



Before: Judge Margaret Tibulya

Registry: New York

Registrar: Isaac Endeley

BEDI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

James Glaysher

Counsel for Respondent:

Alister Cumming, UNICEF

Chinonyelum Esther Uwazie, UNICEF

Introduction

1. On 9 August 2023, the Applicant, an Operations Manager with the United Nations Children’s Fund (“UNICEF”) in Morocco, filed an application in which she contests “[c]omments left by [her] supervisor in [her] Performance Evaluation Report [“PER”], of 27 March 2023”.

2. On 16 August 2023, the Respondent filed a motion requesting the Dispute Tribunal to: (a) suspend the deadline for the Respondent’s reply pending a determination of the receivability of the application, and (b) determine the issue of receivability as a preliminary matter and dismiss the application as being not receivable.

3. By Order No. 072 (NY/2023) dated 17 August 2023, the Duty Judge; (a) partially granted the Respondent’s motion by suspending the deadline for the Respondent’s reply until further notice, and (b) instructed the Applicant to file a response to the Respondent’s submissions on receivability.

4. On 21 September 2023, the Applicant filed his submission as per Order No. 072 (NY/2023).

5. On 1 April 2024, the case was assigned to the undersigned Judge.

6. On 4 April 2024, a case management discussion (“CMD”) attended by Counsel for the parties was held. Both Counsel confirmed that no further submissions were necessary for the Tribunal to determine the issue of receivability.

Facts

7. On 27 March 2023, the Applicant’s supervisor issued the Applicant’s PER for 2022, which is at issue in this case. In that PER, the Applicant’s supervisor inserted various different comments regarding the Applicant’s performance during the relevant performance period, under 15 separate subheadings of which “Demonstrates self-

awareness and ethical awareness” was one. While the PER contained many more comments, in her submissions, the Applicant only refers to comments made under the subheading “Demonstrates self-awareness and ethical awareness” as “the Contested Statement”.

8. On 25 May 2023, the Applicant filed her request for management evaluation. In a letter appended thereto, her Counsel stated under “relief sought”, that “our client requests that the Contested Statement be removed from the PER for 2022 as a clear misconstruction of [the Applicant’s] performance in the 2022 annual performance cycle”. Reference was therefore only made to the written comments inserted by the Applicant’s supervisor under the subheading, “Demonstrates self-awareness and ethical awareness”.

9. The parties held a meeting on 12 June 2023 to seek an informal settlement. The Respondent later sent an email to the Applicant, indicating that the Applicant’s supervisor had agreed to replace her comments under the subheading, “Demonstrates self-awareness and ethical awareness”, with the insertion, “No comment (agreement June 2023)”. Counsel for the Respondent therefore sought the Applicant’s agreement therewith.

10. On 27 June 2023, Counsel for the Applicant responded to Respondent’s Counsel that “upon careful reflection, [the Applicant] requests that all of the comments made in the PER by [the Applicant’s supervisor] be deleted and replaced by the phrase ‘No comment (agreement June 2023)[]’; this being the same replacement phrase suggested by your email of 12 June 2023”.

11. On 10 July 2023, the Office of the Executive Director of UNICEF issued its management evaluation report in which it was stated that “since your supervisor has decided to reopen your 2022 PER and delete the contested statement from your PER, your request for management evaluation concerning your 2022 PER has been rendered moot”. The management evaluation therefore only addressed the replacement of the comments of the Applicant’s supervisor under the subheading, “Demonstrates self-

awareness and ethical awareness”, and not all the other comments inserted under the remaining 14 subheadings of the PER.

Considerations

12. It is not in dispute that the Applicant sought management evaluation in respect to “a Contested Statement”, specifically requesting that it be deleted from her 2022 PER, in accordance with her 25 May 2023 management evaluation request, and which was done. In relation to this contested decision therefore, since the Applicant received the remedy which she sought in her management evaluation request of 25 May 2023, the appellate jurisprudence that “where an Applicant has already received the relief requested, an application [seeking a remedy which has already been granted] is moot and should be dismissed” (see, *Rehman* 2017-UNAT-795, para. 21), supports a conclusion as the Tribunal does that there is no administrative decision on which it is competent to pass judgment in accordance with arts. 2 and 8 of its Statute.

13. The Applicant, however, asserts that since the Request for Management Evaluation of 25 May 2023 was made timeously, and it was regarding her PER, and specifically about comments that had been made about her, for the United Nations Dispute Tribunal to decline jurisdiction over this application on the basis that her requests regarding *all* of the PER comments were not made timeously would be unreasonable, particularly given the serious impact of these statements on her professional reputation and career.

14. Staff rule 11.2(a) provides that “[s]taff members wishing to formally contest an administrative decision alleging non-compliance with their contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), *shall*, [emphasis added] as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision”.

15. In the Tribunal's view, Counsel for the Applicant's arguments at para. 13 above, suggesting that the Applicant's request for management evaluation covered *all her supervisor's comments in PER*, is, in the first instance, a departure from their pleading that, [she] "accepts that her Request for Management Evaluation dated 25 May 2023 and the accompanying letter from CANDEY [Applicant's Counsel] *did not specify a request for all of [her supervisor's] comments* to be removed from the PER...".

16. As admitted, the request related to the Applicant's supervisor's comment in the Applicant's PER, that she lacked adherence to UNICEF's core values was as follows:

Throughout the year, [the Applicant] came across as someone who strongly feels about ethics: she has been proactive in bringing up issues of ethics, integrity, and inclusion in most meetings and processes. However, more than once, her behaviors were not aligned with self/ethical awareness and some of the UNICEF values, namely accountability, trust and respect, vis a vis the team and the Rep.

17. That the request for management evaluation only related to a specific aspect of the PER, and not to all comments in it, is incontrovertible. The fact that it was made timeously, which is the Applicant's other argument, has no bearing on its relevance to all comments in the PER.

18. The Applicant's other arguments that since the evaluated comment was in the same PER as the rest of the impugned comments, and since the request was specifically about comments that had been made about her, it would be unreasonable for the Tribunal to decline jurisdiction to hear the Application, have no merit.

19. This is because the fact that the evaluated comment is in the same PER as the rest of the other comments does not clothe the request generally to the entire PER since each comment in the PER constituted a separate administrative decision which should have been subjected to management evaluation. And, the fact that the request related to a comment about the Applicant does not clothe it with relevance regarding all the other comments about her.

20. It should also be recalled that it is a legal requirement under staff rule 11.2(a) that contests to administrative decisions should be subjected to management evaluation. It would therefore not be unreasonable for the Tribunal to decline jurisdiction where the law is not complied with.

21. The Appeals Tribunal has consistently held that the purpose of management evaluation is “to afford the Administration the opportunity to correct any errors in an administrative decision so that judicial review of the administrative decision is not necessary” (see, for instance, *Farzin* 2019-UNAT-917, para. 40 and, similarly, *Applicant* 2013-UNAT-381, para. 37, and *Nastase* 2023-UNAT-13, para. 31).

22. “[C]learly identifying the administrative decision the staff member disagrees with is essential for this goal to be met” (see, *Farzin*, para. 40 and, similarly, *Applicant*, para. 37). It is therefore necessary for an applicant to state all relevant issues in the management evaluation request for the Administration to consider them as part of its management evaluation (see, *Nouinou* 2020-UNAT-981, para. 57, as well as *Nouinou* 2019-UNAT-902, para. 42).

23. The Tribunal has considered the import of Counsel for the Applicant’s 27 June 2023 email to that of the Respondent, and determined that the letter cannot be construed as a lawful expansion of the scope of the Applicant’s 25 May 2023 request for management evaluation, nor can it be taken to have been an entirely new request for management evaluation. This is because the “time for challenging an administrative decision starts with the notification of that decision” (see, *Rahman* 2012-UNAT-260, *Chahrour* 2014-UNAT-406, and *O’Donnell* UNDT/2014/63). It is moreover firmly established that the deadline for requesting management evaluation cannot be waived by the Dispute Tribunal (see, art. 8.3 of its Statute and the Appeals Tribunal in, for instance, *Costa* 2010-UNAT-036; *Rosca* 2011-UNAT-133, *Ajdini et al* 2011-UNAT-108, *Dzuverovic* 2013-UNAT-338, and *Wu* 2013-UNAT-306/Corr.).

24. It is not in dispute that the Applicant’s 2022 PER was completed on 27 March 2023, on which date the Applicant received the notification of completion. The

Applicant should have requested a management evaluation in relation to all the comments within 60 days, i.e., by 26 May 2023 to be able to challenge all of her supervisor's comments in her PER. She failed to do so.

25. As already noted, the Applicant accepts that the management evaluation request and the supporting letter to the request did not specify a request for all her supervisor's comments to be removed from her PER. Instead, the request was directed at only the "Contested Statement", as described in the supporting letter to her request for management evaluation. It was only on 27 June 2023, in the context of a discussion between Counsel, that the Applicant submitted a request through her Counsel in relation to all of her supervisor's comments in the PER.

26. Based on the foregoing, the Tribunal agrees with the Respondent that the Applicant's Counsel's email of 12 June 2023 did not reset the time limit for allowing the Applicant to contest all of her supervisor's comments in her PER, nor was it capable of suspending the time limit, given that the Applicant's deadline for contesting all of her supervisor's comments expired before the discussion of 12 June 2023. And as was submitted, it was a proposal in the context of *inter partes* discussion that did not involve the Office of the Ombudsman.

27. The argument that the Applicant's supervisor's willingness to remove the comment under the section "Demonstrates self-awareness and ethical awareness" of the PER evidences the fact that the remainder of the comments on the PER cannot be treated with any reliability, and therefore should be removed, goes to the merits of the Application, and is irrelevant to the receivability issue.

28. Since the Applicant got the relief which she sought regarding the one aspect of the PER which she subjected to management evaluation, any further contests relating to the settled claim are moot.

29. The Applicant's failure to comply with the mandatory time limits with respect to all of her supervisor's comments in the PER renders the application non-receivable *ratione temporis* in accordance with staff rule 11.2(c) (see, also *Christensen* 2013-UNAT-335).

Conclusion

30. The application stands dismissed for being not receivable.

(Signed)

Judge Margaret Tibulya

Dated this 12th day of April 2024

Entered in the Register on this 12th day of April 2024

(Signed)

Isaac Endeley, Registrar, New York