



Before: Judge Alexander W. Hunter, Jr.

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MOHAN DAS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Evelyn W. Kamau, OSLA

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR

Maureen Munyolo, AAS/ALD/OHR

Introduction

1. The Applicant is a former P-4 Mission Planning Officer, working with the United Nations Assistance Mission in Afghanistan (“UNAMA”).¹

2. By an application filed on 26 November 2020, she contests what she termed as the “Administration’s failure to act and correct the perverse decision of including and retaining, in the Applicant’s Official Status File (“OSF”) and *Inspira*, an unwarranted performance document (2018/2019 e-PAS) and a rebuttal report tainted with factual errors and substantive irregularities”.²

3. The Respondent filed a reply on 31 December 2020 in which it is argued that the application is not receivable *ratione materiae* because the Applicant does not contest a reviewable administrative decision within the meaning of art. 2(1)(a) of the Dispute Tribunal’s Statute. The Respondent further contends that the application is not receivable because the Applicant did not timely request management evaluation of the contested decision.

4. The Respondent also avers that should the Tribunal find the application receivable, it should be dismissed because the contested decision was lawful.

Facts

5. The Applicant joined UNAMA on 15 June 2013 as the Mission Planning Officer, P-4. She served on a fixed-term appointment (“FTA”) until she separated from the Organization on 30 October 2019.³

6. From 2 April 2018 to 12 October 2018, the Applicant was placed on certified sick leave (“CSL”).⁴ Upon her return to the Mission following CSL, the Applicant initiated and completed a work plan for the 2018/2019 performance cycle on 13

¹ Application, section II.

² Application, section V.

³ Reply, R/2.

⁴ Application, section VII, para. 26.

November 2018.⁵

7. On 7 July 2019, the Applicant and her First Reporting Officer (“FRO”) held the end of cycle performance discussion.⁶ For the 2018/2019 performance cycle, the Applicant was given a rating of D: Does not meet performance expectations.⁷

8. On 6 August 2019, the Applicant requested leave to rebut her performance rating before the Rebuttal Panel.⁸

9. On 20 August 2019, the Applicant’s FRO submitted to the Rebuttal Panel a reply to the Applicant’s rebuttal statement. However, UNAMA Human Resources and Training Section (“HRTS”) did not provide the Applicant with the copy of the response from the FRO.⁹

10. The Rebuttal Panel interviewed the Applicant on 17 October 2019. On 2, 7 and 8 December 2019, the Rebuttal Panel interviewed the FRO, the Second Reporting Officer (“SRO”) and the Chief Legal Officer (“CLO”), respectively.¹⁰

11. While the rebuttal process was still in progress, the Applicant resigned from her post at UNAMA on 29 October 2019 and she separated from the Mission on 30 October 2019.¹¹

12. On 18 May 2020, the UNAMA Chief of Human Resources Officer (“CHRO”) sent the rebuttal report to the Applicant. The Rebuttal Panel designated a new rating of “partially meets the expectations”. The CHRO informed the Applicant that due to their large size, the attachments would be sent in a separate email. The CHRO also informed the Applicant that the Office of Human Resources in New York (“OHR/NY”) would

⁵ Application, annex B.

⁶ Application, section VII, para. 29.

⁷ Application, annex B.

⁸ Application, annex C.

⁹ Application, section VII, para.30.

¹⁰ Application, annex N, p.1.

¹¹ Application, section VII, para.31.

place a copy of her rebuttal report in her OSF.¹²

13. On 19 May 2020, the Applicant wrote to the CHRO and informed her that she did not receive a copy of her FRO's response to her rebuttal statement as was indicated in the rebuttal report.¹³ On the same day, the CHRO replied to the Applicant and gave her a copy of the FRO's reply and indicated that failure to share a copy with her previously was due to an oversight.¹⁴

14. On 2 June 2020, the Applicant requested the CHRO to ask the OHR/NY to remove her 2018/2019 e-performance document from *Inspira* and her OSF due to the procedural flaws identified by the Rebuttal Panel in their report, including the fact that the Panel concluded that no e-performance document was required.¹⁵

15. On 3 June 2020, the UNAMA Human Resources Officer replied to the Applicant and informed her that they had reached out to the e-performance policy team in New York who had advised that performance documents are not deleted or removed from the OSF due to procedural flaws.¹⁶

16. On 8 June 2020, the Applicant reiterated her request to CHRO and inquired if OHR/NY was aware of the error in paragraph 3 of the rebuttal report, i.e., that she had not been provided with a copy of her FRO's reply and that the Panel itself was not aware of the oversight.¹⁷

17. On 16 June 2020, the CHRO informed the Applicant that the report of the Rebuttal Panel and the impugned e-performance document had to remain in her OSF pursuant to section 15.4 of ST/AI/2010/5 (Performance Management and Development System). The CHRO advised the Applicant to address her concerns regarding any

¹² Reply, R/4.

¹³ Reply, R/5, p. 3.

¹⁴ Ibid, p. 2.

¹⁵ Application, annex H, p. 2.

¹⁶ Application, annex G.

¹⁷ Ibid, p. 1.

procedural flaws to the Special Representative of the Secretary-General (“SRSG”).¹⁸

18. On 17 July 2020, the Applicant requested the SRSG to remove her 2018/2019 e-PAS and the rebuttal panel report from *Inspira* and her OSF.¹⁹

19. The SRSG replied on 28 July 2020, informing the Applicant that, having assessed the entire performance appraisal process, rebuttal process and rebuttal outcome, including the material effect, if any, from the Administration’s failure to provide her with a copy of the response of her FRO to her rebuttal statement, she was satisfied that the process was not prejudicial to her. The SRSG also reaffirmed that the newly designated performance rating of “partially meets performance expectations” should stand. She further indicated that the decision to maintain the e-performance and rebuttal documents in the Applicant’s OSF would be maintained.²⁰

20. On 30 July 2020, the Applicant requested management evaluation of the contested decision.²¹ On 3 September 2020, the Management Evaluation Unit (“MEU”) issued its decision finding the Applicant’s request irreceivable.²²

Receivability

Respondent’s submissions

21. The Respondent submits that the application is not receivable *ratione materiae* because the Applicant does not contest a reviewable administrative decision within the meaning of art. 2(1)(a) of the Dispute Tribunal’s Statute. The Applicant has not demonstrated any adverse consequences to her employment contract. She contends that the contested decision is prejudicial to her future career prospects and reputation. However, to be considered as an appealable administrative decision, a decision must have a direct impact and not the potential of a future injury.

¹⁸ Application, annex I.

¹⁹ Application, annex J.

²⁰ Application, annex K.

²¹ Application, annex M.

²² Application, annex N.

22. The Respondent further contends that the application is not receivable because the Applicant did not timely request management evaluation of the contested decision. The 60-day deadline for requesting management evaluation began to run from 18 May 2020 when the UNAMA CHRO first informed the Applicant that the signed rebuttal report would be placed in her OSF. The management evaluation deadline was, therefore, on 17 July 2020. The Applicant requested management evaluation on 30 July 2020, 13 days late.

Applicant's submissions

23. The Applicant submits that the application is receivable because the contested decision has a direct negative impact on her. The adverse effect of the impugned decision on her occurred from when the irregularities occurred, leading to a violation of her due process rights, and continue to date for as long as the impugned materials remain in her OSF.

24. The Applicant further submits that the Respondent misconstrues the decision she is challenging and thus erroneously asserts that she did not file the request for management evaluation in a timely manner. The Applicant does not contest the placement of the rebuttal panel report and the performance documents in her OSF *per se*. Rather, she challenges the Administration's decision refusing to remove them, following the discovery of procedural irregularities.

25. The Applicant states that after the rebuttal panel report was shared with her, she became aware of the procedural irregularities, including one which was not known to the Administration. The Applicant notified the CHRO on 19 May 2020 that indeed there was an error and that the Applicant had not been provided with her FRO's statement, contrary to what was stated in the rebuttal panel report. The rebuttal panel report had also stated that no e-PAS was required due to the short period of time that the Applicant had actively served the Organization during that performance cycle.

26. Based on these procedural irregularities, the Applicant then requested the CHRO on 02 June 2020 to remove the impugned documents from her file, and the

CHRO denied that request on 3 June 2020. Contrary to the Respondent's assertions, the 3 June 2020 decision was not a reiteration of the decision to place the documents in the file. Rather, the decision directly addressed the Applicant's request to have the documents removed based on the identified errors and procedural irregularities. The Applicant then filed her management evaluation request on 30 July 2020, which was within 60 days from when the decision was issued. Based on this, and contrary to the Respondent's submissions, the management evaluation request was filed in a timely manner.

Considerations

27. The Applicant does not contest a reviewable administrative decision within the meaning of art.2(1)(a) of the Dispute Tribunal's Statute. Article 2(1)(a) of the UNDT Statute defines an administrative decision as one alleged to be in non-compliance with the terms of appointment or contract of employment. The administrative decision must have a direct impact on the terms of appointment or contract of employment of the individual staff member.²³ What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made and the consequences of the decision.²⁴

28. The Appeals Tribunal in *Gnassou*²⁵ affirmed this Tribunal's finding that the act of placing the rebuttal report in the Applicant's OSF is an administrative requirement and not an appealable administrative decision. In *Oummih*²⁶, the Appeals Tribunal held that "under the applicable legislative framework as set out in ST/AI/2002/3 (Performance Appraisal System) and ST/AI/2010/5 (Performance Management and Development System), it was mandatory for the Administration to keep in the personnel file both the impugned appraisal and reports, and the rebuttal outcome."

²³ *Avramoski* 2020-UNAT-987, para. 39; *Faye* 2016-UNAT-657, para. 30.

²⁴ *Olowo-Okello* 2019 UNAT-967, para. 32; *Lee* 2014-UNAT-481, para. 50.

²⁵ *Gnassou* 2018-UNAT-865, paras. 34-35.

²⁶ *Oummih* 2014-UNAT-481, para. 52.

29. The Tribunal notes that, in challenging the decision to place the rebuttal report in her OSF, the Applicant challenged her performance evaluation itself. In *Kebede*,²⁷ the applicant challenged before the United Nations Dispute Tribunal the outcome of the rebuttal process for his performance evaluation. In rejecting the application as irreceivable, the Dispute Tribunal held that direct legal consequences “are normally not caused by the evaluation alone.” The Tribunal could not find, nor did she provide any evidence, that any negative decision affecting her terms of appointment was taken on the basis of the performance evaluation, be it, for example, a decision not to grant her a step increment or to separate her from service. Indeed, as to the latter, the Tribunal notes that she resigned from service.

30. The Applicant has, further, not demonstrated any adverse consequences to her employment contract. She contends that the contested decision is prejudicial to her future career prospects and reputation.²⁸ However, to be considered as an appealable administrative decision, “a decision must have a direct impact and not the potential of a future injury.”²⁹

31. There were no direct effects of the placement of the rebuttal report and e-performance documents in the Applicant’s OSF, in terms of her former contract.

32. Pursuant to section 15.4 of ST/AI/2010/5:

“[t]he report of the rebuttal panel shall be placed in the staff member’s official status file as an attachment to the completed e-PAS or e-performance document and communicated to OHRM, or the Field Personnel Division of the Department of Field Support, as appropriate.”

33. Use of the word “shall” signifies that the Administration was obliged to place these documents in her OSF. Moreover, pursuant to section 15.5 of ST/AI/2010/5, the performance rating resulting from the rebuttal process was binding on the head of office and on the Applicant. Thus, the placement of these documents in her OSF did not have

²⁷ *Kebede*, UNDT/2019/144, para. 34.

²⁸ Application, section VII, para. 53.

²⁹ *Lee* 2014-UNAT-481, para. 52.

any impact on any of the rights that the Applicant held under the terms of her employment. In this regard, the Tribunal recalls that in *Kennes*, analogously, the applicant objected to the placement of a note in his OSF which stated that, at the time of his resignation, there was a pending disciplinary process. The applicant argued, *inter alia*, that the note made his re-employment dependent on future contacts with the then-Administrative Law Section of the Office of Human Resource Management, which, he stated, affected his contractual rights as a staff member to be re-employed without any such condition. The Tribunal rejected the argument on the basis that these statements constituted contentions of future harm.

34. For this reason, the application is not receivable *ratione materiae* as it does not meet the conditions of alleging non-compliance with Applicant's former contract of employment within the meaning set out in staff rule 11.2(a).

35. Since there is no appealable administrative decision under art. 2.1(a) of the UNDT Statute, the Tribunal sees no need to address the issue of whether the Applicant requested management evaluation timeously.

JUDGMENT

36. The application is rejected.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 30th day of November 2021

Entered in the Register on this 30th day of November 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi