

ORGANISATION
FOR ECONOMIC
CO-OPERATION
AND DEVELOPMENT



ORGANISATION DE
COOPÉRATION ET
DE DÉVELOPPEMENT
ÉCONOMIQUES

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 31 October 2022

JUDGEMENT IN CASE No. 101

AA

v.

Secretary-General

Translation (the French version constitutes the authentic text).

JUDGMENT IN CASE No. 101 OF THE ADMINISTRATIVE TRIBUNAL

Hearing on 14 October 2022

In Château de la Muette,

2 rue André-Pascal à Paris

The Administrative Tribunal consisted of :

Louise OTIS, Chair

Pierre-François RACINE

And Chris DE COOKER

with Nicolas FERRE and David DRYSDALE providing Registry services.

The Tribunal heard

Jean-Didier SICAULT, Counsel of the Applicant ;

Diana BENOIT, Head of General Legal Affairs Division, Auguste NGANGA-MALONGA, Senior Legal Advisor of the Organisation's Directorate for Legal Affairs and Gaëtan VAN DER HORST, Legal Advisor, on behalf of the Secretary-General ;

Monsieur Jeremy MADDISON, President of the Staff Association

I. INTRODUCTION

1. By her application for annulment of the termination of her appointment and for modification of the decision rating her performance as unsatisfactory, lodged with the Registry on 14 October 2021, AA (hereinafter ‘the Applicant’) requests that the decision of the Secretary-General (hereinafter ‘the Organisation’) of 21 July 2021 rejecting her prior request of 21 June 2021 be annulled.
2. An application for an extension of the time limit for the Organisation to present its comments in response was made on 3 December 2021. This application was granted by the Chair of the Tribunal, who extended the time limit to 21 January 2022.
3. The Organisation submitted its comments in response on 21 January 2022.
4. An application for an extension of the time limit for the Applicant to present her reply was made on 1 February 2022. This application was granted by the Chair of the Tribunal, who extended the time limit to 30 April 2022.
5. The Applicant submitted her reply on 25 April 2022.
6. The Staff Association submitted its statement of intervention on 27 April 2022.
7. An application for an extension of the time limit for the Organisation to present its comments in rejoinder was made on 12 May 2022. This application was granted by the Chair of the Tribunal, who extended the time limit to 27 June 2022.
8. The Organisation submitted its comments in rejoinder on 27 June 2022.
9. On 7 July 2022, the Chair of the Tribunal issued a management decision relating to the selection and hearing of witnesses.
10. The witnesses who were heard in person or by video link during the hearing are BB, Director of the Education and Skills Directorate (EDU), CC, former Deputy Director and supervisor of the Applicant, DD, former supervisor of the Applicant and head of the *EDU/IMEP* Project, EE, former manager of the Applicant and head of the *INES/LSO* Unit,

FF, former colleague and analyst at the *INES/LSO* Unit, and GG, analyst at the *INES/LSO* Unit. HH, former Chair of the *LSO* Network, gave a written testimony.

11. All the documents cited and produced by the Applicant (annexes) bear the reference letter **R**, whereas those cited and produced in defence by the Organisation (documents) bear the reference letter **O**.

II. FACTS

12. After reviewing the documentary evidence and hearing the witness evidence, the Tribunal singles out the following facts as relevant:

13. In 2002 the Applicant, who holds a doctorate in economics¹, joined the OECD as a statistician, a post she held at various directorates of the Organisation until the termination of her contract in December 2020.

14. On 28 October 2002, the Applicant was first hired as an auxiliary statistician² for six months and then as an official at grade B4 in the Social Policy Division of the Directorate for Education, Employment, Labour and Social Affairs. On 1 August 2003, she was transferred, at the same grade, to the Trade Directorate. Then in 2005, she was recruited to the Education Directorate (EDU), in the Innovation and Measuring Progress Division (IMEP), at grade B5.

15. CC testified that the quality of the Applicant's work during the supervision years 2003-2004-2005 was very good (good) in terms of autonomy, collaboration and attention to detail.

¹ Document R-1.

² A category of employees prior to the 2011 employment framework.

16. In 2007, in the same directorate, she joined the Indicators of Education Systems (INES) programme.
17. The Applicant remained in the Education Directorate (EDU), at the same grade B5, until the end of her appointment, i.e. for nearly 15 years. She never progressed in rank and was not given any promotion. Between 2015 and 2017, she applied for seven positions at a higher grade - including four (4) at EDU - but without success³.
18. Between 2003 and 2012, the Applicant carried out her duties in an autonomous, competent and diligent manner, as evidenced by the annual evaluation reports in which her superiors note in particular her positive interaction in teamwork and her sense of initiative⁴. In 2009, BB stressed her exceptional contribution to the division's work programme⁵.
19. At the end of 2011, the Applicant's immediate supervisor, II, left his post unexpectedly. The tasks of analyst and manager of the INES Network were temporarily assumed by the Applicant for six (6) months, until June 2012. It was a difficult time, but the Applicant performed these tasks well.
20. An important fact should be emphasised here. In June 2012, the post of manager that had been held by II was awarded to DD, a statistician who was a colleague of the Applicant and had the same grade B5. According to the Head of the IMEP Division, JJ, the Applicant found it hard to accept the appointment of DD. In the 2012 performance evaluation report, he points out: *'AA faced a rather challenging year 2012, with the departure of her immediate colleague and supervisor II. (...) and the replacement by DD as coordinator of the INES/LSO network, a decision she accepted with reluctance...'*⁶.

