



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/076

Judgment No.: UNDT/2019/144

Date: 18 September 2019

Original: English

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**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

KEBEDE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for the Applicant:**  
Self-represented

**Counsel for the Respondent:**  
Amboko Wameyo, ECA

## **INTRODUCTION AND PROCEDURAL HISTORY**

1. The Applicant is a staff member of the Economic Commission for Africa (ECA). On 31 August 2017, he filed an application with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi challenging the outcome of the rebuttal process for his 2013-2014 e-PAS. The application was registered as Case No. UNDT/NBI/2017/076 and assigned to former UNDT Judge Nkemdilim Izuako.
2. On 28 September 2017, the Applicant submitted a motion titled “new findings” that comprised his response against the response from the Management Evaluation Unit (MEU) dated 26 September 2017.
3. The Respondent filed a reply on 2 October 2017 in which he contested, *inter alia*, the receivability of the application.
4. On 9 October 2017, the Applicant submitted a response to the Respondent’s reply that included 23 annexes, some of which were documents dated between 2006 and 2012 and have no bearing on his current claim.
5. On 19 July 2019, the parties were informed by the Registry that the Presiding Judge, Nkemdilim Izuako, had ended her term with the Tribunal on 10 July 2019 and that the case had been reassigned to the undersigned Judge with immediate effect.

## **FACTS**

6. The facts of this case have been established from the parties’ pleadings and additional submissions.
7. The Applicant serves as a Supply Assistant at the G-4 level with ECA.<sup>1</sup> On 23 May 2014, he received his completed e-PAS for 2013-2014, which included an overall rating of “partially meets expectations”.<sup>2</sup> The Applicant signed his e-PAS and

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<sup>1</sup> Respondent’s reply, annex 1.

<sup>2</sup> Application, annex 1.

requested a rebuttal on the same day.<sup>3</sup> He also emailed the Executive Secretary of the ECA to protest the outcome of his 2013-2014 e-PAS.<sup>4</sup>

8. By memorandum dated 2 June 2014, the ECA Chief Human Resources Services Section (C/HRSS) provided the Applicant with a list of rebuttal panel members and requested that he select three individuals, one from each of the three categories provided.<sup>5</sup>

9. The Applicant sent his list of rebuttal panel members (Ms. KB, Mr. AG and Mr. DS) to the C/HRSS on 6 June 2014.<sup>6</sup>

10. On 9 June 2014, the C/HRSS transmitted the Applicant's rebuttal statement to his First Reporting Officer (FRO), Mr. AH, for a response.<sup>7</sup> The FRO's response was transmitted to the Applicant on 20 June 2014.<sup>8</sup>

11. On 9 July 2014, the Applicant requested suspension of the rebuttal panel process pending the outcome of mediation in a complaint that he had made on 1 April 2014 under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).<sup>9</sup> The C/HRSS agreed to the Applicant's request on 11 July 2014.<sup>10</sup>

12. On 2 March 2015, the Regional Ombudsman in Nairobi informed the then Senior Legal Advisor of ECA of the parties' desire to terminate the mediation effort and their decision to use other mechanisms to address the outstanding issues.<sup>11</sup>

13. On 9 March 2016, the ES/ECA informed all ECA staff members of the re-constitution of ECA committees, including the rebuttal panels on performance

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<sup>3</sup> *Ibid*, annex 5.

<sup>4</sup> Applicant's submission of 9 October 2017, annex 7.

<sup>5</sup> Application, annex 4.

<sup>6</sup> *Ibid*.

<sup>7</sup> *Ibid*, annex 6.

<sup>8</sup> *Ibid*, annex 4.

<sup>9</sup> Respondent's reply, annex 4.

<sup>10</sup> *Ibid*, annex 5.

<sup>11</sup> Applicant's submission of 9 October 2017, annex 16.

management.<sup>12</sup>

14. The Applicant followed up on the rebuttal process on 14 October 2016<sup>13</sup> and on the same day, HRSS provided him with the revised list of rebuttal panel members that had been circulated by the ES on 9 March 2016. He was directed to “select one [panel member] from each category and constitute the panel that will review your evaluation report for the cycle in question”.<sup>14</sup>

15. On 1 November 2016, the Applicant advised HRSS that he had selected Messrs. SK, DS and NO for the rebuttal panel.<sup>15</sup>

16. By memorandum dated 10 November 2016, HRSS informed Messrs. SK, DS and NO of their nomination by the Applicant to serve on the rebuttal panel for the rebuttal of his 2013-2014 e-PAS and provided them with copies of the rebuttal papers.<sup>16</sup>

17. The rebuttal panel held meetings on 24 January 2017 and 2 February 2017 and concluded its report in June 2017.<sup>17</sup>

18. By memorandum dated 9 June 2017, the Director of the Division of Administration, ECA, informed the Applicant that after a review of the rebuttal documents, the rebuttal panel had recommended that his overall rating for the 2013-2014 performance period be maintained as “C: Partially meets performance expectations” and that he be placed on a Performance Improvement Plan (PIP).<sup>18</sup> The memorandum was transmitted to the Applicant by HRSS on 12 June 2017.

19. On 12 June 2017, the Applicant wrote to HRSS rejecting the mandate of the rebuttal panel.<sup>19</sup> He also informed HRSS that he would appeal the matter to the UNDT because he had been forced to select other panel members due to HRSS’ “office

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<sup>12</sup> Respondent’s reply, annex 9.

<sup>13</sup> Application, annex 4.

<sup>14</sup> Respondent’s reply, annex 10.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, annex 11.

<sup>17</sup> *Ibid.*, annex 13.

