Macro-Trends in the Performance Management of International Civil Servants and Their Legal Implications

*Laurent Germond and Estelle Martin**

Abstract

The purpose of this chapter is to explore three performance management trends within international organizations and evaluate their legal implications. It seeks to identify different ways of combining well-settled principles of international civil service law, including the principle of 'acquired rights' and the right to appeal, with career systems increasingly focused on promoting meritocracy (the 'what'), continuous feedback and feedforward (the 'how') and people managers (the 'who'). Drawing on their experiences as legal practitioners and on a selection of jurisprudence from international administrative tribunals, the authors attempt to identify the balance between the legal features specific to managing the performance of international civil servants with the demands for accountability and sustainability in the delivery of a public service mission. The goal is not to provide a comprehensive study but rather to foster discussion and contribute to the overall debate on how to enhance the functioning of international organizations whilst allowing them to best achieve their mission. The authors wish for an outcome where this public service mission can emerge strengthened.

1 The What: careers in International Organizations—From Seniority to Merit-Based Career Advancement

Career advancement in international organizations—the upward progression of an employee's career in terms of remuneration and responsibilities—is dependent on two main drivers: seniority and merit. Whilst the first one rewards the time worked for an organization, the second rewards the employee's

* Laurent Germond, Director, Employment Law Division of the European Patent Office (EPO), lgermond@epo.org; Estelle Martin, Departmental Head, Employment Law at EPO, estellemartin@epo.org. The views expressed in this chapter are the personal views of its authors and do not represent those of the EPO.

contribution to the organization's goals and is based on performance. Seniority refers to the number of years or months employees have spent in service whilst performance refers to how well these employees have performed their duties. These two drivers seem to always be present in the design of career systems in international organizations, but the emphasis on one or the other—or the way they are combined—varies greatly from one organization to the next. At the risk of oversimplification, some general trends have nevertheless been observed.

On one side of the spectrum, advancement is directly correlated to the individual performance rating attributed to employees in their regular (usually yearly) performance evaluations.¹ This means that better individual performance leads to quicker career advancement in a way that is not pre-established. Such systems are found in some international financial institutions.

On the other side of the spectrum, advancement is granted through organization-wide advancement exercises (usually yearly ones) but can be withheld on an individual basis when performance proves unsatisfactory.² This means that advancement is largely pre-established and, as a rule, the same for all employees irrespective of their individual levels of performance. In these career systems, which are found in some political and technical organizations, quicker advancement is reserved for only particularly meritorious employees and limited in number.

Between these two ends of the spectrum, different ways of shaping career progression have emerged where, for instance, advancement results from a merit-based selection of employees amongst those who perform well. This means that satisfactory performance is a pre-condition for advancement but is not necessarily sufficient.³

In recent years, some international organizations have undergone major career reforms aimed at shifting from seniority-based advancement through annual salary increments towards advancement schemes more focused on merit. The European Organization for Nuclear Research (CERN) first had its Merit-Oriented Advancement Scheme (MOAS) reform tested before (and upheld by) the Administrative Tribunal of the International Labour Organization (ILOAT) some 25 years ago.⁴ Since then, other technical organizations have followed suit, such as the European Patent Organization in 2015.

1 World Bank Staff Manual, r 6.01.

2 UNHR Portal Guidelines on Withholding Salary Increment, 1.

3 EPO Service Regulations, arts 47–49.

4 ILOAT, *Antoine Guyen v CERN* 1994, para 1; ILOAT, *Markus Audria v CERN* 1995, consids 1 and 3; ILOAT, *Edith Feldmann v CERN* 1995, para 1; ILOAT, *Monique Häusermann v CERN* 1995, para 1; ILOAT, *Eddy Penny v CERN* 1995, paras 1–3; ILOAT, *Maryse Seissau v CERN* 1995, para 1.

These career system reforms rely on the premise that merit-based advancement will lead to higher staff engagement and better service delivery. Whilst each organization has its own policy reasons for venturing into the shift from seniority to merit-based advancement (be it financial sustainability, enhanced efficiency or both), it is interesting to explore the legal boundaries which international civil service law sets around such important shifts and whether the principle of 'acquired rights' has any place in the career advancement of an international civil servant. Indeed, the principle of acquired rights lies at the core of wide policy reforms in international organizations for it sets the legal parameters of permissible unilateral changes to employment conditions and has often been put forward in litigation to challenge such policy changes. It is of interest, for discussion purposes, to recap how some international administrative tribunals have defined the principle of acquired rights, and to then assess the outcome of a few, illustrative, cases selected from the relevant jurisprudence.

1.1 *The Principle of 'Acquired Rights'*

Using the expression 'acquired rights' is a convenient way to cover multiple references to the same reality in the jurisprudence of international administrative tribunals. At the risk, here again, of oversimplification, this reality boils down to limiting the legislative power an international organization possesses to unilaterally amend key conditions of employment of its staff. The very term 'acquired rights' implies and suggests the idea of protection and the notion that such rights may expect to survive future variation.⁵ Are there any such rights in relation to career advancement?

Firstly, in its famous decision in *Louis de Merode et al. v The World Bank*, the World Bank Administrative Tribunal (WBAT) defined the Bank's power of amendment and, as a counterpoint, the Tribunal's power of review, particularly in respect of acquired rights:

As has been stated, while the fundamental and essential elements of the conditions of employment may not be amended unilaterally, the non-fundamental and non-essential elements are subject to unilateral amendment. This power is discretionary and it is not for this Tribunal to substitute its own judgment for that of the competent organs of the Bank in exercising that discretion. However, the Bank's power to amend non-essential terms may be exercised subject to certain limitations. Discretionary power is not absolute power.

5 ILOAT, *Ayoub et al. v ILO* 1987, consid 12, cited in UNAT, *Lloret Alcañiz et al. v Secretary-General of the UN* 2018, para 86; UNAT, *Quijano-Evans et al. v Secretary-General of the UN* 2018, para 52.

First, no retroactive effect may be given to any amendments adopted by the Bank. The Bank cannot deprive staff members of accrued rights for services already rendered. This well-established principle has been applied in many judgments of other international administrative tribunals.

The principle of non-retroactivity is not the only limitation upon the power to amend the non-fundamental elements of the conditions of employment. The Bank would abuse its discretion if it were to adopt such changes for reasons alien to the proper functioning of the organization and to its duty to ensure that it has a staff possessing “the highest standards of efficiency and of technical competence”. Changes must be based on a proper consideration of relevant facts. They must be reasonably related to the objective which they are intended to achieve. They must be made in good faith and must not be prompted by improper motives. They must not discriminate in an unjustifiable manner between individuals or groups within the staff. Amendments must be made in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff. In this respect, the care with which a reform has been studied and the conditions attached to a change are to be taken into account by the Tribunal.

The Tribunal must be satisfied itself in each case that the Bank’s power to change the non-fundamental elements in the conditions of employment of its employees has not been exercised either retroactively or in an arbitrary or otherwise improper manner.⁶

Secondly, although the ILOAT had already referred to the concept of acquired rights in its judgment *Robert V. Lindsey v International Telecommunication Union*,⁷ it is in its judgment *Ayoub et al. v International Labour Organization*, that it provided a generic definition of acquired rights and established a methodology to assess an alleged breach of acquired rights:

In Judgment 61 (in re Lindsey) the Tribunal held that the amendment of a rule to an official’s detriment and without his consent amounts to breach of an acquired right when the structure of the contract of appointment is disturbed or there is impairment of any fundamental term of appointment in consideration of which the official accepted appointment. That calls for some explanation. Although there will be breach of an acquired right only if one of two conditions is fulfilled, the two are in

6 WBAT, *Louis de Merode et al. v The World Bank* 1981, paras 45–48.

7 ILOAT, *Robert v. Lindsey v ITU* 1962.

fact but one. Disturbance of the structure of the contract posits impairment of a fundamental term, and the latter the former. A somewhat broader framing of the doctrine is wanted so that it will cover not just terms of appointment that were in effect at recruitment but also terms that were brought in later and were calculated to induce the staff member to stay on. The reference to a “term of appointment in consideration of which the official accepted appointment” was never meant to import a subjective test: did this term or that actually make the staff member sign on or decide to stay? What the Tribunal had in mind was a term of the sort that might sway his decision. In some instances only the existence of a particular term of appointment may form the subject of an acquired right. But there are other contingencies in which the arrangements for giving effect to the term may also give rise to such a right. Stated in that way the doctrine is broader than the rule against retroactivity. Whereas the doctrine looks to the future as well as to the past, the rule merely forbids altering what already belongs to the past. So before ruling on the plea the Tribunal must in each case determine whether the altered term is fundamental and essential.

There are three tests it will apply.

The first is the nature of the altered term. It may be in the contract or in the Staff Regulations or Staff Rules or in a decision, and whereas the contract or a decision may give rise to acquired rights the regulations and rules do not necessarily do so.

The second test is the reason for the change. It is material that the terms of appointment may often have to be adapted to circumstances, and there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost-of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted.

The third test is the consequence of allowing or disallowing an acquired right. What effect will the change have on staff pay and benefits? And how do those who plead an acquired right fare as against others?⁸

This landmark judgment has consistently been referred to by the ILOAT ever since.⁹

⁸ ILOAT, *Ayoub et al. v ILO* 1987, paras 13–14.

⁹ For a recent example, see ILOAT, *H. (No 4) et al. v EPO* 2019, para 7.

Thirdly, in its recent judgment *Quijano-Evans et al. v Secretary-General of the United Nations*, the United Nations Appeals Tribunal (UNAT) defined its approach to acquired rights as follows:

An “acquired” right should be purposively interpreted to mean a vested right; and employees only acquire a vested right to their salary for services already rendered. Promises to pay prospective benefits, including future salaries, may constitute contractual promises, but they are not acquired rights until such time as the quid pro quo for the promise has been performed or earned. Moreover, the fact that increases have been granted in the past does not create an acquired right to the future increases or pose a legal bar to a reduction in salary.

The limited purpose of Staff Regulation 12.1, therefore, is to ensure that staff members are not deprived of a benefit once the legal requirements for claiming the benefit have been fulfilled. The protection of acquired rights therefore goes no further than guaranteeing that no amendment to the Staff Regulations may affect the benefits that have accrued to, or have been earned by, a staff member for services rendered before the entry into force of the amendment. Amendments may not retrospectively reduce benefits already earned. In the final analysis, the doctrinal protection of acquired rights is essentially an aspect of the principle of non-retroactivity. The aim is to protect individuals from harm to their vested entitlements caused by retrospective statutory instruments.¹⁰

These judgments show multiple approaches towards the definition of ‘acquired rights’: a broad and comprehensive one held by the WBAT; a more generic one, combined with an assessment methodology, held by the ILOAT and a narrower one held by the UNAT.

1.2 *Recognition of Acquired Rights*

Whereas employees have often invoked the principle of acquired rights in litigation to challenge a change in their employment conditions, including in relation to career advancement, they have rarely achieved a successful outcome before the international administrative tribunals who seldom censure such changes—and those cases where they do, mostly involve compensation and benefits aspects or access to judicial review. The WBAT has recognised ‘acquired

¹⁰ UNAT, *Quijano-Evans et al. v Secretary-General of the UN* 2018, para 52, citing UNAT, *Lloret Alcañiz et al. v Secretary-General of the UN* 2018, paras 90–91.

rights' to tax reimbursement on salaries,¹¹ to periodic adjustment of salary¹² and to the availability of an impartial adjudicator of employment claims.¹³ Similarly, the ILOAT has, for instance, considered a non-resident's allowance¹⁴ or pension entitlements to be 'acquired rights'.¹⁵

The most specific legal considerations both directly relevant to career advancement and referring to the principle of acquired rights were identified in the jurisprudence of the ILOAT and address promotion as follows:

...rules on promotion do confer an acquired right insofar as they offer staff an expectation of advancement. But the particular arrangements for the grant of promotion confer no such right because on recruitment staff cannot foretell how they will fare in their career. [...] In any event an organization may change the rules on promotion for the sake of efficiency and so as to cope with changing circumstances.¹⁶

One may conclude from the above that the only 'acquired rights' specifically conferred by a career system is an expectation of advancement or in other words, a career prospect—which can encompass different forms of career moves (upwards towards increased responsibilities or through a competitive process, across between technical and managerial functions). It is worth mentioning that the Tribunal has also left the door open to changes made necessary by efficiency requirements or changing circumstances.

It would seem that it is therefore first and foremost the reason behind the reform that drives the robustness of a change in career system. This aspect is equally emphasised in the *de Merode* case of the WBAT, where the manner in which the change is prepared or applied is to be taken into account when assessing whether the change is permissible. Ultimately, the answer to the question of permissibility seems to lie in the specific reasons for the change rather than in the change itself.

11 WBAT, *Louis de Merode et al. v The World Bank* 1981, para 82.

12 WBAT, *Louis de Merode et al. v The World Bank* 1981, paras 111 and 112; WBAT, *Lyra Pinto v IBRD* 1988, para 40; WBAT, *Elena Gavidia v IFC* 1988, para 26; WBAT, *Bechir C. Chakra v IBRD* 1988, para 30; WBAT, *Rosario Cardenas v IBRD* 1988, para 31; WBAT, *Alan Berg v IBRD* 1988, para 43.