³ Document O-1 attached to the response. Period preceding the arrival of the Applicant's manager Marie-Hélène Doumet.

⁴ Performance rating forms, Documents R-2 to R-11.

⁵ Document R-9.

⁶ Document R-12.

21. Between 2012 and 2020, the Applicant experienced performance difficulties which gradually worsened to the point where the Organisation implemented a Performance Improvement Plan (henceforth 'PIP')⁷.
22. First, in 2012, the Applicant found it hard to accept the authority of her new manager⁸.
23. After this, certain technical shortcomings in the quality of her work, her role in the team and her ability to show initiative were observed in particular by JJ, who noted in May 2012: *'Both J.D. and myself have had several discussions in the past weeks and months with AA and we will have another one tomorrow morning. It is fair to say that there are some issues with her work and that she is not feeling happy at all.'*⁹
24. DD testified to the significant difficulties encountered by the Applicant during the years 2011-2013 when she could not count on his collaboration and the suggested changes were refused by the Applicant.
25. Several solutions were offered to the Applicant, including an internship at CERI in 2014-2015, a reassignment to another INES team, a special mandate to update a Handbook¹⁰ and a data visualisation platform project, but these did not enable the Applicant to remedy the shortcomings pointed out by her superiors.
26. On 31 December 2018, the annual performance report concluded that the Applicant had not made the expected progress according to the objectives set, in particular project management, data processing, analysis, writing and collaboration. The report therefore concludes: *'improvement needed'*¹¹. This report was not submitted by the

⁷ Annex XXVI, Section IV of the Staff Regulations; Document R-21

⁸ Documents O-1, O-2, O-3 of the surrejoinder.

⁹ Documents O-4 and O-5 of the surrejoinder.

¹⁰ OECD Handbook for Internationally Comparative Education Statistics.

¹¹ Document O-4.

Applicant to the Re-evaluation Commission, in accordance with Annex XXVI, Section III of the Staff Regulations, entitled 'Dispute settlement', which refers to the procedures for dispute settlement set out in Regulation 22b) of the Staff Regulations.

27. In her testimony, EE, the Applicant's manager, provided details about the performance evaluation of 31 December 2018 and about the process of the PIP. She also confirmed the Applicant's shortcomings with regard to detailed statements, collaboration, coordination, follow-up on matters in progress and attention to detail.
28. On 24 June 2019, a 'Talent Review meeting / examen des talents' was held to discuss the competencies and career development of statisticians at the Education Directorate (EDU). The Director, BB, and a number of senior managers at the Directorate attended this meeting moderated by LL, Chief Human Resources Advisor for the Education Directorate (EDU). According to KK, who was present at the meeting, the Applicant's performance was considered unsatisfactory and her competencies ill-suited to the requirements of the Directorate. KK stated: *'that AA had not really been given the opportunity to show off her talents; the Director said that enough had already been done for her...'*¹².
29. In mid-2019, after a series of monthly meetings, the manager concluded that the Applicant's performance was likely to be rated unsatisfactory, given the numerous shortcomings detailed in the mid-term evaluation¹³.
30. Consequently, the Director of EDU together with the Human Resources Management Service (HRM) implemented the PIP, which began on 30 October 2019 and ended on 29 April 2020¹⁴. This decision was not submitted to the Re-evaluation Commission by the Applicant.

¹² Document R-20.

¹³ Document R-19, p.8.

¹⁴ Document R-21.

31. At the end of the period of six (6) months, the PIP report concluded that the Applicant's performance remained unsatisfactory¹⁵. The Applicant's manager, EE, proposed an extension of the PIP for an additional three (3) months, i.e. until 29 July 2020.
32. After this additional period, the final report of the PIP, dated 30 July 2020, finally concluded that the Applicant's performance was unsatisfactory in the following terms: *'AA still requires strong supervision and support particularly in how to manage her own time and how to organise and structure her work efficiently. She also fails to demonstrate full autonomy, proactivity, analytical thinking, attention to detail, communication and collaboration as would be expected from a statistician of her level. AA had commented on several occasions that her workload was too high, although her objectives have been established to be slightly lower than those of other similar statisticians at a similar position in the directorate. After a careful review of AA's work over the initial duration of the PIP and its extension, the complaints of a high workload most likely stem from AA's difficulty to make optimal use of tools that would simplify her work, and in deficiencies in other competencies, such as attention to detail, technical expertise or autonomy to organize her work efficiently, which have resulted in work having to be redone or taking longer than expected.'*¹⁶.
33. This evaluation was criticised by the Applicant, who complained about the lack of specific performance criteria that could be used to conclude that the individual objectives set in the PIP had been achieved¹⁷.
34. On 22 September 2020, the Head of Human Resources Management (HRM) notified the Applicant of the Secretary-General's intention to terminate her appointment for

¹⁵ Document R-22G.

¹⁶ Document R-24A/1.

¹⁷ Document R-24A/2, R-23 B to D.

unsatisfactory performance under the terms of Paragraph 36 b) ii) of Annex XXVI and Regulation 11 a) i) of the Staff Regulations¹⁸.

35. On 4 October 2020, the Applicant requested a hearing by the competent advisory body in cases of termination for unsatisfactory performance, namely the Staff Review Board, a joint committee chaired by the Executive Director. At the end of this meeting, the Committee concluded that the termination procedure based on Regulation 11 a) was regular¹⁹.
36. On 15 October 2020, the Applicant requested referral to the Re-evaluation Commission, to which the Organisation agreed on 16 November 2020, specifying that this referral did not have a suspensive effect with regard to the appointment termination procedure, but that *'if the Secretary-General were subsequently to modify the rating of the Applicant's performance following the procedure before the Re-evaluation Commission, he would then reconsider any decision to terminate the Applicant's appointment.'*²⁰.
37. On 16 December 2020, the Secretary-General terminated the Applicant's appointment with effect from 18 December 2020. Following this termination, the Applicant received 48,168 euros for the remaining notice period of 9 months²¹.
38. On 17 February 2021, the Re-evaluation Commission unanimously concluded that the unsatisfactory performance finding should stand and issued a recommendation to the Secretary-General²².

¹⁸ Document R-26.

¹⁹ Document O-7.

²⁰ Document R-28.

²¹ Document R-29.

²² Documents R-32B and O-9.

III. PLEAS

39. The Applicant puts forward four (4) pleas in support of her application for annulment of the termination of her appointment and for modification of the decision rating her performance as unsatisfactory. These pleas are as follows:
1. That the Applicant's performance was evaluated according to a PIP procedure that was flawed because it was premature, was not accompanied by appropriate training for the Applicant and was conducted according to performance criteria that were not understood, defined and accepted by the Applicant, contrary to the HR brochures;
 2. That a legal error was committed concerning the basis of the decision to terminate her appointment under Regulation 11 a) i) rather than Regulation 11 a) iii), concerning termination further to a redefinition of functions.
 3. That essential points - including the Applicant's successful overall career - were not taken into account, invalidating the grounds for the decision to terminate her appointment.
 4. That there was a breach of the duty of care as a result of the failure to treat the Applicant with respect, kindness, transparency and objectivity.
40. On the contrary, the Organisation maintains that (1) there was no flaw in the PIP procedure, which was initiated at the right time and according to the appropriate criteria and administered properly, with due regard for the Applicant's workload, (2) that the decision to terminate the appointment does not contain any obvious error, (3) that the Applicant's functions did not undergo any redefinition which would justify a review of the case on a different basis in law and that the Applicant's career was duly considered, and (4) that the duty of care was upheld by the rigorous procedure which was followed both by the review bodies and by the support and supervision measures for the Applicant's benefit.

41. The Staff Association supports the pleas put forward by the Applicant and, in addition, submits its comments on a procedural flaw not mentioned by the Applicant, claiming that the decision to terminate her appointment was taken before the opinion of the Re-evaluation Commission had been issued. The Tribunal will consider the Association's comments at the end of the analysis.

IV. RELEVANT PROVISIONS OF THE STAFF REGULATIONS

Regulation 11

a) The Secretary-General may terminate the appointment of an official:

i) for unsatisfactory service;

b) In cases falling under a) i), iii), v) or vii) above:

i) the decision shall be taken after the relevant advisory body has been consulted on the regularity of the procedure;

ii) an official shall be notified in writing, before the consultation of the relevant advisory body, of the Secretary-General's intention to terminate his/her appointment, indicating the grounds for such intended termination.

Instructions

111/1 *In cases in which the appointment is terminated pursuant to Regulation 11 a) i), iii) or vii), the relevant advisory body must hear the official if he/she has so requested in writing within eight days of receiving the letter informing him/her that his/her case will be examined by this body. Should the official be physically unable to attend, the advisory body shall examine the case in the absence of the official, who may designate another serving official to represent him/her.*

Regulation 22

Advisory Bodies

...

b) The Secretary-General shall establish a Re-evaluation Commission comprising a Chairman and two members nominated by him/her. This Commission shall advise the Secretary-General, at the request of an official, on any individual dispute arising from a decision of the Secretary-General relating to the official's performance evaluation, periodic advancement or post classification and which the official considers contrary to the terms of the appointment or to the provisions of these Regulations or of applicable Rules. Prior referral to this Commission is a precondition for filing an application with the Administrative Tribunal mentioned in paragraph c) of this Regulation.

Instructions

122/2.3 *An official wishing to contest a decision relating to his/her performance evaluation, periodic advancement or job classification must necessarily submit his/her claim to the Re-evaluation Commission within two months of the written notification of the decision concerned.*

122/2.7 *The Commission shall have access to that part of the personal files of officials dealing with career and, in cases where the dispute relates to a decision concerning performance evaluation or periodic advancement, to the opinions of the Management Group of the Directorate concerned or of the Management Review Board. It may summon any person it considers might be able to provide relevant information or expertise having regard to the subject of the dispute, and if it does so, the claiming official shall be informed accordingly.*

122/2.8 *If he/she so wishes, the official concerned may ask to be heard by the Commission. In this case, the official may choose a member of staff to assist him/her.*

...

ANNEX XXVI – DECISION OF THE SECRETARY-GENERAL ON PERFORMANCE MANAGEMENT PROCEDURES

I. Annual performance evaluation

1. The performance of officials shall be evaluated as part of the annual performance management cycle corresponding to the calendar year preceding the evaluation. This

evaluation is based on the achievement of individual objectives set in advance, within the framework of the official's job description.

....

9. A mid-term review shall take place when managers consider that, on the basis of the ongoing performance during the year, the global performance of officials under their supervision risks being rated unsatisfactory or improvement needed at the end of the year. This review is preceded by a meeting between the officials and their manager(s), a written record of which shall be included in the performance management form.

...

19. The ratings which may be attributed to an official's performance are as follows:

...

Improvement needed:

The official has not achieved most of the set objectives, adjusted where appropriate, and has not taken all reasonable measures to achieve them.

Unsatisfactory performance:

The official has not achieved the set objectives, adjusted where appropriate, and has not taken all reasonable measures to achieve them.

...

26. When an official's performance is rated as "Unsatisfactory performance", no step shall be granted and, if it is not already the case, a Performance Improvement Plan shall be implemented pursuant to paragraphs 32 to 36 below.

...

III Dispute settlement

31. If, at the end of the annual performance evaluation process, officials wish to contest the decision relating to their global evaluation, performance rating or advancement, they shall make use of the procedures for dispute settlement set out in Regulation 22 of the Staff Regulations.

IV. Performance Improvement Plan

32. A Performance Improvement Plan (PIP) shall be implemented at the end of the performance management cycle for officials whose global performance is rated as “Unsatisfactory performance”. Furthermore, when, during the performance management cycle, the Secretary-General, where appropriate, or the Directors consider that the performance of officials risks being judged unsatisfactory at the end of the annual cycle unless substantial improvement is made and following the mid-term review mentioned in paragraphs 8 and 9 above, they may implement a PIP using the same procedures. After consultation with the Head of Human Resource Management, the PIP is implemented for a period of six months, subject to the extension referred to in paragraph 36.

...

34. During the PIP, a monthly meeting shall take place with the official, during which the manager takes stock of the official’s progress. The manager shall make written comments on these meetings which shall be put in the PIP form. The official may also add comments within eight working days. The Human Resources Management Service shall be regularly informed of the results achieved by the official and the evolution of the process.

35. At the end of the PIP, the manager shall communicate to the official the PIP form containing the evaluation of his or her performance. The official is invited to sign the form to acknowledge receipt and may add comments to the form within ten working days. Signing the form does not mean that the official consents to it. The refusal of the official to sign the form has no effect on the proper conduct of the proceedings. The PIP form is then sent to the Head of Human Resource Management and shall be put into the official’s personal file.

36. If, in the evaluation referred to in paragraph 35, it is judged that:

...

b) The performance of the official is still unsatisfactory but capable of improvement, the manager may, in agreement with the Head of Human Resource Management, extend the PIP for a further three month period on the conditions set out in paragraphs 33 to 34. If at the end of the extension, the evaluation concludes that:

i) the performance of the official becomes satisfactory, objectives are set for the rest of the evaluation cycle, in accordance with paragraph 4 above;

ii) the performance of the official is still unsatisfactory, the Secretary-General may terminate the official's appointment pursuant to article 11 a) i) of the Staff Regulations.

ANALYSIS

42. Before examining the four pleas put forward by the Applicant, it is first necessary to specify the standard of review applicable to disputes relating to the evaluation of officials' performance in international administrative law. The case law of international organisations applies a substantially uniform standard of review in recognising the very broad discretion enjoyed by international organisations in this regard. Therefore, a limited standard of review is the principle applicable to a performance evaluation justifying the non-renewal of an appointment.

43. This is apparent in particular from the case law of the Administrative Tribunal of the International Labour Organization (ILOAT). In particular, the latter drew attention to its case law in this area in a recent case, in the following terms:

'(...) The principles governing the Tribunal's consideration of challenges to staff performance appraisal reports are well settled. Indeed, they are discussed in Judgment 3378, consideration 6. The Tribunal recognises that such reports are discretionary and will set aside or amend a report only if there is a formal or procedural flaw, a mistake of fact or law, or neglect of some material fact, or misuse of authority, or an obviously wrong inference drawn from the evidence' (see Judgment 3842, consideration 7). The Tribunal has also held that, 'as a rule "he who approves [a staff member's appraisal report] will grant the reporting officer great freedom of expression. The official's observations on the report may in some cases serve to correct any error of judgment that may have been made. It will be right not to approve a report only if the reporting officer made an obvious mistake over some important point, if he neglected some essential fact, if he was grossly inconsistent or can be shown to have been prejudiced. And he need not be deemed prejudiced just because his assessment for one period is not the same as another reporting officer's opinion of the same official

for an earlier or later period” (see Judgment 724, consideration 3; see also Judgment 2318, consideration 4)²³.

44. Furthermore, concerning the non-renewal or non-conversion of open-ended contracts, the case law of international organisations also emphasises the broad discretionary power of international organisations.

45. The Administrative Tribunal of the OECD has recalled this principle on many occasions, in particular in Judgment No. 64/2009:

‘With regard to the non-renewal of a contract, the Tribunal notes again, as it already did in Judgments Nos. 30 of 27 March 1998 and 55 of 6 June 2002, that a decision by the Secretary-General not to renew a contract falls within his discretionary power and that it is not for the Tribunal to substitute its assessment for that of the Organisation. It will condemn the Secretary-General’s decision only if the decision is issued by a body without authority to do so, is affected by a vice of form or procedure, is based on inaccurate facts or involves an error in law, a misuse of power or a manifest error of appreciation’²⁴.

46. The discretionary power of international organisations is also apparent from ILOAT case law on the same issue.

47. Thus, the ILOAT noted in its Judgment No. 3005 that:

‘In Judgment 1349, under 11, the Tribunal noted the wide discretion an organisation enjoys in relation to the decision to convert a fixed-term appointment to a permanent one. Given the highly discretionary nature of the decision, it is subject to limited review and will only be set aside “if it is taken without authority or in breach of a rule of form or of procedure, or if it is based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was an abuse of authority” (see Judgment 2694, under 4)’.²⁵

²³ Judgment No. 4462 (2022), consideration 9. In addition to the judgments cited in this excerpt, see also Judgment No. 3932 (2018), consideration 21 and Judgment No. 4450 (2022), consideration 3.

²⁴ OECDAT Judgment No. 64 (2009), page 3. See also Judgment No. 30 (1998) page 3, consideration 6, Judgment No. 55 (2002), pages 3-4 and Judgment No. 73 (2014), consideration 29.

²⁵ ILOAT Judgment No. 3005 (2011), consideration 10.

1) The evaluation procedure according to the Performance Improvement Plan (PIP)

48. The Applicant alleges that her performance was rated unsatisfactory following a PIP procedure that was premature and inappropriate in both design and execution. Accordingly, all resulting decisions, including the ultimate unsatisfactory performance finding, are null and void.
49. In the initial phase, the PIP was not implemented prematurely. In mid-2019, after a series of monthly meetings, the manager concluded that the Applicant's performance was likely to be rated unsatisfactory, given the numerous shortcomings detailed in the mid-term evaluation²⁶. Paragraph 32 of Annex XXVI specifies that the PIP may be implemented when the official's performance risks being judged unsatisfactory at the end of the annual cycle unless substantial improvement is made.
50. The Applicant then notes that the performance criteria for the PIP were not established in accordance with the practices recommended by HRM, as detailed in certain HR brochures.
51. It should be emphasised that the implementation and design of the PIP were not the work of the manager on her sole authority. The PIP was the result of a decision by the Director of EDU, BB, assisted by FF, supervisor, EE and LL of the Human Resources Management Service (HRM).
52. On examination, the PIP form, signed by the Applicant, sets out a series of specific objectives, each of which is specifically detailed and conforms to the practices followed by the Organisation. These three (3) objectives were (1) to process data from a questionnaire and an indicator, (2) to master the use of the STATA software and (3)

²⁶ Documents R-21 and R-21G.

to review the ISCED mapping. The evidence suggests that these were usual objectives for statisticians of the same level. These objectives had already been included in the 2019 performance objectives. They were sufficiently precise and did not depart from the practices of HRM which, moreover, was a signatory of the PIP.

53. As for training for STATA, a statistical and econometric software package, the evidence in the file shows that the Applicant could have followed specialist training with other statisticians more quickly, but never got back to her manager about this option. In addition, it was the manager who found out about a number of STATA online training options and suggested them to the Applicant. In the end, the Applicant chose and followed some training sessions before finally concluding that this training did not suit her²⁷. The evaluators of the PIP procedure deduced from this that the Applicant lacked initiative and autonomy.

54. Finally, the Applicant alleges that she had difficulty in carrying out her PIP due to a work overload. This allegation has not been substantiated. As specified by the Chief Statistician of the Organisation: *'The PIP objectives and subsequent workload were carefully designed to be manageable by the claimant within the allocated timeframe, and deemed consistent with the basic duties of other statisticians in the EDU/IMEP division and in the EDU directorate and the OECD at large'*²⁸.

55. Consequently, this first plea must be rejected. No formal or procedural flaw or neglect of some material fact has been demonstrated.

2) Appointment termination procedure under Regulation 11 a) i).

56. The Applicant alleges that the legal basis for the decision to terminate her appointment was the redefinition of her functions, as her competencies and

²⁷ Documents O-11 and R-12.

²⁸ Documents R-32B, Re-evaluation Commission

qualifications no longer met the needs of the Organisation. Accordingly, the decision to terminate her appointment should have been based on Regulation 11 a) iii) of the Staff Regulations and not on the concept of unsatisfactory performance provided for in Regulation 11 a) i) of the Staff Regulations. She claims that this is an error in law.

57. The Applicant deduces this assertion from the opinion of the Re-evaluation Commission, which concludes: *'It appears that the claimant's skills and expectations have progressively diverged from the evolution of the job requirements and roles of statisticians which came to require more proactivity, autonomy and a readiness to embrace technical and process innovation'*²⁹.

58. This proposition is unfounded. The Commission simply states that the Applicant's initial skills and expectations have gradually diverged from the normal development of her duties as a statistician which, over the years, have incorporated technical and methodological innovations essential to the performance of her duties. Moreover, after she had worked as a statistician for more than a decade, the Organisation expected more autonomy and initiative. This point does not relate to a redefinition of functions but to adaptation to the development of the basic functions.

3) The failure to take account of essential points in the decision-making process leading to the 'unsatisfactory' rating

59. The Applicant alleges that the decision to terminate her appointment for unsatisfactory performance took account neither of her career as a whole nor of her accomplishments as assessed by her superiors.

²⁹ Document R-32B.

60. It is undeniable that from 2003 to 2011, the Applicant performed her duties autonomously, competently and diligently. The annual performance reports bear this out. The Applicant's performance was recognised and commended.
61. However, the present dispute concerns the Applicant's performance after this period. The evidence reveals that several solutions were offered to the Applicant, including an internship, reassignment and a special mandate.
62. In May 2012, JJ noted: '*...some issues with her work*'. In 2013, her manager emphasised: '*...for 2014, I encourage her to have more initiative to get involved on new tasks as I believe she has the expertise to give a good support in other projects we have in LSO.*'
63. Between November 2011 and March 2014, the Applicant unsuccessfully applied for eight (8) positions³⁰.
64. The difficulties became more acutely apparent during the last years of her career. In 2016 and 2017, the performance reports highlighted the Applicant's shortcomings and offered her possible solutions, including the importance of developing competencies in communication, coordination and attention to detail.
65. The Applicant did not contest the 2018 evaluation which concluded 'Improvement needed'. In her comments, she undertook to improve in 2019³¹.
66. Monthly meetings were held with the Applicant throughout 2019 in order to monitor the improvement in her performance. Following these meetings, her manager noted that the Applicant was still reluctant to take on new tasks, although her workload was lower than that of the other statisticians in the team. This point was also highlighted at the eighth meeting of the PIP procedure.

³⁰ Document O-1.

³¹ Document O-4.

67. The PIP procedure, carried out over nine months, involved constant monitoring of the Applicant's performance. The final finding of the PIP was submitted to the Staff Review Board and reviewed by the Re-evaluation Commission. The Organisation's exercise of its discretionary power of assessment was not affected by any obvious error of assessment or error of law or procedure.

4) Lack of care by the Organisation in interpreting evaluations

68. Finally, the Applicant alleges that the Organisation breached its duty of care by lacking objectivity and kindness in interpreting the Applicant's 2015, 2016 and 2017 evaluations hastily, unfavourably and without nuance.

69. The Tribunal refers to its account of the relevant facts and the analysis of the evidence with regard to the first three pleas.

70. No breach of the duty of care was demonstrated in the interpretation of the evaluations. Progressive monitoring of the Applicant's performance was introduced to make an improvement of her work performance possible. This monitoring was spread over several years and gave rise to measures that did not produce the expected results.

71. The termination of the appointment for unsatisfactory performance was not the result of a hasty managerial initiative without consideration for the Applicant. It was a process implemented after several ratings that revealed serious shortcomings. Dozens of meetings have been held with the Applicant over the past few years in order to find an efficient solution. This plea is therefore unfounded.

5) Comments from the Staff Association

72. The Staff Association joins the Applicant in complaining about a lack of care in the manner in which the Applicant was removed from the Organisation after receiving notice from the Secretary-General of the termination of her appointment for unsatisfactory performance.
73. In addition, the Staff Association comments that the termination procedure is flawed since the decision to terminate the appointment should have come after the Re-evaluation Commission had given its opinion according to its interpretation of Regulation 22 b) of the Staff Regulations.
74. Concerning the procedural comment, reference should be made to Annex XXVI of the Staff Regulations, which was revised by the Council of the OECD in 2018 in accordance with the Framework Convention³².
75. Annex XXVI establishes a comprehensive Performance Management System for all persons employed by the Organisation including management personnel. For performance evaluation, provision is made for two systems: one used in the normal course of the annual evaluation made by the manager, and another system of an exceptional nature, which is used when the performance of officials is rated unsatisfactory or at risk of being rated unsatisfactory and which is implemented after consultation with the Head of Human Resource Management.
76. First, Annex XXVI covers the normal process of annual performance evaluation which may give rise, at the official's initiative, to a special mode of dispute settlement, namely the Re-evaluation Commission. This is a managerial-type Commission composed of representatives appointed by the Secretary-General. This Commission examines the

³² OECD Convention, 30 September 1961.

decision of the official's manager. The Staff Association has no representative on it, unlike the Joint Staff Committee.

77. Recourse to the Re-evaluation Commission is provided for in Paragraph 31 of Section III of Annex XXVI, entitled 'Dispute settlement'. It covers three (3) situations that arise in the normal course of the annual performance evaluation process: periodic advancement, post classification and performance evaluation. Recourse to the Commission consists of a request for a review of the manager's decision.
78. It is only at the end of the re-evaluation - if it is requested by an official - that the Secretary-General will confirm or reverse his decision on annual performance management. Recourse to the Re-evaluation Commission, as provided for in Regulation 22 b) of the Staff Regulations, is a prerequisite for the filing of an application with the Administrative Tribunal by the official.
79. It is clear that the Applicant never sought the opinion of the Re-evaluation Commission with regard to the annual evaluation of her performance of 31 December 2018, which concluded 'Improvement needed', or the mid-year evaluation in July 2019, which led to the establishment of the PIP. Far from contesting the evaluation, the Applicant actually thanked her manager, undertaking to improve her performance in 2019³³.
80. Annex XXVI then makes provision for the special case of officials whose performance, having already been rated as 'unsatisfactory' or at risk of being so, raises the prospect of termination of appointment. This is precisely the situation of the Applicant, who does not fall within the normal framework of the annual evaluation but rather within that of a performance improvement plan, which lies beyond the sole control of the manager.

³³ Document O-4, p.12.

81. Section IV of Annex XXVI is directly relevant to the disputed case. It concerns the Performance Improvement Plan (PIP). In the present case, the establishment of the PIP stemmed from the annual performance evaluation decision of 31 December 2018, which was not submitted by the Applicant to the Re-evaluation Commission.
82. The PIP is set up to support officials in returning to satisfactory performance. It is a kind of special evaluation commission set up for a period of six (6) months. In the Applicant's case, as is known, the manager requested and obtained a three (3) month extension to enable her to meet the objectives of the PIP.
83. In the present instance, the Applicant's 'unsatisfactory performance' rating results from the final PIP report dated 30 July 2020.
84. In light of the PIP report, the Secretary-General followed the procedure set out in Section IV of Annex XXVI.

Paragraph 36.

If at the end of the extension, the evaluation concludes that:

...

b) ii) the performance of the official is still unsatisfactory, the Secretary-General may terminate the official's appointment pursuant to article 11 a) i) of the Staff Regulations.

85. It should be noted that the competent advisory committee, the Staff Review Board, concluded that the termination procedure was regular before the decision to terminate the appointment was taken. This is a joint committee consisting of members proposed by the Staff Association and members designated by the Secretary-General.

86. Paragraph 36 of Annex XXVI, which establishes the procedures in relation to the PIP, makes no mention of recourse to the Re-evaluation Commission. However, Paragraph 31 of the same Annex and Regulation 22b) of the Staff Regulations, which are worded in general terms and attached to the annual performance evaluation, do not exclude this possibility either.
87. The PIP report of 30 July 2020 was the first evaluation in which the Applicant's performance was found unsatisfactory. Whether this determination occurred within the framework of the annual evaluation or whether it was made following a PIP - which is an extraordinary extension of an annual evaluation - the fact remains that the Applicant could not - given the ambiguity of the texts - be denied recourse to the Re-evaluation Commission so that it could give its opinion to the Secretary-General on the evaluation of her performance.
88. The Applicant chose not to request the Re-evaluation Commission's opinion when her manager concluded that her performance needed improvement. She committed to the Performance Improvement Plan in good faith. However, she retained the same right as all other officials to seek this opinion when her performance was subsequently rated unsatisfactory and her appointment entered a termination procedure.
89. On 16 November 2020, after receiving this referral request, the Executive Director informed the Applicant that the referral to the Re-evaluation Commission would not have the effect of suspending the decision to terminate her appointment³⁴. However, the Organisation undertook to review the decision regarding re-appointment in the light of the Re-evaluation Commission's conclusions.

³⁴ Document R-28.

90. On February 22, 2021, the Commission issued its opinion and confirmed the conclusion of the PIP as to the Applicant's unsatisfactory performance.
91. According to Instruction 122/2.6 of the Staff Regulations, the Commission should have given its final opinion within one month of the referral or 'as soon as possible thereafter' in the event of the inability to act of the Chairman or one of the other Members. It took four (4) months after the referral to obtain this opinion. However, it should be recalled that the pandemic had led to the closure of the Organisation and made the functioning of the committees more difficult.
92. It would have been in accordance with Regulation 22(b) of the Staff Regulations and with the principles of good administration for the Organisation to await receipt of the Commission's opinion before taking the decision to terminate the appointment. However, in this instance and in the general context of the case, within a six (6) month PIP, extended by three (3) months and conducted by a committee and not only by a manager, this procedural flaw is not sufficient to entail the annulment of the decision to terminate the appointment or to modify the performance evaluation. The reason for this is as follows.
93. For this procedural flaw to entail the annulment of the decision to terminate the appointment, it must be established that it stems from an error that is sufficiently serious and obvious to have had a decisive effect on the outcome of the dispute³⁵.
94. A serious error. A refusal to allow the Applicant to file an application with the Re-evaluation Commission might have constituted a serious error. This did not occur. The commission was established according to the Applicant's wishes, but submitted its report after four (4) months instead of two. The two (2) month period is not mandatory,

³⁵ See applications in ILOAT, Nos. 4531, 4418 and 4385.

since the text provides for its extension. The Applicant was heard by the Commission. The adversarial principle was not undermined.

95. An obvious error. The Staff Association insists that the Secretary-General's decision to terminate was subject to the prior submission of the Commission's report. This could also have been an error but for the ambiguity of the texts (Paragraphs 31 and 36 of Annex XXVI), which prevents the conclusion that the error is obvious. The notice to proceed with the decision to terminate the appointment had already been served on the Applicant before her request for referral to the Re-evaluation Commission. The termination procedure had already been initiated. The ambiguity of the texts makes it impossible to speak of a flagrant and indisputable violation.

96. A decisive error. This is the fundamental question which prevents the procedural flaw from being used as grounds for cancelling the decision to terminate the appointment. The procedural flaw did not have a decisive effect on the outcome of the dispute so as to invalidate the contested decision. In this instance, the procedural irregularity had no effect on the decision to terminate the appointment³⁶.

- a. This case does not concern an unsatisfactory performance finding decided on solely by the manager, Marie-Hélène Doumet, which could be reviewed by a Commission of three (3) members. On the contrary, the Re-evaluation Commission was asked to review a comprehensive evaluation process that took nine (9) months and in which a committee was formed specifically to administer the Performance Evaluation Plan.
- b. Exceptionally, the Tribunal, having benefited from the provision of detailed and consistent evidence, has heard seven witnesses and examined around a hundred items of documentation, and has concluded that the application should be

³⁶ Fonction publique internationale, Plantey and Lorient, CNRS Edition

dismissed since the Secretary-General's decision was not affected by any reviewable error concerning the substance of the case.

- c. Moreover, the report of the Re-evaluation Commission - which is managerial in type - is laconic and very precise: no error was made which would justify modifying the conclusions of the Secretary-General.
 - d. Annuling the termination decision in order to refer it back to a Re-evaluation Commission would have no decisive effect on the outcome of the dispute, other than to generate a new procedure without any regard to the proportionality of resources and means employed, which is a principle now applicable in national and international employment law.
97. However, the Tribunal accepts that the Organisation showed a lack of care for the Applicant as described by the Applicant and the Staff Association. The formal flaw, together with the excessive delay of the Re-evaluation Commission, which left the Applicant in uncertainty for several months and, above all, the lack of care resulting from the abrupt and unceremonious removal of the Applicant, who was forced to leave her workplace of 18 years within 24 hours, persuades the Tribunal that it should award the Applicant moral damages of 15,000 euros.

Conclusion

FOR THESE REASONS, THE TRIBUNAL:

1. **DECLARES** the application formally admissible.
2. **ORDERS** the Organisation to pay the Applicant 15,000 euros in moral damages.
3. **REJECTS** the Applicant's request for the annulment of the termination of appointment and the modification of the performance evaluation decision.