



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/077

Order No.: 327 (NY/2010)

Date: 10 December 2010

Original: English

Before: Judge Marilyn J. Kaman

Registry: New York

Registrar: Santiago Villalpando

SIMMONS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER
RECEIVABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. On 10 June 2010, the Applicant filed her application with the UN Dispute Tribunal (“UNDT”). In his reply of 12 July 2010, the Respondent included a submission concerning the Applicant’s case not being receivable. In Order No. 242 (NY/2010) of 14 September 2010, the Tribunal directed the Applicant to file and serve a submission in response to this contention, which she did on 28 September 2010.

Facts

2. The following outline of facts is largely based on the Respondent’s factual contentions from his reply. The Applicant has not commented on these facts, which is only reasonable, since the receivability issue presented by the Respondent is merely whether the delay of the rebuttal process alleged by the Applicant constitutes an administrative decision under the UNDT Statute. While the Tribunal has chosen to include the outline in this Order to better illustrate the circumstances of the case, this will have no bearing on whether the Tribunal will accept these facts for the substantive trial of the Applicant’s claim.

3. On 9 May 2008, the Applicant submitted a rebuttal of her Performance Appraisal System (“PAS”) evaluation for the cycle 1 April 2006 to 31 March 2007.

4. Upon receipt of the First Reporting Officer’s (“FRO”) response of 18 July 2008 to the Applicant’s rebuttal, the Executive Office, Department of Management (“DM”), on 29 August 2008, requested the Applicant to identify the Rebuttal Panel members. The Applicant submitted the names of three individuals for appointment as Chairperson, Management Representative and Staff Representative of the Rebuttal Panel.

5. On 15 November 2008, the Applicant was informed that the Management Representative was away on mission assignment and that such assignment had been extended; the Applicant subsequently identified a replacement.

6. In November 2008, the Staff Representative advised that she was no longer able to sit on the Rebuttal Panel due to a conflict of interest and another person was subsequently identified to replace her.

7. In May 2009, the Rebuttal Panel members tentatively organised interviews with the Applicant and the First and Second Reporting Officers. However, the Chairperson withdrew from the Rebuttal Panel due to exigencies of service. The interviews did not take place.

8. Having been requested by the Executive Office, DM to identify a new Chairperson, the Applicant did so. The Executive Office was informed that the second Staff Representative would no longer be available, and, by the end of May 2009, the second Chairperson returned the case to the Executive Office, indicating that he was unable to review the Applicant's PAS rebuttal due to work commitments.

9. On 29 January 2010, the Applicant submitted an incomplete request for management evaluation.

10. By email dated 1 February 2010, the Management Evaluation Unit ("MEU") requested that the Applicant provide additional information to enable it to decide upon her request. By email dated 8 February 2010, the MEU informed the Applicant that the deadline for management evaluation would start running from the date the MEU received the "complete information".

11. In February 2010, the Executive Office sought guidance from the Office of Career Support and Performance Management concerning the delays due to the unavailability of Rebuttal Panel members. Discussions followed between the Executive Office, a (named) person and the second Chairperson. This (named) person had been identified to replace the second Chairperson and she indicated that she would schedule the meeting with Rebuttal Panel members as soon as they confirmed their participation.

12. On 23 March 2010, the Applicant submitted a completed request for management evaluation concerning the delay in finalising her rebuttal process in relation to the PAS

for the cycle 2006-2007; in essence, the Applicant contended that the instant PAS rebuttal process was not conducted in a timely manner.

13. By letter dated 25 March 2010, the MEU advised the Applicant that in view of the Applicant's 23 March 2010 submission, the 30-day response period for the management evaluation would run from 23 March 2010.

14. On 31 March 2010, the Executive Office, DM, requested all Rebuttal Panel members to conclude their consideration of the Applicant's case in a timely manner.

15. By letter dated 21 April 2010, containing the decision of the Under-Secretary-General for Management, on behalf of the Secretary-General, the outcome of the management evaluation request was conveyed to the Applicant. In this letter it was specified that, if the Rebuttal Panel had not concluded its deliberations within one month of the date of the letter, the Applicant's rating would be determined as "fully meets performance expectations".

16. On 11 May 2010, the Executive Office informed another (named) person that the Applicant had agreed to his appointment as Chair of the Rebuttal Panel (a third Chairperson) and that the deadline for issuing the report was 20 May 2010.

17. On 12 May 2010, the third Chairperson of the Rebuttal Panel spoke with the Applicant to determine her availability for interview. The Applicant informed him that she saw no value in this, as her position was set out in her rebuttal statement and in her response to the FRO's statement, but that she would be willing to answer any specific questions which the Panel members may have during the course of their deliberations.

18. The Rebuttal Panel convened on 13 May 2010. It determined that further documentation was required from the FRO to support the statements of poor performance. The Panel sent a set of questions to the FRO on 14 May 2010. The FRO responded that in view of the imminent deadline, the time which had elapsed and the fact that he was now working in Vienna and had no access to the documentation, he would not be in a position to facilitate the work of the Panel.

19. On 19 May 2010, the Rebuttal Panel issued its Rebuttal Report, indicating therein that there was insufficient documentary evidence to sustain the finding of “partially meeting performance expectations” and that the rating for the performance appraisal cycle 2006-2007 should be adjusted to “fully successful performance.”

20. By way of memorandum dated 20 May 2010, the Applicant was advised of the outcome of the Rebuttal Report and a copy of the same was provided to her.

Respondent’s submissions [put first as moving party]

21. The application is not receivable because the alleged delay in issuing the Rebuttal Report does not in itself constitute an “administrative decision” under the UNDT Statute. That is, under the former UN Administrative Tribunal’s Judgment No. 1157, *Andronov* (2003), in order for an administrative decision to be open for appeal under Chapter XI of the former Staff Rules, the decision: (i) must have been unilaterally taken by the Administration; (ii) must be of an individual application; and (iii) must have created direct legal consequences for the terms of employment of a particular individual.

22. According to the Respondent, the timeframe within which the Rebuttal Report was issued cannot constitute an “administrative decision”, since it does not involve an “outcome” which directly affects the Applicant, nor does the period of time in question have any direct legal consequences for the Applicant’s terms of employment.

23. Section 15.4 of ST/AI/2002/3 (Performance appraisal system) of 20 March 2002 makes a clear distinction between the “rating resulting from the rebuttal process,” which is not subject to appeal, and “administrative decisions that stem from any final performance appraisal and that affect the conditions of service of a staff member,” which may be appealed. It may be logically inferred that since the Rebuttal Report itself is not subject to appeal (as distinct from administrative decisions taken as a result of the Report), the timeframe within which the Rebuttal Panel prepared its report should also not be open to appeal.

24. The period in which the Rebuttal Report was prepared does not have any direct legal consequences for the Applicant in terms of her employment, and, accordingly, the application should be dismissed.

Applicant's submissions

25. The Applicant contends that her application is receivable both *ratione materiae* and *ratione temporis*. The administrative decision being challenged is that of the administration not to consider the Applicant's request for rebuttal in a timely manner and report thereon with utmost dispatch, as required under ST/AI/2002/3 (Performance appraisal system) of 20 March 2002. The delay of considering the Applicant's request for her PAS rebuttal meets the definition of an administrative decision as espoused by the former Administrative Tribunal in *Andronov* since:

- a. the decision to delay consideration of her request was unilaterally taken by the Administration in light of her many reminders and complaints of "the unreasonable delay";
- b. the administrative decision to delay consideration of her request for PAS rebuttal was individual in nature and application; and
- c. the administrative decision to delay consideration of her request for rebuttal was not in compliance with the Staff Rules and therefore had direct and serious legal consequences for the terms of her employment contract.

26. The timeframe for consideration and delivery of a decision to her request for a rebuttal was "definitely inordinate, unreasonable and unjustifiable and a gross violation of [her] employment and due process rights" in accordance with the case-law of the former UN Administrative Tribunal, including Judgment No. 1132 *Goddard* (2003). In addition:

To accept the Respondent's argument that it is not an administrative decision would result in giving unlimited discretion to the Respondent in considering such requests in light of the provision of the Staff Rules which requires that these matters must be considered with "utmost dispatch"

27. The Applicant also refers to published Order No. 19 (NY/2010) in *Wasserstrom* (Case No. UNDT/NY/2009/044/JAB/2008/087) which states that:

30. ... This is not dissimilar to the approach of the International Labour Organization Administrative Tribunal in Judgment 1203, *Horsman, Koper, McNeill and Petitfils*, cited with approval by Laker J in *Planas UNDT/2009/086* at [11]ff.

31. It will often be the case that following the administrative law path, as it were, will lead to the same conclusion as the contractual law path. The former path (if I may take the metaphor somewhat further) is, however, often winding and badly marked, whilst the latter is relatively straightforward and well marked. If the *Andronov* formula indeed correctly stated the administrative law, then its liability to confuse with unnecessary complexity is obvious. Thus, it really does not matter whether a decision is unilateral or joint, nor does it matter how many individuals are affected; if the decision is in breach of an explicit or implicit term of the staff member's contract, these considerations are irrelevant; and the only "direct legal consequence" (to take the third *Andronov* requirement) that matters is the breach of the contract.

Considerations

Was there an administrative decision?

28. An undue delay in taking a decision, or a clear omission of doing so, may by inference constitute a contestable administrative decision under art. 2.1 of the Statute. See the judgment of the UN Appeals Tribunal in *Tabari* 2010-UNAT-030 in which it states that "[n]ot taking a decision is also an administrative decision challengeable before the United Nations Appeals Tribunal". See also this Tribunal's Order No. 289 (NY/2010) in *Appleton* Case No. UNDT/NY/2010/085 (para. 35).

29. In this case, the contested administrative decision is the Administration's delay in deciding on the Applicant's request for a rebuttal of her PAS. That such delay in itself may constitute a breach of the Applicant's employment contract under art. 2.1(a) of the

UNDT Statute follows directly from art 15.3 of ST/AI/2002/3, which stipulates that “[t]he rebuttal panels *shall prepare with maximum dispatch* a brief report setting forth the reasons why the original appraisal rating should or should not be” (emphasis added).

30. However, the Administration has now accepted the Rebuttal Panel’s report of 19 May 2010 which granted leave to the Applicant’s request for changing her PAS for 2006-2007 from “partially meeting performance expectations” to “fully successful performance.”

Scope of the case

31. The only remaining questions of the case are therefore:

- a. whether the protracted rebuttal process in itself constituted a compensable breach of the Applicant’s contract; and
- b. if so, to what compensation is the Applicant then entitled.

32. The Tribunal draws the attention of the Parties to the UN Appeals Tribunal Judgment in *Sina* 2010-UNAT-094 in which the Appeals Tribunal Judgment stated in its synopsis that:

This court will not approve the award of compensation when no harm has been suffered. While we agree with the UNDT that a staff member certainly has the right to be informed of administrative decisions affecting him, a few days lapse is inconsequential—and in this case it had no consequences whatever. And the trial court specifically found that no harm was suffered. (Perhaps it could have found differently, and in that event we would have a different issue.) We vacate only that portion of the UNDT Judgment that orders payment to Sina.

IT IS ORDERED THAT—

33. The application is receivable and the issues of the case are determined as:

- a. whether the protracted rebuttal process regarding the Applicant's e-PAS report for 2006-2007 in itself constituted a compensable breach of the Applicant's contract; and
 - b. if so, to what compensation is the Applicant then entitled.
34. The Tribunal will revert with further orders for managing the remainder of the case.

(Signed)

Judge Marilyn J. Kaman

Dated this 10th day of December 2010