



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/084/
JAB/2009/048
Judgment No.: UNDT/2011/084
Date: 16 May 2011
Original: English

Before: Judge Marilyn J. Kaman
Registry: New York
Registrar: Santiago Villalpando

SIMMONS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

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

Introduction

The Applicant's three inter-related cases before the Dispute Tribunal

1. The Applicant has filed a number of cases before the Dispute Tribunal, three of which are inter-related and which concern issues regarding the Applicant's electronic performance appraisal system ("e-PAS") reports from 2006 to 2009, her three unsuccessful applications to different P-4 positions, and the Applicant's contention that she has been harassed and intimidated by the Administration for a number of years. The three inter-related cases are: UNDT/NY/2009/084/JAB/2009/048 (which is dealt with in the instant Judgment), UNDT/2010/071/JAB/2006/066 and UNDT/2010/077.

2. Because of the inter-related nature of the three cases, in Order No. 197 (NY/2010) of 5 August 2010, the Tribunal inquired of the parties whether the cases could be consolidated for efficiency purposes. The Respondent in reply agreed to this, but the Applicant in her written submission of 12 August 2010 stated that she "strongly object[ed] to the joining of the cases in order that they may form subject of a single judgment". In Order No. 242 (NY/2010) of 14 September 2011, the Tribunal decided it would not render a consolidated judgment for these three cases.

3. Based on the applications, the issues to be adjudicated in the three cases, respectively, are as follows:

a. UNDT/NY/2009/084/JAB/2009/048:

i. The preparation and/or completion of the Applicant's e-PAS reports for 2007-2008 and 2008-2009; and

- ii. The Applicant's candidature for two posts, respectively with vacancy announcements "OPPBA-VA-#07-ADM-DM-415191" ("Post 1") and "OPPBA-VA-#07-ADM-DM-415428" ("Post 2").
- b. UNDT/2010/071/JAB/2006/066 (see Judgment No. UNDT/2011/085):
- i. The completion of the Applicant's e-PAS report for 2006-2007;
 - ii. The Applicant's candidature for the post with vacancy announcement "06-ADM/DM-OPPBA-408902-R-New York";
 - iii. The alleged harassment and intimidation of the Applicant; and
 - iv. The timeliness of the Joint Appeals Board's ("JAB") Report No. 2034.
- c. UNDT/2010/077 (judgment to be rendered in the future):
- i. The timeliness of the rebuttal process for the Applicant's e-PAS report for 2006-2007.

The present case

4. Based on the Applicant's complete statement of appeal ("the Statement") to the former United Nations Administrative Tribunal dated 15 June 2009, the Dispute Tribunal defined the issues of the present case in Order No. 325 (NY/2010) of 10 December 2010 as follows:

- a. Did the Respondent violate the Applicant's employment contract when preparing and/or completing her e-PAS reports for 2007-2008 and 2008-2009?
- b. Did the Respondent's handling of the selection processes for posts with vacancy announcements "OPPBA-VA-#07-ADM-DM-415191" ("Post 1") and "OPPBA-VA-#07-ADM-DM-415428" ("Post 2"), for which the Applicant was not selected, constitute a breach of the Applicant's employment contract?

5. In her application, the Applicant also appealed the "[a]dministrative decision to ... (iii) Continue to expose [her] to workplace harassment and intimidation by supervisors". However, the Tribunal affirms its finding of Order No. 325 (NY/2010) that her appeal of this decision is not receivable since, unlike the two other issues recited above, she had not requested administrative review of the underlying administrative decision—a fundamental requirement under established jurisprudence of the Dispute and Appeals Tribunals (see, for instance, *O'Neill* UNDT/2010/203 and *Syed* 2010-UNAT-061).

6. Furthermore, the Respondent contended that the appeal of the underlying decisions of the issues recited in paragraph 4(a) and (b) above was also not receivable. The Tribunal rejected this contention under Order No. 325 (NY/2010), since the appeal of these decisions was neither time-barred under former staff rule 111.2, nor had the Applicant abandoned her appeal under secs. III.E or III.O.3 of the JAB Rules of Procedure. For the analysis regarding the preliminary receivability questions, the Tribunal refers to Order No. 325 (NY/2010).

