UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2015/103
Judgment No.: UNDT/2015/069
Date: 30 July 2015
Original: English

Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

SURVO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a staff member of the Economic and Social Commission for Asia and the Pacific ("ESCAP"), contests the non-approval of the workplans he submitted for his 2010-2011 and 2011-2012 performance appraisal cycles.

2. He seeks monetary compensation of six months' net base salary.

Facts

3. The Applicant served as Chief, Statistical Information Services Section ("SISS"), Statistics Division ("SD"), ESCAP, since 1 June 2003. In July 2009, this position was re-classified from P-4 to P-5, following which the post was advertised on 2 February 2010.

4. On 4 July 2010, the Applicant emailed the Chief, SD, ESCAP, his then supervisor, a draft workplan for his performance appraisal (e-PAS) for the period 2010-2011. There is no record of any feedback received by the Applicant thereon.

5. On 3 September 2010, the Applicant, having applied for the re-classified post, was informed that he had not been selected.

6. From 29 October 2010 to 3 July 2011, the Applicant worked for the ICT and Disaster Risk Reduction Division ("IDD"), ESCAP. No e-PAS exists for this period.

7. The Applicant states that during early 2011, the Human Resources Management Section ("HRMS"), ESCAP, followed-up on the Applicant's 2010-2011 workplan.

8. In April 2011, the Applicant requested the Tribunal order suspension of action in respect of the decision to reassign him to the position of Statistician (P-4) in the SD. This matter, was settled through mediation.

9. On 4 July 2011, as a result of the agreement reached, the Applicant was transferred to the position of Knowledge Management Coordinator with Office of the Executive Secretary ("OES"), ESCAP.

10. In the context of ESCAP attempts to achieve 100% compliance with e-PAS procedures, by email of 6 July 2011, the Executive Secretary, ESCAP, urged ESCAP managers to finalise all pending e-PASes for 2010-2011 before 31 July 2011 and to ensure that all 2011-2012 workplans were approved electronically by the same date.

11. On 19 August 2011, the Applicant emailed to his new supervisor, the Chief of Staff, OES, ESCAP, and his two additional supervisors, a draft workplan for the 2011-2012 period. She acknowledged receipt on the same day; however, there is no record on file about any feedback on it from the first reporting officer

12. On 11 and 12 April 2012, HRMS, ESCAP, contacted the Applicant regarding his workplans for 2010-2011 and 2011-2012 respectively.

13. From April 2012, the Applicant was reassigned to the Programme Planning and Partnerships Division. Since then, his e-PASes have been completed as required and in due course.

14. The Applicant requested management evaluation of the impugned decisions on 26 September 2014. By letter dated 24 November 2014, the Management Evaluation Unit responded that the Applicant's request was irreceivable as it had not been submitted within the prescribed timeframes.

15. The Applicant filed the present application on 22 February 2015. The Respondent submitted his reply on 27 March 2015, raising issues of receivability *ratione materiae* and *ratione temporis*.

16. By Order No. 76 (GVA/2015) of 1 April 2015, the parties were convened to a case management discussion on 15 April 2015, to address receivability issues.

Parties' submissions

17. The Applicant's principal contentions are:

a. The application concerns repeated, persistent and continuing outright refusals by the concerned first reporting officers, and through their inaction, by the second reporting officers and the Executive Secretary, to approve and provide any feedback whatsoever on the workplans prepared by the Applicant for 2010-2011 and 2011-2012. These violations are continuing and the Applicant is still awaiting decisions;

b. The Applicant was never notified of the contested decisions. He understood at the end of the 2014 mediation process that the Administration would not take action to complete his missing e-PASes;

c. The Applicant respected all the time limits and practices on performance management. The first and second reporting officers have a duty to ensure that all staff members have a workplan and are properly evaluated. A lack of agreement between the concerned staff member and his first reporting officer on the workplan is not an excuse or reason not to provide feedback on it;

d. The Applicant's management has violated numerous obligations regarding, *inter alia*, the objective appraisal of the Applicant's performance, ensuring productivity, rewarding result-oriented excellence, preventing discrimination and providing a harmonious and conducive work environment;

e. The Administration has failed to comply with Administrative Instruction ST/AI/2010/5 (Performance Management and Development System) on multiple accounts;

f. Since candidates to posts within the Organization are required to attach their performance evaluation to their applications, the deprivation of two successive appraisals forced the Applicant to explain in his job applications why these were not available. This might have had a negative

impact on the Applicant's candidacies and certainly had one on his motivation. The permanent undocumented two-year gap in the Applicant's work history continues affecting the rest of his career.

18. The Respondent's principal contentions are:

a. The Applicant failed to request management evaluation of the contested decision within the 60-day time limit catered for in staff rule 11.2(c). He did so only on 26 September 2014, that is, several years after the performance evaluation processes for 2010-2011 and 2011-2012 cycles were required to be finalised;

b. Regarding the 2010-2011 workplan, the Executive Secretary sent an email on 6 July 2011 requesting all staff to finalise all pending e-PASs for said period before 31 July 2011. By that date, the Applicant was aware that his workplan had not been finalised, that he had not had any midpoint review and that his end of cycle evaluation had not been completed;

c. As to the 2011-2012 workplan, the Applicant's end of cycle evaluation was due by 30 June 2012. By this date, the Applicant knew or ought to have known that his workplan, or indeed any other step in that performance process, had not been completed;

d. The Tribunal has no jurisdiction to hear the matter, since the Applicant did not identify an administrative decision taken as a direct consequence of the absence of a performance appraisal for the two periods in question, in line with sec. 15.7 of ST/AI/2010/5;

e. The Applicant has not adduced evidence of any damage suffered as a direct result of the absence of the appraisals at issue. Since 2011, he has applied for two post through Inspira and in neither case was he required to produce copies of his performance appraisals. Also, his two most recent performance appraisals (for 2012-2013 and 2013-2014) have been completed.

Consideration

19. Staff rule 11.2(c) unambiguously provides that:

> A request for a management evaluation shall not be receivable …unless it is sent within *sixty calendar days from the date on which the staff member received notification* of the administrative decision to be contested. (emphasis added)

20. Art. 8 of the Tribunal's Statute makes clear that for an application to be found receivable the requisite management evaluation request must be filed within the prescribed time limit. Further, art. 8.3 of the Statute bars the Tribunal from the possibility to suspend or waive the time limits for management evaluation (*Costa* 2010-UNAT-036).

21. In this respect, both the Dispute and the Appeals Tribunal have repeatedly held that the time limits for formal contestation are to be strictly enforced (*Al-Mulla* 2013-UNAT-394, *Samuel-Thambiah* 2013-UNAT-385, *Romman* 2013-UNAT-308).

22. In this case, there is no question that the Applicant requested management evaluation for the two impugned decisions only on 26 September 2014. The matter rather revolves around the date on which the 60-day time limit to submit such request should start.

23. The decisions at stake are implicit decisions inferred from the Administration's failure to act. As a result, the Applicant never received a written "notification" thereof, as the above-citied staff rule 11.2(c) implies he would.

24. It is well settled, nonetheless, that inactions or omissions by the Administration may be appealable decisions, as long as they produce direct legal consequences for the concerned staff member's terms of appointment (*Tabari* 2010-UNAT-030). At the same time, the Appeals Tribunal has acknowledged the difficulties inherent in calculating the applicable time limits where the decision was never communicated to the concerned staff (see e.g., *Schook* 2010-UNAT-013, *Manco* 2013-UNAT-243).

25. Notwithstanding these difficulties, the Appeals Tribunal has ruled that, in case of silence by the Organization, the applicant cannot be let to unilaterally determine the date of an implied administrative decision. Instead, this date should be identified "based on objective elements that both parties (Administration and staff member) can accurately determine" (*Rosana* 2012-UNAT-273). In essence, this exercise comes down to determining when the staff member actually knew or should have reasonably known about the implied decision (*Chahrour* 2014-UNAT-406).

26. In this respect, it is noted that the Applicant was aware of the end of cycle dates, on which the relevant e-PASes should have been finalised. In addition, on 6 July 2011, he was reminded by email of the Executive Secretary that the 2010-2011 e-PAS should be completely finalised (that involves not only approving the workplan but also holding the midpoint review discussion and the final evaluation) by 31 July 2011, and that workplans for the 2011-2012 period should be electronically approved by the same day.

27. It follows that, beyond these dates, the Applicant should have reasonably apprehended, if not actually been aware, that the Organization had failed to approve his 2010-2011 and 2011-2012 workplans.

28. The Tribunal notes that the parties engaged in meditation efforts in April 2011 and August 2014, and understands that in doing so, he may have trusted that outstanding issues between him and his management could be resolved. It further takes note of the Applicant's assertion that he realised after the end of the 2014 mediation process that the Administration would not take action to complete his missing e-PASes. However, as explained above, the Applicant should have reasonably known of the implicit contested decisions long before, i.e., by 31 July 2011, and also been aware that the contestation deadlines started running from then.

29. Accordingly, the Tribunal is left with no option other than to declare this application irreceivable, given that the Applicant did not request management evaluation of the contested decisions in a timely fashion.

30. Having said that, the Tribunal finds the overall situation clearly unsatisfactory. In light of the circumstances surrounding this case, it is particularly worrisome that the Administration was in a position to easily drive the situation to the outcome that the Applicant has ended up facing, that is, he waited for, and relied upon, the Administration to fulfil its obligations and has finally found himself deprived of two years of performance evaluations.

31. The Tribunal observes that the Applicant complied fully with his obligation to submit workplans for the two relevant performance cycles. In contrast, from the Organization's side, his successive first reporting officers failed to approve, and even to give feedback, on the draft workplans submitted. HRMS, ESCAP, although it followed-up and detected this failure, was unable to provide a remedy. Lastly, senior management let four of the Applicant's reporting officers leave the Organization without first ensuring that they brought to completion his performance appraisals, as they were contractually obliged to do before they departed. That this could happen requires serious examination by the Organization. Given that the primary facts alleged by the Applicant are admitted by the Respondent, had it not been for the fact that the four responsible reporting officers have left the Organization, the Tribunal would have referred them under art. 10.8 of its Statute for possible action to enforce accountability.

32. The Management Evaluation Unit observed that "it is inadequate that [the Applicant's] performance management was not completed". Moreover, the same Administration that failed to fulfil its performance evaluation duties towards the Applicant, creating a two-year gap in his performance evaluation history, now claims that its failure caused no demonstrated harm to the Applicant. The situation is unsatisfactory for the Applicant.

33. As a separate final observation, this case has highlighted another systemic, albeit procedural, issue, that is, the practical difficulties of processing cases where the parties sit in duty stations with 11 hours of time difference. While the Tribunal greatly appreciated the willingness of Counsel for the Respondent to appear in New York at 6:30 a.m. for the case management discussion, with the Applicant appearing in person after the end of his working day in Bangkok at 5:30 p.m., it is

strongly suggested that a solution is needed that takes better into account the global geographical reach of the United Nations and the General Assembly's stated desire for a decentralised justice system. It was unfair to both the Applicant and Counsel for the Respondent to appear before the Tribunal at these times, but nothing more reasonable to both parties was possible. Unless this matter is properly considered, the Tribunal may be left with Counsel for the Respondent in New York being only available, for technical reasons, for a full hearing from 9 a.m. (New York time) and an Applicant in Bangkok being required to commence a hearing at 8 p.m. (Bangkok time), if indeed it is possible to technically arrange at this time. It is unreasonable for any person to have to commence a hearing at such a time at night. It would also be practically impossible if they were to desire to call witnesses. In addition it is unimaginable that a lawyer would be prepared to act for an applicant if a hearing were to start at 8 p.m. and proceed for at least four hours.

Conclusion

34. In view of the foregoing, the Tribunal DECIDES:

The application is rejected as irreceivable.

(*Signed*)

Judge Rowan Downing

Dated this 30th day of July 2015

Entered in the Register on this 30th day of July 2015

(*Signed*)

René M. Vargas M., Registrar, Geneva