



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2020-UNAT-1044/Corr.1

**Simon Handy
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Jean-François Neven Judge Kanwaldeep Sandhu
Case No.:	2020-1389
Date:	30 October 2020
Registrar:	Weicheng Lin

Counsel for Mr. Handy:	Brandon Gardner, OSLA
Counsel for Secretary-General:	Christos Ravanidis

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The Secretary-General appeals Judgment No. UNDT/2020/030 dated 27 February 2020 issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), which found Mr. Handy's application contesting the negative comments included in his 2016-2017 electronic performance appraisal system report (ePAS) by both his first reporting officers (FROs) and his second reporting officer (SRO), to be receivable. For reasons set out below, we affirm the UNDT Judgment.

Facts and Procedure

2. At the material time in 2017, Mr. Handy was a Political Affairs Officer at the P-4 level with the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA). The present case arose from his ePAS for the period from 1 April 2016 to 31 March 2017.

3. During the 2016-2017 ePAS period, Mr. Handy was away from the mission for a significant amount of time on sick leave, first from 7 April to 16 May 2016 and then from the end of June 2016 to late February/early March 2017. He was thus at the mission for cumulatively 12 to 13 weeks, of which he was supervised by No. 1 FRO during the first eight weeks of the ePAS period and subsequently by No. 2 FRO for about four to five weeks cumulatively.

4. According to Administrative Instruction ST/AI/2010/5 titled "Performance Management and Development System" dated 30 April 2010, there are two types of ratings, one called "individual core values and competency ratings" consisting of A. Outstanding; B. Fully competent; C. Requires development; and D. Unsatisfactory, and the other called "overall performance ratings" consisting of A. Exceeding performance expectations; B. Successfully meets performance expectations; C. Partially meets performance expectations; and D. Does not meet performance expectations.

5. For the 2016-2017 ePAS period, Mr. Handy received an overall end-of-cycle rating of "B. Successfully meets expectations" from No. 2 FRO, with the following overall comments (she attributed the comments originally in French to No. 1 FRO):

No. 1 FRO indicates: [original in French; official English translation] During the review period, Mr. Simon Handy displayed considerable analytical ability, knowledge of the environment of the Central African Republic, and various other competencies.

He accomplished the above-mentioned tasks in an efficient manner. However, with his many skills, Mr. Simon Handy could have been highly instrumental in helping the Political Affairs Division achieve astonishing results and flourish, if he had been effectively present in our team. As his supervisor, I did not have a full grasp of Mr. Handy's schedule. He essentially did not participate in our team meetings, and I was not informed about most of his travel. My team could have benefited from his considerable experience and skills if he had been available." [End of the official English translation.] Mr. Handy appears quite capable of producing work in line with his assignments and relevant standards, however he is often pulled away from his tasks by the need to address administrative issues, and these circumstances have provoked inappropriate and unprofessional communications with colleagues.

6. No. 2 FRO also gave her individual ratings and comments on Mr. Handy's performance in the areas of core values and core competencies relevant for his position. For core values, she gave Mr. Handy a "B" for integrity, and a "C" for both professionalism and respect for diversity, with the following overall comments:

Mr. Handy does not consistently remain calm in stressful situations, as exhibited in several instances over this reporting period during which he communicated with staff in a disrespectful manner, often copying the most senior leadership at NYHQ or in the mission.

7. Regarding the three core competencies relevant to the position, No. 2 FRO gave Mr. Handy a "C" for communication, and a "B" for creativity and continuous learning, with the overall comments as follows:

For the brief period we have worked together, Mr. Handy has often been creative and thoughtful when it comes to political analysis of current events, and regularly makes helpful and insightful observations in team meetings and through notes or draft cables. He does not adequately tailor his language, tone and style when communicating with management or other colleagues on issues related to his own professional situation, which has occupied a large portion of his time since returning to the mission.

8. No. 2 FRO did not provide individual ratings or overall comments on Mr. Handy's managerial competencies of leadership and managing performance or on his development plan.

9. The overall comments made by Mr. Handy's SRO were even more critical. He stated:

I take note of the comments and ratings given by the two colleagues who served successively as FROs over this reporting period and consider them as not adequate to describe the professional performance and the behaviour displayed by Mr. Simon Handy. Even before he resumed his duties with the Division, while on sick leave, Mr. Handy sent at least one aggressive message to colleagues. His frequent infringement of rules, his difficulty in working with others, in sharing office space, in sharing vehicles in the car-pool, his disrespect for simple rules such as being present on time for work, observance of curfew hours, attend compulsory meetings including meetings he is supposed to chair, in my view do not correspond to a satisfactory completion of work. Moreover his aggressive remarks openly directed against people he considers as foreigners would have justified unsatisfactory ratings in professionalism, integrity and respect for diversity. During this reporting period alone Mr. Handy has caused at least three incidents one of them being insulting me, his SRO, Director of the Division. Anotehr [sic] has been for breach of curfew regulations, and yet another for unauthorized statements to the press and for misrepresenting his position in the organization. His two first reporting officers during this pas reporting period were both aware of the facts I describe above, it is therefore my view that Mr. Handy should have been rated as "unsatisfactory" in the core competencies of professionalism, integrity and respect for diversity. The performance of this staff member will have to be closely monitored over the next reporting period with particular attention to the three competencies mentioned here above and to his observance of all rules and regulations including time of arrival and presence in the office. In the next reporting period Mr. Handy will be supported to substantially improve his performance and to display satisfactory levels of professionalism, of integrity and of respect for diversity, starting with minimal respect for his colleagues in every area of work, communication and working in a team, including his first and second reporting officers.

10. On 14 September 2017, Mr. Handy filed a request for management evaluation of the decision to award him an overall rating of “successfully meets performance expectations” for his 2016-2017 ePAS while disparaging his performance in the same document with the intention of barring him from resorting to the ePAS rebuttal process to challenge the overall comments by his FRO, in violation of Administrative Instruction ST/AI/2010/5.

11. Mr. Handy states that he did not receive any formal response to his management evaluation request.

12. On 26 January 2018, Mr. Handy filed an application with the UNDT to contest the decision to award him a “B” overall rating for his 2016-2017 performance while inconsistently including “disparaging comments” in the same ePAS.

13. In Judgment No. UNDT/2020/030 dated 27 February 2020, the Dispute Tribunal found Mr. Handy's application receivable, concluding that it had jurisdiction to consider the merits of the application, because the negative overall comments in Mr. Handy's 2016-2017 ePAS constituted an administrative decision, as they detracted from the favorable overall rating and had direct legal consequence on Mr. Handy affecting his right to rebut his ePAS and his right to a fair and balanced performance evaluation, and causing him adverse career consequences. The UNDT concluded that Mr. Handy's 2016-2017 ePAS was unlawful and ordered that it be amended so that the overall comments no longer detract from the overall rating, and that Mr. Handy have all his due process rights protected. But, the UNDT left it to the decision-makers to decide as to how this could be achieved.

14. The Secretary-General appealed the above UNDT Judgment on 27 April 2020, and Mr. Handy filed an answer on 26 June 2020.

Submissions

The Secretary-General's Appeal

15. The Secretary-General requests that the Appeals Tribunal vacate the impugned UNDT Judgment in its entirety.

16. The Secretary-General submits that the Dispute Tribunal erred in law and exceeded its jurisdiction by finding that Mr. Handy's application was receivable. It applied the wrong legal standard in determining that the negative comments in Mr. Handy's 2016-2017 ePAS constituted a reviewable decision. There is no support in either *Ngokeng* (Judgment No. 2014-UNAT-460) or *Staedtler* (Judgment No. 2015-UNAT-546) that comments about the need to improve certain core values and competencies, which are inconsistent with the "B" overall rating, constitute themselves an administrative decision or turn the ePAS into an administrative decision.

17. The Secretary-General contends that the UNDT erred in fact in finding that the negative comments in Mr. Handy's 2016-2017 ePAS had direct legal consequences for his terms of employment, as such an ePAS deprived him of his right to contest the negative comments via the rebuttal process and his right to a fair performance appraisal and caused him adverse career consequences. Contrary to the UNDT's analysis, staff members do not have an absolute right to rebut their ePASes in all circumstances. Under Section 15.1 of

ST/AI/2010/5, Mr. Handy did not have a right to rebut his 2016-2017 ePAS because he had received a “B” overall rating. Receiving comments about the need to improve was part and parcel of Mr. Handy’s terms of appointment and the regulatory framework governing performance management. While comments in a favorable ePAS cannot be rebutted, Mr. Handy was not without a remedy as he could have lodged a ST/SGB/2008/5 complaint against his supervisors if he had believed that he had been unfairly treated.¹ If a favorable ePAS were to become unfair by virtue of inclusion of disparaging comments, then every comment about the need to improve in an ePAS would become an administrative decision subject to judicial review. Such an interpretation would enormously change the rationale of the performance appraisal system and fundamentally alter the concept of what constitutes an appealable administrative decision. Furthermore, the UNDT’s reference to the potential impact of the negative ePAS comments on a staff member’s future career prospects was purely conjectural and hypothetical, and was not in line with the long-settled case law that an appealable administrative decision must have direct and tangible effects on a staff member’s terms of employment. In this regard, UNDT did not rely on, nor did it cite, any relevant judgments of the Appeals Tribunal, because there is no Appeals Tribunal precedent in support of the Dispute Tribunal’s analysis of this most critical element of an appealable administrative decision.

18. Finally, the Secretary-General submits that if the impugned UNDT Judgment is left to stand, negative comments in a favorable ePAS would now be judicially reviewable and *ipso facto* unlawful, even in the absence of any concrete impact on the staff member’s terms of appointment. This reasoning runs counter to the Appeals Tribunal’s jurisprudence on receivability and what constitutes an appealable administrative decision. It could open the floodgates of litigation to grievances over any negative comments in performance appraisals with an overall satisfactory rating.

Mr. Handy’s Answer

19. Mr. Handy requests that the Appeals Tribunal dismiss the present appeal in its entirety.

¹ The Secretary-General’s Bulletin ST/SGB/2008/5 titled “Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority”. ST/SGB/2008/5 has been replaced by ST/SGB/2019/8 titled “Addressing discrimination, harassment, including sexual harassment, and abuse of authority”.

20. Mr. Handy submits that the Dispute Tribunal did not err in law nor did it exceed its jurisdiction in finding that his application was receivable. It correctly concluded that the contested ePAS was improper. The Dispute Tribunal correctly distinguished his case from the Appeals Tribunal's leading cases of *Ngokeng* and *Staedtler*. The Dispute Tribunal appropriately extended the logical reasoning of *Ngokeng* to a situation where the comments were so much more disparaging that the cases became almost different in kind.

21. Mr. Handy states that the UNDT did not err in finding that the negative ePAS comments had direct legal consequences on his terms of employment. In this regard, Mr. Handy draws the attention of the Appeals Tribunal that the Secretary-General has deconstructed the Appeals Tribunal's finding in *Staedtler* by stressing the direct legal consequences rather than the extent that the comments detracted from the satisfactory performance appraisal. The UNDT correctly understood that each part of the *Staedtler* finding was crucial in determining a case's justiciability. The more disparaging comments fail to equate with a satisfactory ePAS overall rating, the more direct legal consequences exist for the concerned staff member. Contrary to the Secretary-General's fallacious argument about the availability of the ST/SGB/2008/5 recourse, the filing of a harassment complaint by Mr. Handy against his FRO and SRO is a totally inappropriate method to address the incongruity between the comments and the final evaluation.

22. Mr. Handy maintains that the Secretary-General's concerns about the alleged chilling effects from subjecting an ePAS like his to judicial review on managers are misplaced. The best way for the Administration to avoid litigation over ePASes is to ensure that managers give fair and reasonable comments that equate to final evaluation. Only in a case like Mr. Handy's would there be a need for judicial oversight.

23. Mr. Handy states that should the negative comments be allowed to remain in his ePAS, he will suffer adverse career consequences. In fact, he has already suffered the consequences from submitting his 2016-2017 ePAS in his job applications; he has not been selected for any of the posts for which he has applied.

Considerations

24. The issue on appeal is whether the UNDT was correct in finding Mr. Handy's application contesting the negative comments included in his 2016-2017 ePAS by both the FROs and the SRO to be receivable.

Did the UNDT err in concluding that Mr. Handy's application was receivable?

25. Article 2(1) of the UNDT Statute provides, in part:

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.

26. In terms of the definition of an administrative decision that is subject to judicial review, we recall that an appealable administrative decision is a decision whereby its key characteristic is the capacity to produce direct legal consequences affecting a staff member's terms and conditions of appointment. Further, the date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine.²

27. Deciding what is and what is not a decision of an administrative nature may be difficult and must be done on a case-by-case basis and will depend on the circumstances, taking into account the variety and different contexts of decision-making in the Organization. The nature of the decision, the legal framework under which the decision was made, and the consequences of the decision are key determinants of whether the decision in question is an administrative decision.³ What matters is not so much the functionary who takes the

² *Larriera v. United Nations Joint Staff Pension Board*, Judgment No. 2020-UNAT-1004, para. 29; *Olowo-Okello v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-967, para. 31; *Farzin v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-917, para. 38.

³ *Olowo-Okello v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-967, para. 32; *Lloret Alcañiz et al. v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-840, para. 62; *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 50.

decision as the nature of the function performed or the power exercised. The question is whether the task itself is administrative or not.

28. In the case at hand, as per the documents on file and the record established by the UNDT Judge, while Mr. Handy received, in his 2016-2017 ePAS for the performance period from 1 April 2016 to 31 March 2017, an overall end-of-cycle rating of “successfully meets performance expectations”, this rating was accompanied by comments of the FROs and the SRO set forth therein, which in their majority were profoundly negative (approximately 56 lines of disparaging comments versus nine lines of positive remarks).

29. Specifically, in the narrative overall comments, the FROs stated that:

During the review period, Mr. Simon Handy displayed considerable analytical ability, knowledge of the environment of the Central African Republic, and various other competencies. He accomplished the above-mentioned tasks in an efficient manner. However, with his many skills, Mr. Simon Handy could have been highly instrumental in helping the Political Affairs Division achieve astonishing results and flourish, if he had been effectively present in our team. I was his supervisor, but I did not have a full grasp of Mr. Handy’s schedule. He essentially did not participate in our team meetings, and I was not informed about most of his travel. My team could have benefited from his considerable experience and skills if he had been available” [official translation from French]. Mr. Handy appears quite capable of producing work in line with his assignments and relevant standards, however he is often pulled away from his tasks by the need to address administrative issues, and these circumstances have provoked inappropriate and unprofessional communications with colleagues.

30. Mr. Handy’s second reporting officer stated as follows:

I take note of the comments and ratings given by the two colleagues who served successively as FROs over this reporting period and consider them as not adequate to describe the professional performance and the behaviour displayed by Mr. Simon Handy. Even before he resumed his duties with the Division, while on sick leave, Mr. Handy sent at least one aggressive message to colleagues. His frequent infringement of rules, his difficulty in working with others, in sharing office space, in sharing vehicles in the car-pool, his disrespect for simple rules such as being present on time for work, observance of curfew hours, attend compulsory meetings including meetings he is supposed to chair, in my view do not correspond to a satisfactory completion of work. Moreover his aggressive remarks openly directed against people he considers as foreigners would have justified unsatisfactory ratings in professionalism, integrity and respect for diversity. During this reporting period alone Mr. Handy has caused at least three incidents one of them being insulting me, his

SRO, Director of the Division. [Another] has been for breach of curfew regulations, and yet another for unauthorized statements to the press and for misrepresenting his position in the organization. His two first reporting officers during this pas reporting period were both aware of the facts I describe above, it is therefore my view that Mr. Handy should have been rated as “unsatisfactory” in the core competencies of professionalism, integrity and respect for diversity. The performance of this staff member will have to be closely monitored over the next reporting period with particular attention to the three competencies mentioned here above and to his observance of all rules and regulations including time of arrival and presence in the office. In the next reporting period Mr. Handy will be supported to substantially improve his performance and to display satisfactory levels of professionalism, of integrity and of respect for diversity, starting with minimal respect for his colleagues in every area of work, communication and working in a team, including his first and second reporting officers.

31. Pursuant to Section 15.1 of ST/AI/2010/5, staff members having received the rating of “successfully meets performance expectations” cannot challenge the performance appraisal by way of rebuttal. Section 15.1 provides:

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 [sic] performance expectations” cannot initiate a rebuttal.

32. Pursuant to Section 15.7 of ST/AI/2010/5, “[t]he 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.”

33. It is true that a good final rating, which *in abstracto* is a favourable decision, does not constitute an “administrative decision” able, by itself, to have a direct and negative impact on a staff member’s rights and, accordingly, there is no legal basis pursuant to Article 2(1)(a) of its Statute for a staff member to file an application before the Dispute Tribunal.⁴

34. Nevertheless, as already noted, the determination on whether a specific decision of the Administration constitutes an appealable administrative decision is done *in concreto* on a case-by-case basis by the UNDT Judge, who takes into consideration, *inter alia*, the particular circumstances, the nature of that decision as well as its relevant decision context and consequences on the staff member’s terms and conditions of employment. The judicial determination about the probable adverse impact of the decision of the Administration on the staff member’s employment status is mainly pivoted around, and based on, the relevant final conclusion of such a decision. In exceptional circumstances, however, the adverse impact on the affected staff member’s career, and therefore the actual character of an administrative decision as a reviewable one (*force exécutoire*), may even turn out from an overall judicial assessment of its final conclusion along with the factual basis of that decision, indicating its reasoning. This is especially true when the reasoning detracts from the overall favourable conclusion, such as to affect the terms and conditions of the staff member’s contract.

35. In the course of reviewing the nature of the contested decision, the UNDT first made a reference to *Ngokeng* and *Staedtler* cases, taking note that it is settled caselaw of the Appeals Tribunal that “a comment made in a satisfactory appraisal” is not a “final administrative decision” if it does “not detract from the overall satisfactory performance appraisal and [has] no direct legal consequences for [the staff member’s] terms of appointment”.⁵ Then, it proceeded to find that “the logical consequence of *Ngokeng* is that if the comments in a satisfactory performance do, in fact, detract from the overall rating, they oppositely must constitute a final, and therefore also appealable, decision. As the substantive question of the present case is exactly whether the narrative comments in [Mr. Handy’s] ePAS report detracted from this rating, the application is therefore receivable.”⁶

⁴ *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-546, para. 38; *Ngokeng v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-460, para. 31.

⁵ Impugned Judgment, para. 19.

⁶ *Ibid.*, para. 20.

36. Further, in terms of the question as to whether the narrative comments in Mr. Handy's ePAS detract from the ratings, the UNDT held that:⁷

... while the Tribunal acknowledges in line with the Respondent's submissions that not all narrative comments in a performance appraisal necessarily need to be positive to grant a "successfully meet expectations" rating; they must, however, generally be balanced and consistent in a reasonable, fair and proportionate manner. If negative comments are made about the performance, they must therefore be outweighed or at least balanced by other comments that provide a positive perspective which supports the overall rating.

... The need for balance and consistency in the comments necessarily also applies to the comments of the SRO who is mandated by the Rules to ensure consistency between the comments and ratings. Otherwise—for the sake of argument—even if the FRO or SRO made entirely outrageous and unsubstantiated comments, bordering on character assassination but did so in the context of an overall "successfully meet expectations" rating, they could never be held accountable. The comments would remain on the staff member's record and be entirely protected from any administrative and/or judicial review.

37. On the heels of this holding, the UNDT went on to find, *inter alia*, that the narrative comments in Mr. Handy's 2016-2017 ePAS detracted from the overall rating of "successfully meets expectations", and that the decision to include such comments was *ultra vires* and exposed Mr. Handy *per se* to adverse career consequences.

38. The UNDT Judge based her final conclusion on the fact that the SRO, in particular, criticized the ratings by the FROs in the core values of professionalism, integrity and respect for diversity as he found that based on the FROs' comments and his own experience with Mr. Handy, the latter's performance should have been rated as "unsatisfactory" (the lowest rating out of four) instead of "fully competent" (the second rating) in integrity and "requires development" (the third rating) in professionalism and respect for diversity. Moreover, as noted by the UNDT, the SRO's remaining comments also demonstrated that he did not find that Mr. Handy's performance had been successful in any possible way—all the observations were highly negative and unfavorable to Mr. Handy.

⁷ *Ibid.*, paras. 47-48.

39. According to the UNDT's assessment,

even the gist of the FROs' narrative comments did not necessarily reflect an overall rating of 'successfully meets expectations'. When reading these comments, they were predominantly critical of [Mr. Handy's] performance, especially regarding his attitude and behavior, although the quality of his work did receive some praise. This is particularly so with regard to the rating of 'fully competent' in the core value of integrity as all remarks regarding his performance in the three core values were negative.⁸

40. The Secretary-General challenges the UNDT's decision on the grounds that it erred in law and exceeded its jurisdiction in finding Mr. Handy's application to be receivable. He argues that the UNDT applied the wrong legal standard in determining that the negative comments in the 2016-2017 ePAS constituted a reviewable administrative decision. It is evident from this Tribunal's analysis in *Ngokeng* that the decisive factor in determining whether a negative comment in an ePAS constitutes an administrative decision was the "direct legal consequences" flowing from that comment – not the degree by which the negative comments detracted from the overall satisfactory appraisal. The passing reference, in *Ngokeng*, to the fact that the FRO's comment did not detract from the overall satisfactory evaluation was *dictum*, not a conscious deviation from the long-established definition of what constitutes a judicially reviewable administrative decision. Likewise, in *Staedtler*, the Appeals Tribunal applied the same, well-settled standards of what constituted an administrative decision and concluded that the SRO's negative comment in an otherwise satisfactory appraisal did not meet the receivability threshold, because "there was no evidence of any adverse administrative decision that stemmed from the Appellant's performance appraisal".⁹ The Appeals Tribunal has not endorsed, in either *Ngokeng* or *Staedtler*, the UNDT's definition of what constitutes an administrative decision in this case and has never held that comments about the need to improve the performance of certain core values or competencies in an ePAS with an overall rating of "successfully meets expectations" are judicially reviewable. There is no support in either of the Appeals Tribunal Judgments that comments about the need to improve the performance of certain core values or competencies in an ePAS, which are inconsistent with the overall performance rating of "successfully meets expectations," constitute themselves an administrative decision or turn the ePAS into an administrative decision.

⁸ *Ibid.*, para. 51.

⁹ *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-546, para. 40.

41. However, contrary to the Secretary-General's submissions, the Appeals Tribunal, while not fully endorsing the UNDT's reading of the relevant jurisprudence and the legal arguments in determining that the negative comments in Mr. Handy's 2016-2017 ePAS constituted a reviewable administrative decision, is not able to detect any fault in the UNDT's final conclusion. Under the specific circumstances of the case at bar and the overall assessment of the impugned 2016-2017 ePAS along with the content and nature of the said narrative comments, we agree with, and uphold, the UNDT's finding that these narrative comments in the ePAS detracted from the overall rating of "successfully meets expectations" and therefore constituted an appealable administrative decision for the purpose of Article 2(1) of the UNDT Statute, since the administrative decision as a whole did have a present and direct adverse impact on the terms and conditions of Mr. Handy's employment.

42. Specifically, as correctly found by the UNDT, the FROs' and the SRO's narrative comments, underpinning the impugned 2016-2017 ePAS, are inconsistent with, and contradict, the ratings given by the FROs. As such, these narrative comments do not confirm, but quite conversely detract from, the overall satisfactory performance appraisal of Mr. Handy as "successfully meets expectations", having present and direct legal consequences for Mr. Handy's terms of appointment. In essence, these unfavourable disparaging narrative comments in the 2016-2017 ePAS, which are final and unappealable under Sections 15.1 and 15.7 of ST/AI/2010/5, negated Mr. Handy's positive overall performance appraisal and effectively turned it into an unfavourable one, since they directly have had an adverse impact on his moral and ethical stature and professionalism and might be taken into consideration by the Administration at any time as a basis for his performance rating in the course of his career development, without Mr. Handy being able, due to the individual character of the 2016-2017 ePAS, to incidentally challenge their validity in the context of an application for rescission of a pertinent adverse administrative decision. The harmful effect of the 2016-2017 ePAS negative comments, which detract from the overall satisfactory rating, on Mr. Handy's employment status is not purely hypothetical, as the Secretary-General erroneously contends, but direct and tangible.

43. Consequently, as such, the FROs' and the SRO's narrative comments reflected more than a legitimate exercise of administrative hierarchy evaluating employees, and constituted of themselves along with the 2016-2017 ePAS a final administrative decision able to be challenged through appeal, as the UNDT correctly found. Therefore, there is no merit in the

Secretary-General's arguments to the contrary and the same goes concerning his claim that the fact that Mr. Handy continues to be employed by the Organization at the exact same position he has had since the completion of his 2016-2017 performance appraisal, enjoying the same employment status that he had before, shows that the alleged disparaging comments have not affected him.

44. The Secretary-General expresses concerns about the far-reaching ramifications of such a jurisdictional approach, which could possibly open litigation to grievances over negative comments in performance appraisals with an overall satisfactory rating; this could also lead the UNDT and the UNAT to become the ultimate arbiters of the extent to which FROs and SROs are permitted to provide negative, factual comments on, or constructive criticism of, a staff member's performance, even if the overall appraisal is favourable; the tribunals would be determining, on a case-by-case basis, which comments are permissible and which comments are *per se* unlawful. In other words, the tribunals would become the main forum where questions related to staff members' performance evaluations would be decided. Such a development would, on the one hand, lead to a less than efficient use of judicial resources and, on the other hand, upend the entire performance management scheme established by the Organization, which vested performance management and evaluation in the Administration and not the UNDT.

45. The Appeals Tribunal sympathizes with said concerns. Undoubtedly, making comments in an ePAS about the need for a staff member to improve performance in certain core values and competencies is an important tool for the managers to carry out their functions in the interest of the Organization and, hence, their willingness to do so need to be supported and boosted. Nonetheless, the said concerns of the Secretary-General are not only far-fetched but also not justified, as the gatekeeping tests of admissibility under Article 2(1)(a) of the UNDT Statute do not allow any grievance whatsoever against negative comments in an otherwise satisfactory appraisal to be justiciable. Only those grievances against decisions of the Administration which meet the strict and demanding characteristics of appealable ones are able to pass the threshold of receivability.

46. Moreover, subjecting decisions of the United Nations Administration, which produce adverse direct consequences for the staff member's terms and conditions of employment, to judicial scrutiny, as it comes in the case at bar, responds to the purpose of the UNDT and UNAT, which were established as independent and impartial Tribunals to guarantee the basic

human right of access to justice in response to the demand by staff members for a justice system that provides adequate safeguards of rights and accountability by managers in the exercise of their functions.

47. Further, the Secretary-General argues that the UNDT's analysis is both flawed and legally erroneous because it relied on the same factor – i.e. that the comments were allegedly inconsistent with the rating – to decide both the issue of receivability and the merits of the application; as a result, the Judgment stands for the unprecedented and far-reaching proposition that the inclusion of comments about the need for a staff member to improve performance in certain core values and competencies, set forth in a performance appraisal with an overall satisfactory rating, is an independent administrative decision that justifies judicial intervention and, at the same time, a *per se* violation of a staff member's rights, as well as an unlawful exercise of managerial discretion.

48. However, this argument is not persuasive since the possible adverse direct impact of an administrative decision on a staff member's terms and conditions of appointment is one of the requisite key characteristics of an appealable administrative decision (*force exécutoire*) and, therefore, attaches to the receivability *ratione materiae* context, though it requires more than the staff member merely presenting an allegation of detraction, i.e., it requires the staff member to be successful in his/her allegation that the comments detracted from the overall favourable rating. Hence, the erroneous approach towards this issue by the UNDT Judge, to wit, her reasoning that such an allegation suffices for the application to be receivable,¹⁰ does not, of itself, affect the otherwise correct judicial conclusion that the FROs' and the SRO's narrative comments detracted from the overall satisfactory rating in the 2016-2017 ePAS, and, as already elaborated upon, as such they have had an adverse direct effect on Mr. Handy's employment status, which in turn makes this decision a judicially reviewable one.

49. In the premises, absent any other specific ground of appeal against the UNDT's findings about the illegality of the said narrative comments and the relief ordered by it, the Appeals Tribunal affirms the UNDT's conclusions that Mr. Handy's application against the 2016-2017 ePAS along with the FROs' and the SRO's narrative comments was receivable *ratione materiae*, and that the impugned decision was unlawful.

¹⁰ Impugned Judgment, para. 20.

50. Accordingly, the appeal fails.

Judgment

51. The appeal is dismissed and Judgment No. UNDT/2020/030 is affirmed.

Original and Authoritative Version: English

Dated this 30th day of October 2020.

(Signed)

Judge Raikos, Presiding
Athens, Greece

(Signed)

Judge Neven
Brussels, Belgium

(Signed)

Judge Sandhu
Vancouver, Canada

Entered in the Register on this 24th day of November 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar