

The Administrative Tribunal,

Considering the complaint filed by Mr J.M. Z. against the United Nations Industrial Development Organization (UNIDO) on 31 July 2006, UNIDO's reply of 27 November 2006, the complainant's rejoinder of 30 January 2007 and the Organization's surrejoinder of 7 May 2007;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a United States national born in 1950, is a former staff member of UNIDO. He joined the Organization in October 2000 as an Industrial Development Officer at level P-3 under a three-year fixed-term contract. His appointment was subject to the satisfactory completion of a probationary period of one year. During the first six months of his contract the complainant had to devote much of his time to resolving difficulties concerning his contractual arrangements. His supervisor indicated in October 2001 that this had prevented him from making a proper assessment of the complainant's performance. It was therefore decided that the complainant's probationary period should be extended by one year. His first staff performance appraisal covered the period from 4 October 2000 to 31 December 2001; according to that appraisal his performance was rated as "Good".

By a memorandum of 25 November 2002 the complainant was informed by his supervisor that his performance over the past two years had been reviewed and that improvements were needed in certain areas. His supervisor drew attention to the fact that the complainant had not yet mastered the Organization's standard procedures, particularly in preparing project documents, and that his writing skills in English were inadequate. He stated that he would nevertheless recommend that his appointment be confirmed on the understanding that he would make efforts to produce better results in the areas pointed out to him.

On 2 December the complainant's supervisor sent the Director of the Human Resource Management Branch (HRM) a copy of the complainant's second performance appraisal, covering the period from 1 January to 30 June 2002, and recommended that his appointment be confirmed. In that appraisal, the Managing Director of his Division, as second reporting officer, gave the complainant the summary evaluation of "Good". However, she emphasised that she was giving the complainant "the benefit of [the] doubt", as she had been informed by his supervisor that his performance was of a "borderline" nature. She also indicated that the complainant's performance would be monitored very closely during the coming year. The complainant's appointment was subsequently confirmed.

The complainant wrote to his supervisor on 3 December 2002 indicating that he disagreed with the comments he made in the memorandum of 25 November concerning shortcomings in his performance, and stressing that no such shortcomings were mentioned in the appraisal reports covering the period from October 2000 to the end of June 2002. The complainant's supervisor reiterated on 10 January 2003 that he should make efforts to improve his performance in the areas pointed out to him in late 2002. The complainant's third and final performance appraisal, covering the period from 1 July 2002 to 30 June 2003, was completed by his supervisor on 25 July. The supervisor stated that the complainant had achieved only three of the seven goals set for him and that his English writing skills and ability to master UNIDO's procedures and guidelines still needed improvement. By a letter of even date he informed the Director of HRM that he had decided not to recommend an extension of the complainant's appointment upon its expiry on 3 October 2003. The Managing Director of the complainant's Division signed the final appraisal on 29 August 2003. Noting that the complainant's performance had not improved in the areas pointed out to him, she gave him a summary evaluation of "Unsatisfactory".

The complainant was informed by a memorandum of 29 August 2003 that the Director-General had decided not to renew his fixed-term appointment on the basis of the assessment of his performance since October 2000. He requested a review of that decision on 29 September. That request was turned down on 1 October and the

complainant filed an appeal with the Joint Appeals Board on 26 November 2003.

Meanwhile, on 26 September 2003, the complainant submitted a rebuttal to his final performance appraisal covering the period from 1 July 2002 to 30 June 2003 and to the assessment of his overall performance since October 2000 which, in his view, were both “unfair”. The Director of HRM replied on 1 October 2003 that his claim concerning the assessment of his performance from October 2000 was time-barred, but that a panel of investigation would be constituted to review his final performance appraisal. By a letter of 7 May 2004 he informed the complainant that, on the basis of the report of the panel of investigation and more particularly considering the fact that he had not met the objectives set for the second part of the reporting period, he had decided to maintain “the overall rating of the staff performance appraisal”. He added that the complainant’s staff performance appraisal, his rebuttal, the original report of the panel of investigation as well as a copy of his letter would be placed in his official status file.

In its report of 5 April 2006 the Joint Appeals Board recommended by a majority that the appeal be dismissed. It noted that, in accordance with Staff Rule 103.10, a fixed-term appointment does not “carry any expectancy of renewal or conversion to another type of appointment”. It also stated that the decision to extend a fixed-term appointment lies at the discretion of the Director- General. By a letter of 5 May 2006 the complainant was informed that the Director-General had decided on 27 April 2006 to endorse the Board’s recommendation. That is the impugned decision.

B. The complainant contends that the Director- General’s decision not to extend his appointment was based on mistakes and misappraisal of facts. Indeed, the Director-General stated that his decision was based on the “overall assessment of [his] performance since [his] appointment on 4 October 2000” without specifying which aspects of his performance were taken into consideration; UNIDO has consequently breached his fundamental right to be given a “coherent and reasoned” decision. The complainant denies that his performance since his entry into service was unsatisfactory. He submits that the Director-General did not examine his first two appraisal reports, according to which the summary evaluation of his performance was “Good”, and that his performance was improperly rated as “Unsatisfactory” in his final appraisal report.

He also alleges that the decision not to extend his appointment involved an error of law insofar as he had not been informed in a timely manner as to the unsatisfactory aspects of his service so steps could be taken to remedy the situation. His supervisor stated in the memorandum of 25 November 2002 that he should make a “substantial effort” to overcome certain shortcomings in his performance but did not indicate that the extension of his appointment was “at risk” if he did not improve. Therefore, in his view, he did not receive a written and documented warning, as required by the Tribunal’s case law, prior to the decision not to renew his contract. He contends that the Director- General’s decision is also flawed because it was taken in light of the final performance appraisal, which was not yet “official” as the rebuttal process was ongoing. In that respect, he draws attention to the 29 January 2001 Annex IV, Addendum 1, of the Director-General’s Administrative Instruction No. 10 according to which a “staff performance evaluation with a summary evaluation [which is marginal or unsatisfactory] will be kept pending by HRM before including it in the staff member’s official status file” in order to allow that staff member to submit a rebuttal.

The complainant alleges breach of due process. He points out that his supervisor did not indicate in the first two appraisals that his performance was unsatisfactory, but instead made negative comments on his work outside the performance evaluation system, in particular in the memorandum of 25 November 2002. Moreover, he had no opportunity to reply to the memorandum of 25 July 2003 by which his supervisor recommended against the extension of his appointment. He asserts that the Director-General’s decision not to extend his appointment was taken “with undue haste and without giving [him] the right to be heard”. He also points out that the panel of investigation abdicated its duty to recommend whether the rating “Unsatisfactory” in his final performance appraisal should remain, whereas that was the purpose of the rebuttal process.

In addition, he submits that no reasons were provided for the Director-General’s decision of 27 April 2006 to endorse the recommendation of the Joint Appeals Board. Moreover, the Board has failed to carry out its fact-finding task adequately; the internal appeal proceedings consequently offended against the “minimum standards of justice”. He further alleges that by virtue of the principles of good faith and due process he should have been given six months’ notice of the non-renewal of his contract. Lastly, he argues that his reputation has been tarnished because of the actions taken by senior managers and that UNIDO has consequently acted in breach of its duty of care and good faith.

The complainant asks the Tribunal to set aside the impugned decision, to order his reinstatement with effect from 4 October 2003 and the removal of his last performance appraisal report from his official status file. He claims material damages, in an amount equivalent to the “salaries, pension benefits, emoluments and other entitlements” he would have earned from 4 October 2003 to the date of reinstatement, plus interest. He also claims moral damages, which he evaluates at 25,000 euros, and costs.

C. In its reply UNIDO recalls that, in accordance with Staff Rule 103.10(b), a fixed-term appointment does not carry any expectancy of renewal or conversion to another type of appointment. This fact is expressly stated in the letter of appointment signed by the complainant on 4 October 2000.

Concerning alleged mistakes and misappraisal of facts, the Organization indicates that the complainant has misinterpreted the Director-General’s decision not to renew his appointment. The latter did not state that the complainant’s performance was unsatisfactory from his entry into service but that his decision was based on the “overall assessment of [the complainant’s] performance since [his] appointment on 4 October 2000”. UNIDO asserts that before taking his decision the Director-General had examined the complainant’s performance record, including his first and second performance appraisals. The defendant adds that, according to Staff Rule 103.10(b), renewal of fixed-term appointments is at the Director-General’s discretion.

With regard to the alleged errors of law, UNIDO asserts that the complainant had been informed on several occasions that his performance needed improvement. Moreover, the complainant’s supervisor drew his attention to the seriousness of the situation in the memorandum of 25 November 2002, which, according to the Organization, amounted to a warning that his performance was unsatisfactory. Citing the Tribunal’s case law, it argues that, contrary to the complainant’s assertion, a warning need not be stated explicitly provided that the Organization’s comments leave the staff member in no doubt as to their seriousness and that failure to improve may incur non-renewal. In addition, it asserts that the Director-General is not required, under Administrative Instruction No. 10, to await the outcome of the rebuttal process before taking a decision. In accordance with Staff Rule 110.05, a fixed-term appointment expires automatically and without prior notice on the expiration date specified in the letter of appointment. Consequently, the complainant’s appointment would have expired on 3 October 2003 even if the Director-General had decided to suspend his decision pending the completion of the rebuttal process.

UNIDO denies any breach of due process. It contends that the Director-General was not required to hear his complaint before taking his decision. The memorandum of 25 November 2002 raised the same performance issues as those underlined in the complainant’s first and second performance appraisals but in greater detail. With regard to the report of the panel of investigation, UNIDO submits that the rules on rebuttal do not require the panel to make a recommendation on whether a rating should remain or not. In its view, the panel’s conclusions and recommendations implied that no changes should be made with regard to the rating of the complainant’s performance. It contends that the complainant is in fact challenging the panel’s report or the accuracy of his final performance appraisal report; however, he did not appeal the decision to maintain the report. These claims are therefore irreceivable for failure to exhaust internal remedies.

The Organization also denies any breach of due process with regard to the internal appeal proceedings and explains that the Director-General is not required to repeat the Board’s findings when he endorses its recommendations. It further submits that, in light of the fact that the complainant served the Organization under a three-year contract and received the decision not to extend his appointment almost one month before its expiry date, he received reasonable notice. Lastly, it points out that the complainant’s assertion that the Organization acted in breach of its duty of care and good faith is not substantiated.

D. In his rejoinder the complainant alleges abuse of authority on the part of his supervisor and senior managers, though he acknowledges that he cannot produce direct evidence to support his allegation. He argues that, in view of the documents submitted by UNIDO, the decision not to extend his appointment may have been taken because his post was to be abolished. He asserts that the Director of HRM was not in a position to consider his case fairly as he was representing the Organization in the internal appeal proceedings. He also claims that his supervisor made false statements in order to ensure that senior managers would endorse the recommendation not to extend his appointment. He acknowledges that he did not challenge the decision to maintain his final performance appraisal report and explains that he did not need to do so because his complaint concerns the accuracy of the rating of his performance in his final appraisal.

E. In its surrejoinder the Organization reiterates its position. It denies that the reason for the decision not to

extend the complainant's appointment was the abolition of the post and that the complainant's supervisor abused his authority. It adds that the complainant was fairly and accurately appraised and that the Director of HRM did not "experience any conflict of interest".

## CONSIDERATIONS

1. The complainant joined UNIDO on 4 October 2000 under a three-year fixed-term appointment as an Industrial Development Officer at level P-3. His appointment was subject to a one-year probationary period, which was extended for another year. The complainant's fixed-term appointment was confirmed in December 2002. His performance having been rated as unsatisfactory in his final performance appraisal of July 2003, UNIDO decided not to extend his fixed-term contract beyond its expiry date of 3 October 2003. The complainant subsequently appealed that decision to the Joint Appeals Board, which recommended by a majority vote that the appeal be dismissed in its entirety. The complainant challenges the decision of the Director-General of 27 April 2006 which endorsed the Board's recommendation to dismiss his appeal.

2. The grounds for complaint are as follows: (i) the decision not to extend his contract was based on mistakes and misappraisal of facts; (ii) the decision was based on errors of law; (iii) the decision was tainted by breach of due process; and (iv) there was a breach of duty of care and good faith.

3. The complainant contends that the decision not to extend his fixed-term contract was based on mistakes and misappraisal of facts. The complainant was advised by a memorandum of 29 August 2003 that the Director-General had decided not to renew his fixed-term contract which was due to expire on 3 October 2003. This decision was based on the "overall assessment of [the complainant's] performance since [his] appointment on 4 October 2000". The complainant argues that the Director-General's decision not to renew his contract was mistaken because "[he] took the Director-General to mean that his performance since his entry on duty was less than satisfactory". The Tribunal is of the opinion that the Director-General's decision was based on a comprehensive evaluation of the complainant's performance. The fact that the complainant's first two performance appraisals contain summary evaluations of "Good" does not invalidate the overall judgement of unsatisfactory performance, particularly considering that the written statements in those reports stipulate that improvements were needed. The complainant was informed, in his first performance appraisal, that he needed to improve "[h]is capability to translate his knowledge into well-formulated programmes", and that he should "be able to operationalize his contacts and knowledge into concrete projects for implementation". His second appraisal report indicated that he needed to improve his English writing skills, to be more efficient in preparing project documents. It also indicated that his performance being of a "borderline" nature would be monitored very closely during the coming year.

The complainant received a memorandum from his supervisor, dated 25 November 2002, which concerned his performance. The supervisor stated therein that he had carefully reviewed the complainant's performance over the past two years and had come to the conclusion that, although he had tried to meet some of the objectives given to him, considerable improvement was still required. He added that he had repeatedly drawn his attention to his shortcomings. The supervisor specified that the complainant had not yet mastered the Organization's standard procedures and guidelines, in particular in preparing project documents. He pointed out that the complainant's English writing skills were inadequate and this was affecting his "ability to draft and edit technical documents". The supervisor concluded that he would nevertheless recommend that his appointment be confirmed on the understanding that he would make substantial efforts to overcome his shortcomings and that his performance would be reviewed again at the end of his fixed-term contract. He also informed the complainant that a meeting would be held on 26 November 2002 with the Managing Director of the Division to further discuss his work and the kind of assistance that could be offered to him.

In a memorandum of 10 January 2003 the supervisor reiterated that the complainant should make efforts to improve his performance particularly in the areas mentioned in the memorandum of 25 November 2002. In his third and final performance appraisal the complainant was given a summary evaluation of "Unsatisfactory" and the Managing Director stated that "[i]n spite of repeated warning[s], [he] ha[d] not shown any significant improvement in his ability to master and apply standard UNIDO procedures and guidelines, in meeting deadlines, in making contributions in quantitative terms, and in his English writing skills". Therefore, the plea that the decision was based on mistakes and misappraisal of facts is unfounded. It fails.

4. The complainant's plea that the decision was based on errors of law is also unfounded. The complainant alleges that the Organization did not provide him with "timely and precise warnings of unsatisfactory performance putting him on notice that his contract extension was at risk". The Tribunal finds that, as listed in the examples above, the Organization was clear and consistent in advising the complainant that his performance needed improvement and therefore was fully justified in deciding not to renew his contract after seeing no improvement in the indicated areas. In fact, the complainant, by repeatedly denying that improvement was needed, left the Organization no choice but to let his contract expire. It should be noted that it is not necessary to include an express mention of the risk of termination if performance does not improve: the risk is implied (see Judgments 1546, under 18, and 1583, under 6). The plea, therefore, fails.

5. The complainant contends that the Director-General's decision was tainted by breach of due process. He claims that it was taken with undue haste and in breach of his right to be heard. He also asserts that neither his supervisor nor his Managing Director evaluated his performance with "accuracy and objectivity" going so far as to say that there were no negative assessments of his performance listed on the first two performance appraisals. The Tribunal finds that, given the precise and continuous interventions on the part of the Organization, it is unreasonable to consider the decision as hasty and it should be noted that the Director-General was not required to consult the complainant before taking his decision. The complainant's inability or unwillingness to recognise and accept his supervisor's assessment of his performance does not invalidate the evaluation. The complainant has not proven in any way that the appraisals were not accurate and objective and the Tribunal sees no way in which they could be considered flawed, unreliable or unreasonable. The plea of breach of due process is unfounded and therefore fails.

6. The complainant's plea that UNIDO acted in breach of its duty of care and of its duty of good faith is likewise unfounded. The Tribunal finds that the Organization has fulfilled its duties towards the complainant by scrupulously following the procedures laid down in the Staff Regulations and Staff Rules. In addition, the Organization acted with respect for his personal dignity by ensuring that all criticisms of his performance were carefully and moderately phrased, while at the same time emphasising the importance of improving. The allegation that the Director of HRM was not in a position to consider the case fairly as he was representing the Organization in the internal appeal proceedings is unfounded, considering the nature of the administrative procedure which did not involve the exercise of advisory or review functions regarding his own decisions or actions (see Judgment 2587, under 8). Therefore, the plea fails.

7. The Tribunal concludes that the decision not to extend the complainant's fixed-term contract fell under the authority of the Director-General and did not violate the terms of the complainant's appointment or any specific Staff Regulations or Rules. All subsequent claims are therefore dismissed.

8. As the complaint must be dismissed on the merits, there is no need to deal with the issue of receivability raised by the Organization concerning subsidiary and implicit claims.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2007, Mr Seydou Ba, Vice-President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Mary G. Gaudron

Giuseppe Barbagallo