<sup>18</sup> Applicant’s submission of 9 October 2017, annex 19.

<sup>19</sup> *Ibid.*

problem”. He also alleged the rebuttal panel had failed to follow the procedure because the rebuttal process had not been completed in 28 days.<sup>20</sup>

20. On 19 June 2017, the Applicant wrote to HRSS alleging that it had changed the panel members “for unforeseen reason out of the UN rule”.<sup>21</sup>

21. The Applicant sought management evaluation of the outcome of the rebuttal process on 28 June 2017.

22. By a memorandum dated 26 September 2017, the MEU informed the Applicant that his request was not receivable because the e-Performance document did not constitute an administrative decision in and of itself as it had not produced any direct legal consequences for his contract of employment or terms of appointment.<sup>22</sup>

## **SUBMISSIONS**

23. The Respondent’s case is that the application is not receivable because neither the validity of the rebuttal process nor the rating after the rebuttal process constitute administrative decisions as per the definition of *Mehrabi*<sup>23</sup>. No administrative decision affecting the Applicant’s conditions of service has stemmed from the final rating from the rebuttal process. The Respondent submits that the Applicant continues to get with-grade increments and holds a permanent appointment. The Respondent submitted the Applicant’s personnel action form in support of his submission.<sup>24</sup>

24. The Applicant’s case is that his application is receivable because his yearly step increment and career advancement have been affected by the impugned decision. Further, the Applicant submits that his application is receivable because the outcome of the rebuttal is not binding since the procedure followed violated the Organization’s rules and regulations.

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<sup>20</sup> *Ibid*, annex 20.

<sup>21</sup> *Ibid*.

<sup>22</sup> Applicant’s submission of 28 September 2017, annex A.

<sup>23</sup> Judgment No. UNDT/2015/003.

<sup>24</sup> Respondent’s reply, annex 1.

## CONSIDERATIONS

25. Does the application of 31 August 2017 challenge an administrative decision within the meaning of art. 2.1(a) of the UNDT Statute?

26. Art. 2.1(a) of the UNDT Statute provides that:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

27. Section 15.1 of ST/AI/2010/5 (Performance management and development system) states that:

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 performance expectations” cannot initiate a rebuttal.

28. Section 15.7 of ST/AI/2010/5 provides:

The 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.

29. The Tribunal recalls the United Nations Appeals Tribunal's (UNAT/the Appeals Tribunal) consistent jurisprudence that for a decision to be challengeable under art. 2.1(a) of the UNDT Statute, it must be final and produce direct legal consequences to the legal order.<sup>25</sup> Conversely, a decision that is final but produces no direct legal consequence for a staff member's terms of appointment or the contract of employment is not receivable by the Tribunal.

30. Thus, the questions before the Tribunal at this stage are twofold. One, was there a final decision and two, if there was a final decision, did it produce any direct legal consequence for the Applicant's terms of appointment or his contract of employment?

***Was there a final decision?***

31. The present case concerns a rebuttal process that was initiated in accordance with section 15.1 of ST/AI/2010/5. On 12 June 2017, the rebuttal panel issued its report recommending that the administration maintain the original overall rating of "partially meets performance expectations" and the Applicant's placement on a PIP. In accordance with section 15.5 of ST/AI/2010/5, the performance rating of "partially meets performance expectations" became binding on the Applicant because of the rebuttal panel's recommendation of 12 June 2017.

32. In light of the foregoing, the Tribunal concludes that there was a final decision.

***Did the final decision produce any direct legal consequence for the Applicant?***

33. Although the Applicant alleges several deficiencies with the rebuttal process, the Tribunal sees no reason to deviate from UNAT's established principle that there must be a legal consequence that is caused directly by the administrative decision to the conditions of service. Such consequences are normally not caused by the evaluation alone.

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<sup>25</sup> Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003); *Andati-Amwayi* 2010-UNAT-058; *Elasoud* UNDT/2010/111 confirmed by Judgment No. 2011-UNAT-173.

34. In this respect, the Applicant submits that he has suffered direct legal consequences because of the outcome of the rebuttal process; specifically, he alleges that his yearly step increment has been affected by the impugned decision. Notwithstanding all the extensive unsolicited documentation that the Applicant submitted as part of his 9 October 2017 rejoinder to the Respondent's reply, he did not place before the Tribunal any tangible evidence, such as his payslips or his personnel action forms, that would demonstrate any adverse change to these conditions of service. Neither would there be any reason to construe a causal link between the evaluation and the yearly step increment.

35. Additionally, while the rebuttal panel recommended the Applicant's placement on a PIP, the Tribunal notes that the Applicant does not complain that he was in fact placed on the PIP. Further, the Tribunal is cognizant of the Appeals Tribunal's holding that the decision to place a staff member on a PIP is not an appealable final administrative decision because pursuant to ST/AI/2010/5, the PIP is merely a preliminary step instituted to address a staff member's shortcomings during a performance cycle. Such a preliminary step is not an administrative decision subject to appeal.<sup>26</sup>

36. Under these circumstances, the Tribunal can only conclude that there is no evidence of any adverse administrative decision stemming from the rebuttal process or the rebuttal report that would affect the applicant's conditions of service and thus fall within the Tribunal's jurisdiction. As such, the application is not receivable.

## **JUDGMENT**

37. The application is dismissed as irreceivable.

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<sup>26</sup> *Gnassou* 2018-UNAT-865, para. 31; *Nguyen-Kropp & Postica* 2015-UNAT-509, para 33.



*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 18<sup>th</sup> day of September 2019

Entered in the Register on this 18<sup>th</sup> day of September 2019

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi