



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/056

Judgment No.: UNDT/2020/030

Date: 27 February 2020

Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: New York

Registrar: Nerea Suero Fontecha

HANDY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Natalie Puchalka, OSLA

Counsel for Respondent:

Nicole Wynn, ALD/OHR, UN Secretariat

Nusrat Chagtai, ALD/OHR, UN Secretariat

Introduction

1. On 26 January 2018, the Applicant, a Political Affairs Officer at the P-4 level with the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic, filed an application. He thereby contests the decision to subvert the intention of ST/AI/2010/5 (Performance Management and Development System) by awarding him a “successfully meets expectations” rating in his 2016-2017 performance appraisal while inconsistently including “disparaging comments in his evaluation”. He seeks redress because the effect of this decision was to bar him from requesting a Rebuttal Panel to challenge the disparaging comments. The case was initially filed with the Nairobi Registry.

2. On 2 March 2018, the Respondent filed his reply in which he submits that the application is not receivable. The Respondent claims that a satisfactory performance appraisal is not reviewable and that since the disparaging comments had no direct legal consequences for the Applicant’s appointment or his contract of employment, the application is not receivable *ratione materiae*.

3. By Order No. 120 (NBI/2018) dated 16 August 2018, the Tribunal decided to adjudicate the issue of receivability as a preliminary matter and ordered the Applicant to file a reply to the Respondent’s submissions on receivability.

4. On 29 August 2018, the Applicant duly filed his submission maintaining that the application is receivable.

5. On 16 November 2018, the case was transferred to the New York Registry, and on 16 December 2019, it was reassigned to the undersigned Judge.

6. By Order No. 183 (NY/2019) dated 24 December 2019, the Tribunal indicated that it considered the case fully briefed and that the preliminary issue of receivability could be decided on the papers. The parties were therefore ordered to file their closing statements on receivability. They duly did so.

7. After closely perusing the parties' closing statements on receivability, by Order No. 10 (NY/2020) dated 17 January 2010, the Tribunal found that the case was also ready to be determined on its merits and therefore ordered the parties to file their closing statements thereon. The parties did so in the following order: the Applicant (28 January 2020), the Respondent (4 February 2020) and the Applicant's final observations (11 February 2020).

Facts

8. In the Applicant's electronic performance appraisal system report ("ePAS") for the performance period from 1 April 2016 to 31 March 2017, which he challenges in the present case, the "overall end-of-cycle rating" from his first reporting officers ("FROs") was that the Applicant's performance "successfully meets expectation" (the second highest rating out of four). The Tribunal note that it appears from the ePAS that since two different staff members served as his supervisors during the performance period, they rated his performance by consensus but assessed his performance in separate and independent narrative comments.

9. The Applicant was rated positively regarding one out of three of the core values for his performance assessment, two out of three of the core competencies for his performance assessment. There was neither rating nor comment assessing the Applicant's performance in two other sections of his ePAS, namely Managerial Competencies and Development Plan. Generally, the comments on his performance were overwhelmingly negative. This was evident from the fact that no comment was included in relation to some of the Applicant's satisfactory ratings and achievements such as in integrity, professionalism and continuous learning. On the other hand, there was commentary in support of the less than satisfactory ratings. In relation to some of the satisfactory ratings, including the overall rating of "successfully meets expectations", the comments included were inconsistently negative. As set out below, there were approximately 56 lines of disparaging comments with only 9 lines of positive remarks.

10. In the narrative overall comments, the FROs stated that (emphasis added to negative comments):

[Name redacted] notes: “During the review period, [the Applicant] displayed considerable analytical ability, knowledge of the environment of the Central African Republic, and various other competencies. He accomplished the above-mentioned tasks in an efficient manner. *However, with his many skills, [the Applicant] could have been highly instrumental in helping the Political Affairs Division achieve astonishing results and flourish, if he had been effectively present in our team. I was his supervisor, but I did not have a full grasp of [the Applicant’s] schedule. He essentially did not participate in our team meetings, and I was not informed about most of his travel. My team could have benefited from his considerable experience and skills if he had been available*” [official translation from French]. [The Applicant] appears quite capable of producing work in line with his assignments and relevant standards, however he is often pulled away from his tasks by the need to address administrative issues, and these circumstances have provoked inappropriate and unprofessional communications with colleagues.

11. The Applicant’s second reporting officer was, however, more critical of the Applicant’s performance, stating as follows (emphasis added to negative comments):

I take note of the comments and ratings given by the two colleagues who served successively as FROs over this reporting period and consider them as not adequate to describe the professional performance and the behaviour displayed by [the Applicant]. Even before he resumed his duties with the Division, while on sick leave, [the Applicant] sent at least one aggressive message to colleagues. His frequent infringement of rules, his difficulty in working with others, in sharing office space, in sharing vehicles in the car-pool, his disrespect for simple rules such as being present on time for work, observance of curfew hours, attend compulsory meetings including meetings he is supposed to chair, in my view do not correspond to a satisfactory completion of work. Moreover his aggressive remarks openly directed against people he considers as foreigners would have justified unsatisfactory ratings in professionalism, integrity and respect for diversity. During this reporting period alone [the Applicant] has caused at least three incidents one of them being insulting me, his SRO, Director of the Division. [Another] has been for breach of curfew regulations, and yet another for unauthorized statements to the press and for misrepresenting his position in the organization. His two first reporting officers during this pas reporting

period were both aware of the facts I describe above, it is therefore my view that [the Applicant] should have been rated as “unsatisfactory” in the core competencies of professionalism, integrity and respect for diversity. The performance of this staff member will have to be closely monitored over the next reporting period with particular attention to the three competencies mentioned here above and to his observance of all rules and regulations including time of arrival and presence in the office. In the next reporting period [the Applicant] will be supported to substantially improve his performance and to display satisfactory levels of professionalism, of integrity and of respect for diversity, starting with minimal respect for his colleagues in every area of work, communication and working in a team, including his first and second reporting officers.

12. Regarding the individual ratings, for the mandatory three “core values”, the FROs rated them as follows:

- a. Integrity—“fully competent” (the second highest rating out of four);
- b. Professionalism—“requires development” (the second lowest rating out of four);
- c. Respect for diversity—“requires development” (the second lowest rating out of four).

13. The FROs’ narrative comments regarding the core values (only one of them appears to have made such observations) were critical of the Applicant’s performance (emphasis added to negative comments):

[He] does not consistently remain calm in stressful situations, as exhibited in several instances over this reporting period during which he communicated with staff in a disrespectful manner, often copying the most senior leadership at [New York Headquarters] or in the mission.

14. For the “core competencies” relevant for the post, the ratings of the FROs were as follows:

- a. Communication—“requires development” (the second lowest rating out of four);

- b. Creativity—“fully competent” (the second highest rating out of four);
- c. Continuous learning—“fully competent” (the second highest rating out of four);

15. In the narrative comments of one of the FROs concerning the core competencies (the other FRO does not appear to have provided any), the Applicant’s performance was first commended:

For the brief period we have worked together, [the Applicant] has often been creative and thoughtful when it comes to political analysis of current events, and regularly makes helpful and insightful observations in team meetings and through notes or draft cables.

16. The Applicant’s communication skills were, however, criticized (emphasis added to negative comments):

[The Applicant] does not adequately tailor his language, tone and style when communicating with management or other colleagues on issues related to his own professional situation, which has occupied a large portion of his time since returning to the mission.

Consideration

Receivability

17. The Respondent submits that the application is not receivable *ratione materiae* as the performance rating and the comments of the FROs and the SRO do not constitute reviewable administrative decisions within the meaning of art. 2.1(a) of the Dispute Tribunal’s Statute. It is further argued that the Applicant has not identified any final reviewable administrative decision stemming from the FROs’ and SRO’s comments or the performance rating. The Respondent also contends that the “successfully meets expectation” rating did not deny any right to rebut the appraisal and therefore had no legal consequences. Rather, the overall rating and comments were a legitimate exercise of administrative hierarchy in the performance management process and, as in the cases of *Ngokeng* 2014-UNAT-460 and *Staedtler*

2015-UNAT-546, they had no adverse legal consequences for the terms and conditions of the Applicant's appointment. The Respondent notes that the Appeals Tribunal has recently confirmed this approach in *El Sadek* 2019-UNAT-900, where it found that the decision to re-open the applicant's performance appraisal to correct the evaluation, including comments and a downgrade of a competency rating, did not affect the terms and conditions of his appointment. Also, following the 2016-2017 performance appraisal, the Applicant continued to serve as a staff member on a fixed-term appointment.

18. The Applicant contends that his application is receivable because the decision of awarding him an evaluation of "successfully meets expectation" whilst simultaneously including disparaging comments in his evaluation was not in compliance with his employment contract and terms of appointment. He asserts that he suffered adverse legal consequences as he was deprived of the right to contest the overall disparaging effect of the evaluation via the rebuttal process set out in Section 15 of ST/AI/2010/5. He was thereby denied due process and stripped of an entitlement to exercise a right that, by virtue of the said Section, was embedded in his terms of appointment.

19. The Tribunal notes that it is settled caselaw of the Appeals Tribunal that "a comment made in a satisfactory appraisal" is not a "final administrative decision" if it does "not detract from the overall satisfactory performance appraisal and [has] no direct legal consequences for [the staff member's] terms of appointment (see *Ngokeng* 2014-UNAT-460, as affirmed in *Staedtler* 2015-UNAT-546, para. 40).

20. The Tribunal notes that the logical consequence of *Ngokeng* is that if the comments in a satisfactory performance do, in fact, detract from the overall rating, they oppositely must constitute a final, and therefore also appealable, decision. As the substantive question of the present case is exactly whether the narrative comments in the Applicant's ePAS report detracted from this rating, the application is therefore receivable.

21. This is also the only reasonable outcome in light of the performance appraisal system process outlined ST/AI/2010/5. It is clear from the content of the Administrative Instruction that the important underlying value of accountability is intended to be reflected in the performance appraisal process. This includes accountability of persons tasked with the responsibility for making performance assessment findings that will impact on the job security and/or career progression of Staff Members.

22. Accountability is included as part of the purpose of the Performance Management and Development System in ST/AI/2010/5 (emphasis added).

Purpose

2.1 The purpose of the Performance Management and Development System is to improve the delivery of programmes by optimizing performance at all levels, which it will achieve by:

(a) Promoting a culture of high performance, personal development and continuous learning;

(b) *Empowering managers and holding them responsible and accountable for managing their staff;*

(c) Encouraging a high level of staff participation in the planning, delivery and evaluation of work;

(d) Recognizing successful performance and addressing underperformance in a fair and equitable manner.

23. In addition to the foregoing, a special role is assigned to the SRO in ensuring that there is accountability in the process as follows pursuant to ST/AI/2010/5:

5.4 ... The second reporting officer ensures consistency between the competency and core values ratings, the comments and the overall rating of individual staff members for a given performance cycle.

24. The rebuttal process provided for at sec. 15 of ST/AI/2010/5 provides a forum for ensuring accountability. However, in accordance with secs. 15.1 and 15.7, a staff member who has received the rating of “successfully meets performance expectations” cannot initiate a rebuttal process of the rating. If a rating has not been

rebutted, then it becomes “final and unappealable”. If a staff member were not to be granted access to judicial review by this Tribunal of whether disparaging comments detracted from the provided ratings of “successfully meets performance expectations”, such comments would be entirely shielded from any scrutiny whatsoever and their legality would never be capable of any review at all. Accordingly, a central purpose of ST/AI/2010/5 namely, ensuring accountability, would be subverted.

25. The need for an ethical approach to performance management notion of accountability in performance assessment is underscored by C. Brewster, L. Carey, P. Grobler, P. Holland and S. Wörnich in *Contemporary Issues in Human Resource Management—gaining a competitive advantage* (Oxford South Africa, 3rd edition), p. 189-190:

Related to promotion is the issue of performance management. ... Managers may use performance management as a decision-making tool for the distribution of performance related pay and promotion. A common criticism of performance-management systems is that they raise issues of privacy, dignity, discrimination and power and control over employees ... To ensure that performance-management programmes are ethically sound, managers must ensure that these systems reflect the principles of respect for the individual, procedural fairness and transparency in decision making.

26. The Respondent further refers to *El Sadek* 2019-UNAT-900 in which the Appeals Tribunal held that “if a downgrade of one or more competencies does not detract from the overall satisfactory rating, it does not affect the terms or conditions of employment” (see para. 42).

27. In this regard, the Tribunal notes that the subject of the present case is different from that of *El Sadek* in that it concerns the appropriateness of the narrative comments made by the FROs and SRO and not the downgrade of one or more competencies. Also, as already stated, the very issue at stake in the present case is whether there was a detraction between the overall rating and the comments, and the Tribunal must necessarily be competent to review the question.

28. For a staff member covered by ST/AI/2010/5, the Tribunal finds that the FRO and the SRO are granted a certain degree of latitude when undertaking their responsibilities as supervisors under secs. 8.3 and 8.5:

8.3 The first reporting officer shall evaluate the extent to which the staff member has achieved the goals/key results/achievements as set out in his/her workplan. The first reporting officer shall also evaluate and comment on the manner in which the staff member has demonstrated the core values and competencies. The first reporting officer may comment on the staff member's self-appraisal in his/her evaluation of the staff member. First reporting officers are encouraged to discuss the career aspirations of staff during the end-of-the year discussion. An overall rating on the staff member's performance shall be given by the first reporting officer pursuant to section 9 below.

...

8.5 Evaluations are reviewed by the second reporting officer, who may make comments, as appropriate. ...

29. The Tribunal notes that implicit in the latitude granted is the exercise of discretion. In accordance with the consistent jurisprudence of the Appeals Tribunal, such discretion is, however, never unfettered. For instance, it follows from the general principles guiding the scope of the Dispute Tribunal's judicial review as stated in the seminal judgment of the Appeals Tribunal in *Sanwidi* 2010-UNAT-084 that an administrative decision must be "reasonable and fair, legally and procedurally correct, and proportionate" (see para. 42). An inclusion of inconsistent disparaging commentary, which detracts from a performance appraisal that purports to give a satisfactory rating, is a decision based on the exercise of discretion by the FRO and SRO. It is a decision that would *per se* produce a direct legal consequence as, under the provisions of ST/AI/2010/5, a staff member has an inherent right to receive fair performance appraisal. Accordingly, such a decision must be reviewable.

30. The importance of fairness, transparency and accountability in the performance appraisal is accentuated by the requirement that whenever a staff member submits a job application through the United Nations Secretariat's online jobsite, Inspira, s/he should attach her/his three latest appraisals, if available. The performance appraisal therefore has a direct effect on any such job applicant's

prospects of being selected for a new job and therefore also for her/his career aspirations.

31. The Respondent, in his closing statement, raises a point that ought more appropriately to have been addressed within the rebuttal process provided for in ST/AI/2010/5. The point raised is that the Applicant's performance evaluation, inclusive of the comments, correctly reflects his shortcomings in professionalism, diversity and communication skills; yet the Applicant failed, in the instant application, to produce evidence in rebuttal. However, it is that very process that the Applicant was deprived of accessing by being awarded a satisfactory "successfully meets performance expectations" appraisal rating. He had no access to rebut the exceedingly disparaging remarks that detracted from his overall rating.

32. In essence, the Respondent argues that the disparaging comments about the Applicant's communication and diversity performance were supported by evidence. The evidence referred to is some email exchanges between the Applicant and, *inter alia*, the FRO and SRO from 18 December 2016 to 15 April 2017, which the Respondent appended to his reply. The Respondent points out that the Applicant has produced no evidence of rebuttal in these proceedings.

33. It is the Tribunal's finding, however, that the Applicant was not required to utilize the Dispute Tribunal's proceedings to rebut the disparaging effect of his "satisfactory" appraisal. That type of rebuttal should have been addressed within sec. 15 regarding the rebuttal process provided for in ST/AI/2010/5. He could have made a case against the validity of the disparaging comments in that forum had access not been denied. That is the crux of the harm suffered by the Applicant that gave rise to his application challenging the decision to include such extensively disparaging remarks in his appraisal as to detract from the satisfactory rating yet render him without access to rebuttal.

34. Although not required to do so, the Respondent sought, by his closing statement, to establish that shortly after receiving the disparaging appraisal in July

2017, the Applicant did seek to rebut the remarks. This was done by a Personal Statement dated 5 August 2017. In the statement, strong allegations of personal vendetta, procedural unfairness and bias are made vis-à-vis the decision to include the disparaging remarks in his appraisal. There is no indication as to whether and if so how or when this statement was communicated to the Respondent. However, it is clear that the substance of it would be relevant as the type of rebuttal evidence, the Respondent contended was missing from the Applicant's case.

35. Laurie J. Mullins, *Management and Organisational Behaviour*, (Prentice Hall/Financial Times, 7th edition), p. 769 to 770, cites an article by D. Tackey, *Eliminating Bias in Performance Management*, Manager, the British Journal of Administrative Management, September/October 2001, p. 12 to 13 in highlighting the importance of eliminating bias in performance management:

The evaluation of the performance of individuals in the workplace is fraught with difficulties even at the best of times. The difficulties are compounded when there are allegations of bias in such evaluation; and magnified out of recognition when the alleged bias has racial undertones.

36. The foregoing merely provides an indication of the type of considerations that could have been relevant in rebuttal of the 'evidence' the Respondent cites as supporting the disparaging remarks. It is reiterated however, that the forum for rebutting the alleged evidence supporting the disparaging comments that detracted from the Applicant's appraisal was the Rebuttal Process under the Staff Rules, to which the Applicant was denied access.

37. The Tribunal therefore finds that there is no merit to the Respondent's contention that the fact that the Applicant is still employed on the same fixed-term appointment constitutes proof that the alleged disparaging comments did not have any direct consequence for him. If anything, the Applicant could argue the opposite, namely that he has not been able to find another job exactly because of the alleged disparaging comments in the ePAS.

38. The application is therefore receivable.

Did the narrative comments of the Applicant's ePAS report detract from the ratings?

39. The Applicant submits that the Administration violated its obligations under ST/AI/2010/5 as it consciously acted in a manner preventing him from challenging his performance evaluation before a rebuttal panel. A number of irregularities were associated with the ePAS, including that: the Applicant's midpoint review did not suggest any performance shortcomings in line with the final evaluation; the ePAS contained a vast majority of negative comments that were "disparaging, misleading, unsubstantiated and inconsistent with the overall rating that he received", being "successfully meets expectation"; one of the FROs was effectively only able to assess the Applicant's performance for approximately four to five weeks during the relevant period. The existence of such irregularities indicate that the Applicant was subjected to arbitrary treatment by the Administration and that the ePAS was "riddled with negative comments and unfair inferences of poor performance".

40. The Applicant contends that, in the described circumstances, the Tribunal can make a determination that the intention of the Administration was to subvert the evaluation process and deny the Applicant the right to challenge. Such a right to challenge is laid out in the rebuttal process set out in sec. 15 of ST/AI/2010/5. This failure to accord the Applicant such due process rights undermines the Administration's obligations to treat staff members fairly and justly. It is not the case that every negative comment in an evaluation should be subject to judicial review just that when the threshold is met (when negative comments outweigh the positive evaluation), judicial intervention is required.

41. The Respondent submits that the contested decision was lawful as the Applicant has failed to identify any breach of the staff regulations and rules or of ST/AI/2010/5. Rather, the performance evaluation was conducted in accordance with ST/AI/2010/5. Under sec. 8.3, the FRO had the primary role of evaluating the extent to which the Applicant achieved the goals and key results as set out in the workplan,

and sec 9.6 provides that a rating of “successfully meets expectations” should be given where the staff member fully achieved the success criteria for the majority of the goals and key outputs.

42. The Respondent contends that the Applicant’s FRO for the first eight weeks of the 2016-2017 performance cycle, and his FRO for the remainder of the performance cycle, provided comments which were “consistent” with the overall rating of “successfully meets expectations”. Both FROs recognized the Applicant’s achievements in the performance evaluation, stating, *inter alia*, that the Applicant: “often ... creative and thoughtful when it [came] to political analysis of current events, and regularly [made] helpful and insightful observations in team meetings and through notes of draft cables”.

43. The Respondent argues that the comments reflect that both FROs considered that the Applicant “largely met the goals and key results in the workplan”. Therefore, in accordance with sec. 9.6 of ST/AI/2010/5, the Applicant received an overall rating of “successfully meets expectations”.

44. The Respondent further submits that the SRO had a “broader responsibility” under ST/AI/2010/5, as in accordance with sec. 8.5, he reviewed the FROs’ evaluation and provided comments. ST/AI/2010/5 provides no requirement that the SRO’s views be “consistent with the overall rating” given by the FRO, or that an overall rating “be changed to reflect the views of the SRO, since the FRO has primary responsibility to evaluate the staff member”. Nor does a rating of “successfully meets expectations” preclude “an FRO or SRO identifying areas where the staff member’s performance could improve”. Whilst the Applicant achieved the majority of goals and key outputs, both FROs and the SRO had “an obligation to comment on areas where the Applicant required improvement”.

45. The Tribunal notes that under the Appeals Tribunal’s jurisprudence in *Ngokeng*, as already stated above, the narrative comments in a performance appraisal cannot “detract” from the performance rating. In accordance with *Staedtler*, which

affirms *Ngokeng*, this not only applies to the comments of the FRO, but also those of the SRO (see para. 40).

46. The Tribunal further notes that, as also already stated above, the Appeals Tribunal set out the limitations of the judicial review of the Dispute Tribunal in *Sanwidi*. Following this standard, “it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General” (see para. 41). Rather, “the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate”. This led the Appeals Tribunal to hold that the Dispute Tribunal is not to replace its judgment with that of the decisionmaker, but rather to ensure that that this person does a proper job:

... As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decisionmaker’s decision.

47. Following the principles of *Sanwidi*, while the Tribunal acknowledges in line with the Respondent’s submissions that not all narrative comments in a performance appraisal necessarily need to be positive to grant a “successfully meet expectations” rating; they must, however, generally be balanced and consistent in a reasonable, fair and proportionate manner. If negative comments are made about the performance, they must therefore be outweighed or at least balanced by other comments that provide a positive perspective which supports the overall rating.

48. The need for balance and consistency in the comments necessarily also applies to the comments of the SRO who is mandated by the Rules to ensure consistency between the comments and ratings. Otherwise—for the sake of argument—even if the FRO or SRO made entirely outrageous and unsubstantiated

comments, bordering on character assassination but did so in the context of an overall “successfully meet expectations” rating, they could never be held accountable. The comments would remain on the staff member’s record and be entirely protected from any administrative and/or judicial review.

49. The Respondent’s contention that there is no rule constraining the type of comments made by the SRO is also without merit. As mentioned above, ST/AI/2005/10 provides that the SRO must ensure “consistency between the competency and core values ratings, the comments and the overall rating”. In the present case, it is clear that a decision was made by the SRO not to ensure such consistency. Instead, it is evident from the ePAS that there was a direct contradiction between the SRO’s comments and the ratings given by the FROs. While the FRO rated the Applicant’s overall performance as “successfully meet expectations”, the SRO stated that “the comments and ratings given by the two colleagues who served successively as FROs over this reporting period ... [were not considered as] adequate to describe the professional performance and the behaviour displayed by [the Applicant]”.

50. The SRO, in particular, criticized the ratings of the FROs in the core values of professionalism, integrity and respect for diversity as he found that based on the FROs comments and his own experience with the Applicant, the Applicant’s performance should have been rated as “unsatisfactory” (the lowest rating out of four) instead of “fully competent” (the second rating) in integrity and “requires development” (the third rating) in professionalism and respect for diversity. The SRO’s remaining comments also demonstrate that he did not find that the Applicant’s performance had been successful in any possible way—all the observations were highly negative and unfavorable to the Applicant.

51. The Tribunal further finds that even the gist of the FROs’ narrative comments did not necessarily reflect an overall rating of “successfully meets expectations”. When reading these comments, they were predominantly critical of the Applicant’s performance, especially regarding his attitude and behavior, although the quality of

his work did receive some praise. This is particularly so with regard to the rating of “fully competent” in the core value of integrity as all remarks regarding his performance in the three core values were negative.

52. Accordingly, the Tribunal finds that the narrative comments in the ePAS detracted from overall rating “successfully meets expectations”. The decision to include such comments was *ultra vires* and exposed the Applicant *per se* to adverse career consequences and unfairly deprived him of a right to rebuttal.

Relief

53. In the Applicant’s closing statement, he makes no specific submissions about the relief he seeks. Rather, he complains that due to the overall rating of “successfully meets expectations”, he was unlawfully impeded from initiating a rebuttal process under ST/AI/2010/5 (the Tribunal notes that under sec. 15.1 a staff member can only do so if s/he receives the rating of “partially meets performance expectations” or “does not meet performance expectations”). In the application, the Applicant, however, solely requests that the “the disparaging comments contained in his evaluation be rescinded”.

54. The Tribunal notes that “the very purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations” (see para. 10 of *Warren* 2010-UNAT-059 as affirmed, for instance, in *Ho* 2017-UNAT-791). The Tribunal finds that a similar principle must also apply to other types of relief under art. 10.5 of the Dispute Tribunal’s Statute, including rescission and specific performance. At the end of the day, the justice is most appropriately served if reasonableness, fairness and proportionality are restored (see the citations from *Sanwidi* above).

55. In the present case, as the Tribunal is not to replace the decisionmaker under *Sanwidi*, it cannot give its own assessment of the Applicant’s performance. Considering the circumstances of the case, including the ambiguity of the Applicant’s

submissions regarding the relief he seeks, the Tribunal therefore orders that the Applicant's 2016-17 performance appraisal be amended in a manner to ensure that the narrative comments no longer detract from the provided ratings and that the Applicant is thereafter left with all proper due process rights. The Tribunal's order will, however, reflect that it will be the obligation of the decision makers to decide on how this is to be achieved. In so doing, the important matter to be addressed by the decision-makers is that the appraisal must properly and consistently record an assessment of the Applicant's performance for the given time period.

Conclusion

56. The application is granted. The Administration is ordered to amend the Applicant's 2016-17 ePAS report so that the narrative comments do not detract from the overall rating.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 27th day of February 2020

Entered in the Register on this 27th day of February 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York