Certainly, in *Shasha'a* (2001) UNAT 1003, the Administrative Tribunal said –

> II. The Tribunal has consistently held that, in general, an employee serving under a fixed-term contract has no right to expect the renewal of the agreement, a conclusion dictated by staff rule 104.12(b). The Administration, in its discretion, may decide not to renew or extend the contract *without having to justify that decision*. Under those circumstances the contract terminates automatically and without prior notice, according to staff rule 109.7. (See Judgments No. 440, *Shankar* (1989); and No. 496, *Mr B*. (1990). [Italics added.]
>
> III. On the other hand, when the Administration gives a justification for this exercise of discretion, the reason must be

> supported by the facts. (See Judgment No. 885, *Handelsman* (1998).) Under such circumstances, the exercise of discretion is examined not under the rule enunciated in Judgment No. 941, *Kiwanuka* (1999) but for consistency between the reason offered and the evidence. In this case, the conclusions that the performance of the Applicant was unsatisfactory and that the complaints had been investigated are not adequately supported by the record. The justification offered for the exercise of discretion was unconvincing and, perhaps, disingenuous …

There is regrettably no process of reasoning explaining why the Administration does not have "to justify" the decision not to renew, the Tribunal simply relying on the decisions cited. However, neither *Shankar* nor *Mr B* deal with the question of giving reasons or justification. In fact, in all these cases, the Administration did give reasons and attempted (unsuccessfully) to justify the decisions.

47. In *Aertgeerts* (2004) UNAT 1191, the Administrative Tribunal stated –

> It has been the long-standing jurisprudence of the Tribunal that, in general, fixed-term contracts do not carry any expectancy of renewal. The Tribunal has also repeatedly stated that *the Organization does not have to provide any reason when deciding not to renew* a fixed-term contract upon its expiration. However, as has also been repeatedly stated by the Tribunal, when the Administration chooses to give reasons for its decision not to renew a fixed-term contract, the validity and acceptability of these reasons are subject to judicial review. [Italics added.]

Unfortunately, the italicized proposition was not accompanied by any reasoning that justified it. Again, this proposition was not relied on, since reasons were, in fact, given and the Tribunal held that they were unsatisfactory.

48. By contrast, in *Bonder* (2002) UNAT 1052, the Administrative Tribunal considered the decision not to renew a contract as an administrative decision that fell to be considered in the same way as any other administrative decision visiting adverse consequences on a staff member. The judgment said –

> IV. It is the established jurisprudence of the Tribunal that even where there is no acquired right to renewal of a fixed-term contract the Tribunal monitors the way the Administration exercises its discretion not to renew a contract, in order to prevent a discretionary measure

> from becoming arbitrary. It is especially important for the Tribunal to ensure the right of staff members to an equitable procedure when discretionary decisions are taken by the Administration, in order not to leave them entirely to the mercy of caprice. The Tribunal has many times affirmed the imperative need for oversight of the discretionary decisions of the Administration, in which it seeks a delicate balance between the need to allow the Secretary-General of the Organization room to exercise judgment and the need to provide an essential protection to the staff members working in the service of the Organization…
>
> …
>
> XVIII. … *[The] absence of grounds for the non-renewal decision can also be considered a serious procedural irregularity.* The Executive Director of UNEP in fact asked the Director of UNEP-IE on 22 April 1997 to make a recommendation for extension or non-extension based on "solid grounds". *No grounds were stated, which can be considered contrary to the general principle in international civil service that reasons must be given for decisions — including discretionary decisions — that affect the careers of international civil servants.* That aspect of the matter was also criticized by the Joint Appeals Board, which stated: "There is no trace of a progress report or a recommendation based on 'solid grounds' for extension or non-extension of the appellant's fixed-term contract." This situation left the door wide open for highly arbitrary treatment. [Italics added.]

It is clear from the italicized passages that, in this judgment, the Administrative Tribunal did not consider that special rules in cases of non-renewal excluded the crucial requirement that proper reasons be given for a discretionary decision affecting the career of a staff members in such cases, just as in all others (and see the very early case of *Robinson* (1952) UNAT 15 at [22]). Put another way, the procedural and substantive requirements attaching to the making of administrative decisions comprise a coherent set of principles, not only well settled but internally consistent and readily understood, even if sometimes difficult to apply given the wide range of situations to which they refer. Any qualification of these requirements must be justified as a matter of legal principle. It is clear that, in *Bonder*, the Administrative Tribunal did not consider that departure from the general rule was justified in non-renewal cases.

49. In *Corcoran* UNDT/2009/89 at [46], my colleague Laker J, dealing with an application for suspension of action, repeated without comment the Administrative Tribunal rule that *the Administration is not obliged to provide a reason for non-renewal*, but that where reason is given, it must be supported by the facts, citing *van Eeden* (2004) UNAT 1177 (which deals only with the second half of this proposition) and *Shaasha'a* (italics added). *Corcoran* was a case where reasons were given and found by his Honour to be wrong. I do not read his Honour's citation of the italicized portion of the rule as amounting to approval or adoption of that part, especially since there was no need to consider its possible application in the circumstances of the case before him.

50. The reasoning in the judgments of the Administrative Tribunal (except *Bonder*) to which I have brought attention does not explain why there is a relevant difference between the cases where the Administration provides reasons and those where it does not, except of course, that it is only possible to evaluate reasons which are provided. Why the Administration should be able to determine by giving or withholding its reasons whether a staff member can effectively appeal a decision not to renew is not, so far as I have been able to discover, the subject of any explanation. Nor have I been unable to think of one.

51. As is already apparent, in principle the decision not to renew a fixed-term contract does not differ in substance from any other administrative decision affecting a staff member. The mere fact that it involves a contract which the Administration is not bound to renew does not change or lessen its obligation to make decisions that are not marred by irregularity with a corresponding obligation – at least when requested – to provide those reasons to the affected staff member. By way of comparison, it is well established that there is no right of promotion. This does not lead to the conclusion that any particular promotion process is other than fully examinable by the Tribunal to determine whether it was conducted according to the contractual rights of the staff member. The decision as to renewal of fixed-term appointments is not *sui generis* but is simply one of many administrative decisions affecting staff which may

be the subject of proceedings before the Tribunal. The statements by the Administrative Tribunal to the contrary are not explained by any process of reasoning and may lead to arbitrary and capricious results depending on the whim of the Administration. They do not deal with the implications of the institution of the internal justice system and access to its processes by the staff member and are accordingly unpersuasive and should not be followed.

The right of rebuttal

52. The performance appraisal system is regulated by ST/AI/2002/3, which provides a comprehensive explanation of the purpose and the functioning of each stage of the appraisal process. Sec 6 deals with individual work plans, "competencies" and "planning for development". Part of the process involves holding the staff member "accountable for demonstrating the three core values of integrity, professionalism and respect for diversity/gender equality". Staff with managerial or supervisory responsibilities are also subject to demonstrating managerial competence. Sec 9 deals with appraising performance and sec 10 with the rating system. Sec 10.1 describes the three "ratings", which may be given to staff who have met or exceeded performance expectations, one of which is "fully successful performance" and sec 10.3 the other "ratings" where staff have not so performed. It is clear beyond argument that the competencies referred to in sec 6 are the matters that must be considered in the overall appraisal process provided for in sec 9 and lead to the "ratings" described in sec 10.

53. A rebuttal process is prescribed in sec 15. However, it permits rebuttal only of the "performance rating". The relevant part of this section is set out above. It is clear that no rebuttal is provided in respect of the individual competency evaluations that are part of the rating process, though no doubt, an appeal against a rating as unfairly low would require the Rebuttal Panel to consider the appropriateness of that sub-set of factors. Neither is there any basis for the staff member to rebut the narrative comments made by the first and the second reporting officer. It is also clear

that the applicant could have appealed, if she contested its correctness, the rating she received of "fully successful performance".

54. It is true that the applicant, therefore, could in theory seek to rebut her rating. But she did not wish to do this. She wished to contest the critical comments and the negative evaluations of the various competencies which she was required to have. The reason given by the CMS that she had achieved the goals of her unit cannot reconcile the marked inconsistency between the evaluation of her competencies and her "*fully* successful performance" rating. It is clear that, in considering her application for an exception, this vital point was regrettably and, to my mind, inexcusably, overlooked by the CMS, the JAB and ALU, who focused legalistically and unfairly on one expression in the applicant's request (made as a lay person), without seeing it in context. Moreover, assuming (as I think I must) that the overall rating was both conscientiously and truthfully made, the applicant's contention that it was fundamentally inconsistent with the severe criticism contained or implied in the adverse assessments and demonstrated that they were much exaggerated has considerable force. I simply cannot see how "fully" is the same as "partly".

55. The CMS and the CAS implied that they were aware, at the time of the e-PAS, that only the rating of "consistently exceeds performance expectations" could not be rebutted and that the applicant was mistaken in thinking that she could not rebut her rating. They both played, as second and first reporting officers, a key role in the entire process. In my opinion each had a managerial responsibility to correct – as could easily have been done – the applicant's misapprehension, leaving aside the obligations of ordinary human courtesy. Their failure to do so, as responsible managers, was an important factor to consider when determining whether to grant the exception sought by the applicant. The CMS rejected the notion that he had any responsibility at all, the JAB did not consider it and ALU did not mention it.

56. Although the rebuttal sought by the applicant does not appear to be within the provisions of sec 15 of ST/AI/2002/3, it seems that the practice of the Administration has been to permit rebuttal of individual evaluations of particular competencies even

where the staff member does not dispute the overall performance rating. I infer this from the absence of any submission from the respondent that suggests that the applicant is not entitled to rebut these evaluations absent an objection to her rating. Equality and fair dealing requires that this practice – of which the applicant was obviously unaware – be applied to her request for rebuttal.

57. If the decision as to the exception has been made, it must be rescinded and reconsidered (though not by the CMS), bearing in mind that from the very beginning the applicant gave notice of her intention to rebut if she could and the other factors which to reference has been made above. The respondent submitted that the CMS was authorized to determine whether the exception under (former) staff rule 112.2(b) should have been made. In light of my other conclusions, it is not strictly necessary that I decide this point. However, the Secretary-General's delegation of the discretion is undoubtedly to the ASG/OHRM under ST/AI/234/Rev. 1 (Administration of the Staff Regulations and Staff Rules) and the respondent's contention must be rejected.

The decision not to renew

58. Both the CMS and the CAS gave, as I have mentioned, categorical evidence that they were not influenced at all by the management weaknesses and other problems, which they perceived in the applicant and mentioned in the e-PAS. There is thus no evidentiary basis for the respondent's submission that her contract was not renewed because of the applicant's management shortcomings. The response of the OIC/FPD of 19 November 2008 to the applicant's request for administrative review overwhelmingly concerned itself with the applicant's request for an exception in respect of her rebuttal and disclosed no information about the basis for the decision not to renew her contract. In this respect, the OIC contented himself with simply repeating the terms of (former) staff rule 304.4(a) to the effect that a person appointed under a contract of limited duration had no entitlement to an automatic renewal of appointment.

59. The response of OHRM to the applicant's request to review the decision of the CMS was given on 4 December 2008. It opened with the assurance, "We have carefully reviewed the totality of the circumstances surrounding the decision not to renew your appointment, including the comments of the [OIC/FPD]". Since neither the CMS nor the CAS informed OHRM of the basis for this decision, this effusion was rather exaggerated. The author noted that the applicant was given notice that her contract would not be renewed on 21 July 2008 and that no reason was given for the non-renewal of this appointment. The author went on to say, correctly, that a "staff member has the right that a decision affecting his or her terms of appointment is taken in accordance with the rules of due process..." However, it is clear that it was not thought that this required an enquiry to ascertain whether the rules of due process were in fact, followed. Indeed, there was no enquiry at all about the actual process. The clear implication of the response is that the decision was based upon a conclusion that the applicant "lacked the requisite management skills for someone in [her] position". The only "due process" mentioned was that regarding the e-PAS concerning which it was noted that the applicant "accepted this EPAS and did not file a rebuttal in a timely manner". The second part of this observation was correct, but the first part was patently wrong, as the applicant made clear in the e-PAS itself and her request for administrative review. It seems that the author inferred, from the fact that the applicant did not initiate rebuttal proceedings, that the applicant's claim that the decision not to renew her contract was ill motivated could not be accepted. This is an evident *non sequitur*. It is true that the only evidence relied on by the applicant was the very critical evaluation disclosed in her e-PAS, pointing out that this was in marked contrast to her overall rating, but the suggestion that this could be set aside simply because the applicant had not taken rebuttal proceedings, which, as she said, she did not believe she was entitled to do, is scarcely sound reasoning. There was no attempt to consider whether, indeed, the applicant was not entitled to rebut though, perhaps not for the reason she gave. Having regard especially to what is now known about the circumstances of the applicant's non-renewal, so far from this being "a careful review of the totality of the circumstances", it was a cursory glance at a few largely irrelevant facts.

60. I have noted above the submission on behalf of the respondent that "the record" clearly indicates that the applicant's managerial failings were central to the decision of the CMS and the recommendation by the CAS". If "the record" is a reference to the written material, this is plainly wrong. Nothing in the written material indicates, except for the vague suggestion of the OIC/FPD in his comments of 19 November 2008, that the applicant's managerial failings were even marginally relevant, let alone central to the decision. Furthermore, the evidence of the directly involved persons unqualifiedly contradicts this contention. Regrettably, the respondent's submission does not deal with this evidence nor does it, in particular, explain why it should not be accepted. Nor could what the author called "the record" justify rejection of the applicant's complaints. The "record" did not deal with the issue at all.

61. There is another, and perhaps more fundamental reason, why the submission on behalf of the respondent that the applicant's contract was not renewed because of her lack of managerial competence must be rejected. This derives from the provisions of sec 10.2 of ST/AI/2002/3, set out above. The effect of this provision is that, when a staff member with one of the specified ratings is being considered for renewal of a fixed-term appointment, he or she is to be viewed as establishing "full satisfaction with the work performed". This sub-section does not prevent the Secretary-General from exercising his or her discretionary authority in respect of such an appointment but that discretion must be exercised upon the basis that the staff member in question has in fact performed his or her work with full satisfaction. It follows that the CMS was not permitted to consider renewal of the applicant's contract upon the basis that her performance was not fully satisfactory. Nor was the Secretary-General entitled to consider the applicant's request for administrative review upon any other basis but that her performance was fully satisfactory although, it may be, some other consideration might reasonably have justified non-renewal. Since no such other consideration was in fact considered, this possibility is irrelevant.

62. It follows that the applicant's submission that the administrative review did not comply with the obligations of the Administration towards the applicant is correct.

63. I now return to the reason given by the CMS for his decision not to renew the applicant's contract. It seems to me that it was marred by a significant lack of good faith. If a particular issue has been identified as either significant or crucial to the making of a decision affecting the employment of a staff member and that issue is one about which the staff member has personal knowledge or relevant information, it will be incumbent upon the decision-maker, in the interests of fair dealing, to seek that information from the staff member involved, unless the circumstances are exceptional. Such an enquiry is not only necessary as a matter of undertaking a rational process of decision-making, but, in the interests of fairness, of ensuring that the possibility of error is avoided. In this case, where the crucial question was whether the applicant, in fact, wished to renew her contract, it is inescapable that any reasonable decision-maker should have asked her about this and not relied upon second-hand information and inferences based upon inadequate grounds. It was very unfair to the applicant in the circumstances of this case, since she otherwise would have known the significance that would be placed upon her failure to protest and her expressions of frustration and discontent and could have corrected the mistaken impression which she had created.

64. In the event, the CMS made his decision almost wholly upon the basis of a mistake and he did so because he failed to make an elementary enquiry of the applicant, which not only fairness but also a reasonable approach to ascertaining the material facts required. There was also a failure by the CAS to record the reasons for the recommendation and then by the CMS to record the reasons for his decision. The result was that, when the applicant sought to exercise her rights to administrative review and, ultimately, to a decision by the Tribunal, she had to do so in ignorance of the truth, or at least the asserted truth, about the reasons for not renewing her contract. In my view, this constituted a substantial breach of the applicant's contractual right of

due process. Had the administrative review of the CMS' decision been adequate, the initial failure of the CAS and the CMS to make a proper record could have been made good and, it may be, their mistake corrected.

65. I should deal, though, briefly, with the applicant's allegations that the CAS and the CMS were motivated by malice in their decisions concerning her. In the circumstances, it is not necessary for me to analyse the evidence in detail. It is sufficient to say that, although there were some shortcomings in their approach to the applicant's situation, the applicant herself placed significant obstacles in the way of resolution, and I do not see any persuasive evidence that her supervisors were unfairly prejudiced against or acted other than honestly, as they saw their duty. Certainly, they found it difficult to deal with the applicant and it may be that they did not like her but this is part of the human condition and is not a breach of any legal duty.

Conclusion

66. If there was a decision not to allow an exception under (former) staff rule 112.2(b) to permit the applicant to rebut her e-PAS, it is rescinded; if there was no such decision, then one must be made. Either way, the outcome of this part of the case must be to order the ASG/OHRM consider whether, in all the circumstances, there should be an exception in the applicant's case of the time-limit provided by sec 15.1 of ST/AI/2002/3, such as to permit her now to commence rebuttal proceedings in respect of her e-PAS for 2007-2008, should she wish to do so. The applicant is to inform the respondent within seven days of her decision.

67. In respect of the non-renewal of the applicant's contract, I assume that this cannot now be rescinded. However, the decision was made in breach of the Administration's contractual obligations and the applicant is entitled to compensation. I direct the parties to make written submissions on this question within twenty-one days. Should it be necessary to adduce factual evidence, this should be done by a statement from the witnesses concerned, with the other party

indicating whether the facts are admitted or denied. A hearing will be conducted to determine factual disputes, if any.

(*Signed*)

Judge Michael Adams

Dated this 4th day of March 2010

Entered in the Register on this 4th day of March 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York