13 WBAT, *AK v IBRD* 2009, para 31.

14 ILOAT, *Poulain d'Andecy v FAO* 1960, para 5.

15 ILOAT, *Ayoub (No 2) et al. v ILO* 1989, para 24.

16 ILOAT, *M. S. et al. v EPO* 2014, para 14, citing ILOAT, *Barahona and Royo Gracia (No 2) v ICPO* 1990, para 4.

The interesting perspective given by these three international administrative tribunals is that their findings can be used to frame in simple (yet hopefully not simplistic) terms, the fundamentals of career advancement in the literal sense of the word. Whether these tribunals have established a narrow or a broad interpretation of the concept of acquired rights, none appear to adopt a position in law which would prevent as such international organizations from moving towards performance-based career systems.

2 The How: Performance Evaluations—From Annual or Biannual Performance Reports to Continuous Feedback and Feedforward

In 2017, a leading consultancy firm stated that the performance management revolution was in full flight and that organizations across all sectors and regions were changing the way employee performance was measured and evaluated.¹⁷ Yearly formal performance evaluations are giving way to continuous performance feedback. Continuous feedback allows for the performance of an employee to be evaluated on an ongoing basis rather than in a formalised way (through evaluation reports) at pre-defined intervals (at the end of the year). This shift reflects the organization's acknowledgement that performance management is an everyday task rather than a yearly one. It also relies on the premise that continuous feedback will lead to higher staff engagement and better service delivery in an organization.

Why would an organization venture into continuous feedback? The traditional end-of-year performance evaluation 'ceremony' creates dissatisfaction. Managers responsible for conducting evaluations and evaluated employees alike do not greet performance evaluations with enthusiasm. Beyond mere bitterness, this response is rooted in experience. Reasons for this may be that such exercises do not warrant the time invested, that they do not protect against managers' bias, that they are usually focused on the past rather than the future, on tasks rather than individual development, and that they follow a judgmental approach in many ways, often lacking in the substance needed to truly steer professional development. Added to this is a high risk of cultural misunderstandings which are common in international organizations. This combination of elements is a major cause for conflict in the workplace and for litigation, as evidenced by the rich body of jurisprudence of international administrative tribunals on the matter.¹⁸

¹⁷ Deloitte 2017, 65.

¹⁸ The ILOAT index of cases for instance shows 457 references under 'Work appraisal'.

By contrast, continuous performance feedback (and feedforward) provides more, and therefore better, data for people decisions, encourages conversations and focus on content and performance methods rather than on the sole results.¹⁹ It is presented as a means rather than an end. Overall, this is an attractive prospect for an organization wishing to increase its career system's focus on performance.

What would be the consequences—from a legal perspective—of such a shift for those international organizations who are eager to catch up with the latest trends? A pre-condition to accessing means of redress under international civil service law is the existence of an administrative decision which adversely affects the legal situation of an employee. In performance management, this has long been embodied by the traditional evaluation report. The ILOAT thus held that:

...prima facie the complainant is entitled to have [their appraisal report] for what [they] thinks it to be worth; a doubt thrown on its value is not a ground for denying it. Furthermore, its usefulness to the complainant is not to be judged exclusively by reference to the main purpose of the report as set out in [the] Staff Rule [...]. Appraisal reports constitute a record of service which as a general rule an official is entitled to have for his own satisfaction as well as for use if he is seeking other employment [...].²⁰

What would happen—from a legal standpoint—if performance evaluations as we know them today were to become a means to steer future performance rather than an end to record past performance? What would happen—from a legal standpoint—if a formalised record at pre-defined intervals, so prevalent today in the legal framework of international organizations, were replaced by multiple discussions aimed at providing instant feedback, when and as needed, as part of an ongoing manager-employee exchange? The proposition is that ongoing feedback discussions—taken separately—could not qualify as an administrative decision adversely affecting the legal situation of an employee. Each conversation would be a step in the overall continuous performance evaluation, but could not, in and of itself, embody the evaluation or modify the legal situation of an employee. Otherwise, organizations would run the risk of multiplying decisions to an extent no longer sustainable.

19 Feedforward in performance management refers to a continuous and constructive conversation between employees and their manager, focused on future performance.

20 ILOAT, *Francis Donal Schofield (No 2) v WHO* 1980, para 4.

Would there then be a challengeable decision adversely affecting the legal position of an employee? It is worth recalling that appraisal reports have not always been considered challengeable administrative decisions. In its early days, the ILOAT ruled that:

...the evaluation expressed in that report was made within the exercise of a discretion and constituted only an opinion preliminary to a decision by the Director General relating to the grant of an annual increment, and there can be no recourse to the Tribunal in relation to this evaluation [...].²¹

It later reiterated this position in more specific terms, and dismissed as irreceivable a claim for the quashing of an evaluation report issued in the context of an employee's probation:

A plea to quash can be directed only against a decision, that is, against an act deciding a question in a specific case. A performance report embodies no decision capable of being rescinded. A complaint seeking such relief is not receivable.²²

The performance report was considered an intermediary step in the taking of a different administrative decision, be it termination of service, non-renewal of appointment or salary increment. Later, the ILOAT altered its approach and began to consider that judicial review was warranted:

The words complained of are contained in an appraisal report whose function it is to evaluate past performance and conduct and not to give directives for the future. Moreover, the facts as they appear in the dossier show that there was no act or omission by the complainant which could prompt any special directive for the future, let alone any criticism of the past. The Tribunal will not normally entertain complaints about the contents of appraisal reports; it is essential to their value that the supervisor should be granted great freedom of expression and normally, if there be any errors of judgment on [their] part, they can be sufficiently remedied by the incorporation in the appraisal report of the staff member's point of view. But in the circumstances of this case the Tribunal feels bound to conclude that the words complained of were inserted in the report under

²¹ ILOAT, *René Roux v ILO* 1956, para 11.

²² ILOAT, *P. C. de C. v WHO* 1967, para 1.

a total misconception of the situation and that justice requires that they should be expunged.²³

It is worth noting here that the Tribunal relied on the assumption that the appraisal report in question—in its classical form as is widely used today—was about evaluating past performance rather than steering future performance development.

Finally, the Tribunal asserted control over the appraisal report, and qualified it as a discretionary autonomous decision subject to judicial review, albeit a limited review:

The impugned decision, which relates to the assessment of an official's performance, is of a discretionary nature. Hence the Tribunal may quash it only if it was taken without authority, or tainted with a flaw of form or of procedure, or based on an error of fact or of law, or if essential facts were overlooked, or if the decision is tainted with abuse of authority, or if clearly mistaken conclusions were drawn from the facts.²⁴

So, what could be the way forward? Our proposition is to combine the features which safeguard access to means of redress specific to the international civil service so that continuous performance feedback may under certain circumstances become a challengeable act. Already today at the United Nations, only formal performance evaluations recording a rating below satisfactory may be contested via formal means of redress since the satisfactory ones are considered to have no adverse legal effect on their recipient. Only administrative decisions taken on the basis of the results of a performance review that affects a staff member's conditions of service may be appealed through the United Nations' internal justice system.²⁵ The UNAT went as far as to reverse a decision of its predecessor, the United Nations Dispute Tribunal, in relation to the challengeable nature of a satisfactory evaluation report in the following terms:

Pursuant to Section 15.1 of ST/AI/2010/5, staff members having received the rating of "successfully meets performance expectations" cannot challenge the performance appraisal by way of rebuttal. Section 15.1 provides:

23 ILOAT, *Gerard Joseph Glynn v WHO* 1971, para 3.

24 ILOAT, *Stefaan Bernard Peeters (No 2) v IPI* 1978, para 3.

25 UN Secretariat Performance Management Policy, s 14.

Staff members who disagree with a “partially meets performance expectations” or “does not meet performance expectations” rating given at the end of the performance year may, within 14 days of signing the completed e-PAS or e-performance document, submit to their Executive Officer at Headquarters, or to the Chief of Administration/Chief of Mission Support, as applicable, a written rebuttal statement setting forth briefly the specific reasons why a higher overall rating should have been given. Staff members having received the rating of “consistently exceed performance expectations” or “successfully meets [sic] performance expectations” cannot initiate a rebuttal.

Pursuant to Section 15.7 of ST/AI/2010/5, “[t]he rating resulting from an evaluation that has not been rebutted is final and may not be appealed. However, administrative decisions that stem from any final performance appraisal and that affect the conditions of service of a staff member may be resolved by way of informal or formal justice mechanisms”.

In the instant case, there was no evidence of any adverse administrative decision stemming from [the complainant’s] performance appraisal. The FRO’s comment on [the complainant’s] output—a comment made in a satisfactory appraisal—was not a final administrative decision. It did not detract from the overall satisfactory performance appraisal and had no direct legal consequences for [the complainant’s] terms of appointment.

We find that the [United Nations Dispute Tribunal] erred in law in finding that [the complainant’s] satisfactory appraisal constituted an appealable administrative decision.²⁶

There is therefore interest in finding a position which lies at the crossroads between the approaches of these tribunals, and which addresses pragmatic concerns around the severe consequences unsatisfactory performance may have on the very employment of staff.

It is worth highlighting that the jurisprudence of international tribunals is abundant regarding unsatisfactory performance and displays principles which have appeared stable over time and consistent across tribunals. These principles mainly revolve around the duties of an employer, namely: to inform in a timely manner and in specific terms about the unsatisfactory aspects of the performance; to give a reasonable opportunity for the employee to remedy

²⁶ UNAT, *Ngokeng v Secretary-General of the UN* 2014, paras 29–32.

shortcomings; to warn in specific terms of the risks attached to the unsatisfactory performance; and to afford due process.²⁷

The proposition is that there would be no pre-established administrative decision in the context of continuous performance feedback. There is however always a need for legal certainty in the employment relationship. On the employee's side, this is afforded by a particular act that allows for the possibility of redress without necessarily having to wait for dire consequences. On the employer's side, this is afforded by an act that opens and closes a time limit for challenge by the employee. Both sides meet when the employee is notified of unsatisfactory performance likely to lead to consequences which are difficult to reverse in practice, such as termination of service. Such notification is already a prerequisite under general principles governing performance evaluation. It is therefore a convenient starting point to embody the necessary adverse legal effect.

In conclusion, with feedback and feedforward becoming an ever more prominent trend, there is a need, from a legal standpoint, to identify the challengeable decision in the interests of both the employee and the employer. There is also a need, in more general terms, to strike the right balance between the legitimate right to appeal and the possibility for international organizations as employers to see performance evaluations evolve according to the latest trends without having to fear a paralysing volume of litigation.

3 The Who: Performance Management—From Technical Experts to People Managers

There can be no performance management without managers. The best management tools would fail without good managerial practices and the professionalisation of managers is high on the agenda of reformers.

In recent years, we have witnessed a trend whereby behavioural competencies have become more prevalent in international organizations' performance management schemes. Whilst behavioural competencies (namely, motivational, interpersonal or managerial skills) are intrinsic capabilities that are typically applicable to any role or organization, technical competencies are focused on disciplinary expertise (for example, law and jurisprudence for a lawyer, accounting standards for an accountant) and the application of this expertise to perform effectively in a given role. It is no longer solely what an

27 ILOAT, *A. R. v OIE* 2012, consid 9; WBAT, *Kiran Singh v IBRD* 1988, para 21, citing *N. Samuel-Thambiah v IBRD* 1993, para 32.

employee delivers that contributes to their performance but how this technical output is delivered.

This trend has been translated into jurisprudence to an extent that employees' shortcomings in few (but essential) behavioural competencies can afford sufficient ground for termination of service. The UNAT has observed in this respect:

[The complainant's] claim that it was wrong to terminate [their] service on the basis of the concerns about only two of the eleven competencies in [their performance evaluation] is not supported by any authority. In addition, it is reasonable for the Administration to view the competencies of leadership and communication as the important requirements for [their] position [...].²⁸

In the same vein, the WBAT has observed:

In this case, there can be no doubt that the Applicant was a competent staff member whose technical and professional abilities were never at issue. The problem was essentially one of difficulties in [their] interpersonal relationships.²⁹

The main legal issue behind the growing importance of behavioural competencies lies in performance assessment by managers. Managers have to evaluate people rather than technical output, and behavioural competencies cannot be measured with figures. The jurisprudence of international administrative tribunals has long acknowledged the discretionary and non-mechanical nature of the assessment made by managers of their employees. The ILOAT has articulated it as follows:

Assessment of merit is an exercise that involves a value judgement. It is usual to refer to decisions or recommendations involving a value judgement as "discretionary", signifying that persons may quite reasonably hold different views on the matter in issue and, if the issue involves a comparison with other persons, they may also hold different views on their comparative rating. The nature of a value judgement means that point-to-point comparisons are not necessarily decisive.³⁰

²⁸ UNAT, *El Sadek v UNRWA* 2019, para 55.

²⁹ WBAT, *Kiran Singh v IBRD* 1998, para 9.

³⁰ ILOAT, *J. T. M. v EPO* 2011, para 7.

Overall, international administrative tribunals have exercised restraint when reviewing performance assessments conducted by managers:

The UNDT made several errors of law when it found UNICEF's decision not to renew [the complainant's] contract for poor performance was not supported by the [Performance Evaluation Report] and was unlawful. Initially, the Dispute Tribunal reviewed *de novo* the Agency's decision. It did not accord any deference to UNICEF's conclusion that [the complainant's] performance was poor. Instead, it placed itself in the role of the decision-maker and determined whether it would have renewed the contract, based on the [Performance Evaluation Report]. This is not the role of a reviewing tribunal under the UNDT Statute.³¹

In the context of increased value judgment entailed by the evaluation of behavioural competencies, and with due deference to the conclusions drawn by managers as to the satisfactory nature of their employees' performance, international administrative tribunals are likely to place more emphasis on procedural or substantive safeguards which are critical to governing the way unsatisfactory performance is determined.

As far as procedural safeguards are concerned, the checks and balances put in place by international organizations in the evaluation of performance can take many shapes and forms and can to some extent be decisive. The ILOAT has for instance insisted on the role of the manager's own manager in supervising an evaluation exercise where the relationship between the employee and the manager is at issue:

...it is well settled by the Tribunal's case law that if the rules of an international organization require that an appraisal form must be signed not only by the direct supervisor of the staff member concerned but also by [their] second-level supervisor, this is designed to guarantee oversight, at least *prima facie*, of the objectivity of the report. The purpose of such a rule is to ensure that responsibilities are shared between these two authorities and that the staff member who is being appraised is shielded from a biased assessment by a supervisor, who should not be the only person issuing an opinion on the staff member's skills and performance. It is therefore of the utmost importance that the competent second-level

31 UNAT, *Said v Secretary-General of the UN* 2015, para 40.

supervisor should take care to ascertain that the assessment submitted for [their] approval does not require modification.³²

International organizations have also set up various bodies whose role it is to calibrate, harmonise or review the evaluation of performance by managers, or to monitor performance evaluation exercises at organization level.³³ What these safeguards have in common is that they create peer or institutional pressure to ensure fairness in the process.

As far as substantive safeguards are concerned, some international administrative tribunals are placing particular emphasis on the record available to support the conclusion that an employee's performance falls short of expectations, as well as on the existence of "a rational objective connection between the information available and the finding of unsatisfactory work performance".³⁴ To put it in the words of the WBAT when defining its scope of judicial review for discretionary decisions, this safeguard is about whether the adverse performance evaluation was made on an "observable"—this goes to the record—"and reasonable basis"—this goes to the link and proportionality between the record and the performance findings.³⁵

In summary, the shift in the way managers evaluate performance and place greater emphasis on behavioural competencies necessarily brings wider discretion into the performance assessment exercise. Given dominant and recent trends observed in the jurisprudence of international administrative tribunals, it is suggested that the robustness of a finding of unsatisfactory performance is likely to increasingly revolve around the robustness of the process conducted and around the wealth of record available.

4 Conclusion

It is hoped that this concise exploration of macro-trends in performance management will resonate with professionals familiar with the functioning of international organizations and that it will feed the discussion around the legal implications of these trends. This chapter will have fulfilled its purpose if it has fostered the appetite of international organizations to adapt their approach to

32 ILOAT, *B. (No 2) v EPO* 2016, para 14.

33 See, for instance, UN Secretariat Performance Management Policy, s 14; EPO Guidelines on Performance Development, s II (1); World Bank Staff Manual, r 9.06.

34 UNAT, *Sarwar v Secretary-General of the UN* 2017, para 74.

35 WBAT, *EG v IBRD* 2017, para 86.

performance management, bearing in mind how best to achieve their mission. Its goal will have been met if, at the same time, it has contributed to identifying adequate safeguards of the independence and impartiality of international civil servants through an evolution of the jurisprudence of international administrative tribunals on the matter.

Reference List

- AK v International Bank for Reconstruction and Development*, WBAT Decision No 408 (2009).
- Alan Berg v International Bank for Reconstruction and Development*, WBAT Decision No 73 (1988).
- Antoine Guyen v European Organization for Nuclear Research*, ILOAT Judgment No 1354 (1994).
- A. R. v International Office of Epizootics*, ILOAT Judgment No 3070 (2012).
- Ayoub et al. v International Labour Organisation*, ILOAT Judgment No 832 (1987).
- Ayoub (No 2) et al. v International Labour Organisation*, ILOAT Judgment No 986 (1989).
- B. (No 2) v European Pant Organisation*, ILOAT Judgment No 3692 (2016).
- Barahona and Royo Gracia (No 2) v International Criminal Police Organization*, ILOAT Judgment No 1025 (1990).
- Bechir C. Chakra v International Bank for Reconstruction and Development*, WBAT Decision No 70 (1988).
- Deloitte, *Rewriting the Rules for the Digital Age: 2017 Deloitte Global Human Capital Trends* (Deloitte University Press 2017).
- Eddy Penny v European Organization for Nuclear Research*, ILOAT Judgment No 1415 (1995).
- Edith Feldmann v European Organization for Nuclear Research*, ILOAT Judgment No 1413 (1995).
- EG v International Bank for Reconstruction and Development*, WBAT Decision 567 (2017).
- El Sadek v Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, UNAT Judgment No 2019-UNAT-900 (2019).
- Elena Gavidia v International Finance Corporation*, WBAT Decision No 66 (1988).
- European Patent Office, Guidelines on Performance Development (19 December 2014) <[http://documents.epo.org/projects/babylon/eponet.nsf/o/AC4179D70D826A22C1257ED0002B1AFB/\\$File/Service_Regulations_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/o/AC4179D70D826A22C1257ED0002B1AFB/$File/Service_Regulations_en.pdf)> accessed 2 March 2020.
- European Patent Office, Services Regulations for the Permanent and Other Employees of the European Patent Office <[http://documents.epo.org/projects/babylon/eponet.nsf/o/AC4179D70D826A22C1257ED0002B1AFB/\\$File/Service_Regulations_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/o/AC4179D70D826A22C1257ED0002B1AFB/$File/Service_Regulations_en.pdf)> accessed 2 March 2020.

- Francis Donal Schofield (No 2) v World Health Organization*, ILOAT Judgment No 399 (1980).
- Gerard Joseph Glynn v World Health Organization*, ILOAT Judgment No 182 (1971).
- H. (No 4) et al. v European Patent Organisation*, ILOAT Judgment No 4195 (2019).
- J. T. M. v European Patent Organisation*, ILOAT Judgment No 3006 (2011).
- Kiran Singh v International Bank for Reconstruction and Development*, WBAT Decision No 188 (1998).
- Lloret Alcañiz et al. v Secretary-General of the United Nations*, UNAT Judgment No 2018-UNAT-840 (2018).
- Louis de Merode et al. v The World Bank*, WBAT Decision No 1 (1981).
- Lyra Pinto v International Bank for Reconstruction and Development*, WBAT Decision No 56 (1988).
- Markus Audria v European Organization for Nuclear Research*, ILOAT Judgment No 1412 (1995).
- Maryse Seissau v European Organization for Nuclear Research*, ILOAT Judgment No 1416 (1995).
- Monique Häusermann v European Organization for Nuclear Research*, ILOAT Judgment No 1414 (1995).
- M. S. et al. v European Patent Organisation*, ILOAT Judgment No 3256 (2014).
- N. Samuel-Thambiah v International Bank for Reconstruction and Development*, WBAT Decision No 133 (1993).
- Ngokeng v Secretary-General of the United Nations*, UNAT Judgment No 2014-UNAT-460 (2014).
- P. C. de C. v World Health Organization*, ILOAT Judgment No 112 (1967).
- Poulain d'Andecy v Food and Agriculture Organization of the United Nations*, ILOAT Judgment No 51 (1960).
- Quijano-Evans et al. v Secretary-General of the United Nations*, UNAT Judgment No 2018-UNAT-841 (2018).
- René Roux v International Labour Organisation*, ILOAT Judgment No 36 (1956).
- Robert V. Lindsey v International Telecommunication Union*, ILOAT Judgment No 61 (1962).
- Rosario Cardenas v International Bank for Reconstruction and Development*, WBAT Decision No 71 (1988).
- Said v Secretary-General of the United Nations*, UNAT Judgment No 2015-UNAT-500 (2015).
- Sarwar v Secretary-General of the United Nations*, UNAT Judgment No 2017-UNAT-757 (2017).
- Stefaan Bernard Peeters (No 2) v International Patent Institute*, ILOAT Judgment No 352 (1978).
- United Nations HR Portal, Withholding Salary Increment (1996 and Earlier) <<https://hr.un.org/content/withholding-salary-increment>> accessed 2 March 2020.

United Nations Secretariat, Performance Management and Development System (30 April 2010) <https://careers.un.org/lbw/attachments/Performance_Management_Policy.pdf> accessed 2 March 2020.

World Bank, Staff Manual.