Procedural history

7. On 31 December 2007, the Applicant filed a request for administrative review contesting the selection decisions regarding Post 1 and Post 2, as well as “the refusal of the administration to conduct [the Applicant’s] e-PAS in accordance with the Staff Rules”.

8. On 4 February 2008, the Officer-in-Charge of the Administrative Law Unit of the Office of Human Resources Management (“OHRM”), replied, stating, *inter alia*:

A review of [supporting documentation] indicates that the recruitment for the two posts was undertaken in accordance with the relevant regulations, rules and procedures. The material also indicates that your supervisors have undertaken significant efforts to evaluate your performance, but you have not cooperated in completing the relevant reports and in ensuring that an up-to-date appraisal is on the record.

9. On 29 February 2008, the Applicant filed an incomplete statement of appeal with the former United Nations Administrative Tribunal. After corresponding with the Secretariat of the JAB, the Applicant submitted the statement of appeal to the Administrative Tribunal, which was dated 15 June 2009 (“the Statement”).

10. On 1 July 2009, the case was transferred from the former Administrative Tribunal to the Dispute Tribunal, where it was assigned to Judge Adams.

11. On 25 August 2009, the Respondent filed his reply in which he, *inter alia*, contended that the appeal was not receivable, as it was time-barred.

12. By email of 28 January 2010, the prior Tribunal (Judge Adams) outlined the issues of the case, including the Respondent’s preliminary claim that the case was time-barred and thereby not receivable.

13. In response to a 25 November 2009 request from the Applicant and following a 28 January 2010 email from the Tribunal, on 30 January 2010, the Respondent agreed that the present case “can proceed on the papers” under the reservation that he could possibly submit additional pleadings to take into account “recent developments on receivability and appointment and promotions”.

14. By email of 3 February 2010, Judge Adams directed the parties to file and serve written submissions from both parties regarding the preliminary issue of receivability, which the Respondent did on 16 March 2010 and the Applicant did on 30 March 2010.

15. On 30 June 2010, Judge Adams left the Dispute Tribunal, before deciding the preliminary issue of receivability before his departure. On 27 July 2010, the case was re-assigned to the sitting Tribunal.

16. After issuing further case management orders (Orders No. 197 and 242 (NY/2010)) and receiving further written submissions from the parties, on 10 December 2010, the Tribunal issued Order No. 325 (NY/2010) on receivability (see para. 6 above).

17. In Order No. 3 (NY/2011), the Tribunal called for closing statements on the remaining substantive issues of the case, as defined above in para. 4(a) and (b).

18. By email of 31 January 2011, the Applicant filed and served her closing statement (after submitting an incorrect attachment on 29 January 2011). After being granted a time extension in Order No. 28 (NY/2011) of 1 February 2011, by email of 8 February 2011, the Respondent filed and served his closing statement.

19. By email of 9 February 2011, the Applicant filed and served a “Motion to strike out portions of the Respondent’s closing statement” in which she complained

against the Respondent introducing new evidence in his closing statement concerning the Applicant supposedly “abusing” her supervisor.

20. By email of 11 February 2011, the Respondent replied that this evidence was filed and served a response to the Applicant’s motion in which his Counsel stated that this evidence was “directly relevant to the issues for determination in this proceeding and is responsive to the Applicant’s closing statement”.

21. In Order No. 47 (NY/2011) of 6 February 2011, the Tribunal ordered that the new facts and evidence introduced in the Respondent’s closing statement would be stricken under arts. 18.1, 19 and 36.1 of the Rules of Procedure of the Tribunal. The Tribunal reasoned that in order to ensure due process and fairness, a party would normally be precluded, or estopped, from introducing new facts and evidence in a closing statement, which the Respondent essentially admitted had occurred in this case; otherwise, the opposing party would be denied access to appropriately challenge the said facts and evidence. The Tribunal further observed that during these proceedings, the Respondent had ample opportunity to introduce the relevant facts and evidence at an earlier stage. Finally, the Tribunal noted that the United Nations Appeals Tribunal in *Bertucci* 2010-UNAT-062, para. 23, stated that the Dispute Tribunal as “the court of first instance ... is in the best position to decide what is appropriate for the fair and expeditious disposal of a case and do justice to the parties” and declared that the Dispute Tribunal has a “broad discretion with respect to management” under art. 19 of the Rules of Procedure of the Tribunal, which includes ensuring the “rendering [of] timely judgments”, defined by the Appeals Tribunal as “one of the goals of the new system of administration of justice”.

Facts

22. In the Statement, the Applicant outlined her employment history (Statement, para. 20) and the facts relating to the selection processes in question (Statement, paras. 21 – 27). In his reply dated 25 August 2009, the Respondent explicitly agreed with the summary of facts set out in the Statement, paras. 21 – 27, except for the certain contentions interspersed within these facts. The Respondent did not deny the Applicant’s account of her employment history. The following account of facts is therefore primarily based on the Applicant’s Statement, but the Tribunal has supplemented with any missing facts that are needed for a complete understanding of the contentions and considerations within this Judgment.

The selection processes for Post 1 and Post 2

23. The Applicant joined the United Nations in May 1995 at the P-2 level as an Associate Internal Auditor with the Office of Internal Oversight Services in Geneva, after successfully passing the National Competitive Examination in the field of Finance in 1993. In December 1998, she was promoted to the P-3 level as a Programme Budget Officer with the Office of Programme Planning Budget and Accounts (“OPPBA”) at the United Nations Secretariat, New York.

Post 1

24. On 23 August 2007, Post 1 was advertised with a deadline for application of 22 October 2007. The vacancy announcement, *inter alia*, stated as follows:

Competencies

... PLANNING AND ORGANIZING - Identifies priority activities and assignments and allocates appropriate amount of time and resources for completing tasks in a pressurized situation, foresees risks and allows for contingencies when planning ... ACCOUNTABILITY

- Takes ownership of all responsibilities and honours commitments. Takes personal responsibility for his/her own shortcomings and those of the work unit.

Education

Advanced university degree (Master's degree or equivalent) in business administration, finance, public administration or a related field. A first level university degree with a relevant combination of academic qualifications and experience may be accepted in lieu of the advanced university degree.

Languages

English and French are the working language of the United Nations Secretariat. For this post, fluency in oral and written English is required. Knowledge of another official UN language is desirable.

Other skills

Advanced computer skills and proficiency in complex computerised financial systems such as IMIS and BIS desirable.

25. On 10 September 2007, the Applicant submitted her application. According to the Respondent's closing statement, twelve applications were received at the 30-day mark, of which eight candidates, all internal, were short-listed, including the Applicant. As one candidate withdrew her/his candidature, seven candidates were interviewed.

26. On 3 October 2007, the Applicant was invited for an interview for Post 1. In the subsequent evaluation of the Applicant (inserted into the United Nations online job-site Galaxy) the following observations, *inter alia*, were made (emphasis added):

Competencies

... PLANNING AND ORGANIZING: *The Panel found the candidate's response to be marginal at best, placing undue emphasis in the responsibility of the supervisor to identify priorities when in effect these should be routine decisions of the Incumbent without*

awaiting further instructions ... ACCOUNTABILITY: The Panel found the candidate's response to be weak, again placing emphasis, as in the competency of Planning and Organizing, on the role of the supervisor to take responsibilities and provide basic instructions that should be more correctly implemented at the incumbent's level ... The Panel determined that the applicant meets only some of the competency requirements for this post.

...

Experience

The candidate's PHP [Personal History Profile] lists more than twelve years combined work experience within the United Nations. She joined the Organization in 1995 at UNOG [United Nations Office at Geneva] after having successfully completed the National Competitive Recruitment Examination. She has worked as both an internal auditor and as a programme budget officer, her current post PPBD. In this function she lists her experience working closely with the UN Staff Rules and Financial Regulations and Rules as well as the Finance and Accounting Manuals, General Assembly minutes, resolutions and policies of the Fifth Committee and various UN [United Nations] Organs, including but not limited to ACABQ [Advisory Committee on Administrative & Budgetary Questions] and CPA [unclear abbreviation]. She [unclear word] a deep understanding of the funds and programmes within the UN having been exposed to several budget sections including the Department of Peacekeeping, UNSTO [United Nations Truce Supervision Organization], UNMOGIP [United Nations Military Observer Group in India and Pakistan] and OHRLLS [Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States]. *She meets some of the requirements of the post.*

Languages

The candidate's PHP lists her mother tongue as English and that she reads and understands French and Chinese easily. *She meets some of the requirements of the post.*

Other skills

The candidate's PHP lists fax, computer, palm and blackberry. By virtue of her work in PPBD she will have been exposed to extensive use of IMIS and 615. *She meets most of the requirements of the post.*

27. By letter of 5 November 2007, the Applicant was advised by the Director, OPPBA, that another candidate had been chosen based on the competency-based interview. On 7 November 2007, the Applicant replied, complaining about the decision.

Post 2

28. According to the closing statement of the Respondent, the vacancy announcement for Post 2 was issued on 18 September 2007.

29. At the 30-day mark (18 October 2007), eleven applications were transmitted from OHRM to OPPBA for evaluation. Eight applicants were interviewed in early November 2007, after which a list of recommended candidates was transmitted to the Central Review Committee (“CRC”).

30. On 8 November 2007, the Applicant applied for Post 2, but her application was not considered, since it was deemed to be late.

The Applicant’s electronic e-PAS reports for 2007-2008 and 2008-2009

31. Neither the Applicant’s facts in her Statement, nor the Respondent’s facts in his reply, give an entirely certain picture of what actually happened regarding the Applicant’s e-PAS reports for 2007-2008 and 2008-2009. What is clear is that the e-PAS reports were not completed in time and were not taken into account when the Applicant’s candidatures for Post 1 and Post 2 were being considered.

32. In the Respondent’s closing statement, his Counsel provides the following information regarding the preparation of the Applicant’s 2007-2008 e-PAS report, which is not disputed by the Applicant, since she herself makes direct references to it in her observations on this statement (emphasis added):

15. The work plan of Service I of PPBD for the period 1 April 2007 to 31 March 2008 was circulated to all staff for comments on 11 June 2007, and finally cleared and distributed on 18 June 2007. The Applicant submitted her work plan through e-PAS on 16 July 2007. Discussions between the Applicant and [her first reporting officer] took place on 27 July 2007 and 24 September 2007, covering both the end-of-period assessment for the period 2006-2007 and the work plan for 2007-2008. *It was agreed that the work plan should be further reviewed and revised in order to make it more objective, measurable and specific.* [Her first reporting officer] suggested that the 2006-2007 work plan could be used as the basis for the period 2007-2008. ...

16. Despite the discussion with [her first reporting officer], which concluded with the agreement that the Applicant would revise her work plan, on 9 October 2007, the Applicant resubmitted her original work plan for 2007-2008 without any revisions. *The Applicant provided no explanation or justification for the resubmission of her original plan. She did not contact her supervisor prior to submitting the unrevised plan nor explain why she had unilaterally decided not to implement what was agreed.*

33. In the Applicant's closing statement, she contended that her e-PAS reports for 2007-2008 and 2008-2009 remained unsigned by the relevant first and second reporting officers, respectively.

34. However, in the Respondent's closing statement it was explained that, on 31 March 2010, the Applicant's first reporting officer in fact completed the Applicant's end-of-the cycle appraisal of the 2008-2009 e-PAS report. From this e-PAS report, it also follows that:

a. On 22 April 2008, the first reporting officer signed off the Applicant's development plan and the Applicant counter-signed off one hour later on the same day;

- b. On 27 February 2009, the first reporting officer signed off the Applicant's midpoint review and the Applicant counter-signed off 29 minutes later on the same day;
- c. On 27 April 2009, the Applicant inserted her end-of-cycle self-appraisal;
- d. On 31 March 2010 (i.e., almost a year later), the first reporting officer signed off the end-of-cycle appraisal, on 7 April 2010, the second reporting officer followed-up, and the Applicant did so on 8 April 2010;
- e. On 9 April 2010, her first and second reporting officers signed the report, while the Applicant did so on 15 April 2010.

Applicant's submissions

The Applicant's e-PAS reports for 2007-2008 and 2008-2009

35. The Applicant's primary contentions regarding her e-PAS reports for 2007-2008 and 2008-2009 may be summarised as follows:
- a. Management failed to ensure that the Applicant's work plan for 2007-2008 and her e-PAS for 2008-2009 were prepared and completed in a timely manner;
 - b. The Applicant's due process rights and the proper implementation of the Staff Rules have not been respected by the Administration. The delay in preparation of the Applicant's work plan and e-PAS are longstanding matters and "[m]anagement has for years been either tardy in preparing and/or completing [her] e-PAS";

c. The Administration failed to prepare and complete the Applicant's e-PAS in "good faith" and "in the spirit in which it was meant to achieve the objective of a performance appraisal system", particularly as it was not "done a proper and timely manner over a number of years";

d. There has been a "systematic breakdown of the e-PAS system within OPPBA over the years";

e. The Head of Office/Department has "the responsibility for the implementation of the e-PAS", and s/he should hold managers and staff with supervisory responsibilities "accountable for the proper conduct of the e-PAS as an effective management tool" since the e-PAS "ought to be considered as one of the cornerstones in the [United Nations] system of accountability";

f. The e-PAS process is "not a unilateral assessment by the Administration", but "a process that is intended to be a two-way communication and in that regard, [the Applicant has] tried to cooperate with the Administration without success";

g. The "unsettling situation" and non-completion of the Applicant's e-PAS evaluation over "the last reporting cycles" continues to have "negative repercussions as it impacts [the Applicant's] fundamental guarantee of full and fair consideration of [her] applications for promotion", "significant negative impact on [her] career development", and causes the Applicant "tremendous anxiety, anguish and occupational stress".

36. Concerning the 2007-2008 e-PAS report, the Applicant's specific contentions regarding her allegedly delayed work plan may be summarised as follows:

- a. The Applicant's first reporting officer began "showing concern about the delayed work plan 4-5 months after the period in which it should have been completed and after having been frequently reminded by the Applicant to have the e-PAS addressed. To request a staff member to prepare a work plan in December of an e-PAS cycle when midterm review should have been completed and when the end of cycle period is approaching is simply wrong";
- b. Her first reporting officer "first requested action on [the Applicant's] work plan [six to seven] months after the cycle started";
- c. The Applicant submitted her work plan in a timely manner at the start of the e-PAS cycle without the benefit of a "Division or Service" work plan. It was almost six months later that the first reporting officer began "making reference to the Section's work plan as a guide for individual work plans". The Applicant received "no input from her first reporting officer", who "only gave the impression that he was concerned about [the Applicant's] e-PAS when pushed to do so by senior management who were very concerned about the lack of e-PAS implementation in OPPBA";
- d. A nine-month old work plan "serves no valuable purpose as it should have been prepared at the start of the e-PAS cycle to serve as a guide to staff and a tool to management". A plan prepared towards the end of the e-PAS cycle "has lost its value and is now a historical document prepared only to ensure that management is seen to be as complying with the requirements of the Staff Rules";
- e. A review of the provisions of ST/AI/2002/3 demonstrates that the first reporting officer failed "to take appropriate action".

The selection processes

37. The Applicant's primary contentions regarding the selection processes for Post 1 and Post 2 may be summarised as follows:

- a. The Administration failed to adhere to the staff regulations and rules in the selection processes for Post 1 and Post 2, particularly in that the Applicant's performance was not a factor considered by interview panels;
- b. In the absence of the Applicant's completed e-PAS reports, the Administration solely relied on the results of competency-based interviews and a written test that was unfairly graded for the Applicant;
- c. The Respondent's alleged failure "to undertake and finalize" the Applicant's e-PAS, "is itself sufficient to sustain a successful case against the Respondent in the absence of a challenge of the flawed selection process";
- d. The Applicant was not "favourably impacted by the absence of [her] e-PAS" in accordance with sec. 6.6 of ST/AI/2002/4 (Staff selection system) by therefore being deemed to have "fully met performance expectations" (the Tribunal notes that ST/AI/2002/4 was replaced by ST/AI/2006/3 on 1 January 2007, which has an equivalent sec. 6.6), and the Respondent has not produced any evidence that sec. 6.6 was actually taken into account by the interview panel;
- e. Sec. 6.6 of ST/AI/2003/4 is merely "a stop gap measure, where performance appraisal could not be completed for justifiable reasons" and the delay in the present case is "inexcusable and excessive";

f. The interview panels were “biased and prejudicial” against the Applicant, and all its members were former and current staff members working for OPPBA;

g. While other candidates were deemed to satisfy the required language skills for Post 2, the Applicant was wrongly rated as “meets some of the requirements of the post” even though she fully complied with these, which was “a noticeable trend that suggests a blatant attempt to conspire against [the Applicant’s] career interest by not giving full and fair consideration to [the Applicant’s] candidature”;

Compensation

38. The Applicant’s primary contentions regarding compensation may be summarised as follows:

a. The Applicant requests the Tribunal to order “[her] immediate promotion to the P-4 level” and refers to “the need for real justice in this matter similar to the type highlighted in [the Administrative Tribunal’s Judgment No. 613, Part XIV,] and that “she will receive full and fair consideration for promotion, at the earliest possible date, to a suitable vacant post for which she is qualified and in which she may be interested”;

b. The Applicant also requests an “award [of] reasonable compensation as [the Tribunal] sees fit, but in event no least than two years’ net base salary, for the continued violation of [her] due process rights”;

c. As for her non-pecuniary injury, the Applicant submits that she seeks “relief to repair the years of damage to [her] career interests”.

Respondent's submissions

39. With reference to the Applicant's motion of 9 February 2011 and Order No. 47 (NY/2011), all references to the Applicant abusing her supervisor in the Respondent's closing statement are omitted in the following (see paras. 19-21 above).

The Applicant's e-PAS reports for 2007-2008 and 2008-2009

40. The Respondent's primary contentions concerning the e-PAS reports for 2007-2008 may be summarised as follows:

- a. The performance management system is designed to enhance performance of staff members in the context of a consultative management process, as expressed in sec. 2 of ST/AI/2002/3;
- b. The Applicant did not engage with her supervisor as she was required to do under ST/AI/2002/3, para. 2.2. The e-PAS rating represents a supervisor's expression of the extent to which a staff member has achieved, over the course of a year, mutually agreed performance goals. It is fundamental to this process that the staff member engages with his/her supervisor in order to ensure that the requirements of the procedure are completed and the underlying purpose of the management system is achieved;
- c. Under secs. 5 and 6 of ST/AI/2002/3, individual work plans are prepared by the staff member in consultation with his/her supervisors. Accordingly, the staff member must, with guidance from their supervisor, complete their work plan;
- d. As detailed in secs. 2.2 and 6.2 of ST/AI/2002/3, it is an important part of the e-PAS procedure that the staff member who is working to achieve the

goals of the work plan, has ownership over the process of drafting the work plan. Since it is their work plan, it is important that they express the goals that they will seek to achieve. For this reason, while her supervisor had assisted the Applicant by indicating to her that she may use the earlier work plan as a basis for the draft, he did not draft the work plan for her, which is not the intent of the e-PAS system and not the role of the supervisor;

e. It is standard practice for staff members to check with their colleagues to see how they have expressed their goals. It should not have been necessary for her supervisor to make this suggestion. If the Applicant had simply made the revisions that she had agreed to make, her work plan would have been finalised at the end of September 2007, at the same time as her colleagues;

f. The Applicant did not accept her supervisor's guidance. Instead of redrafting her plan, she simply re-submitted the same plan. By doing this, she rejected her supervisor's input and failed to participate in the "two-way process" mandated by sec. 2.2 of ST/AI/2002/3;

g. It is not disputed that the supervisor is responsible for the implementation of her e-PAS (sec. 7.1 ST/AI/2002/3), nor that responsibility for timely implementation of the e-PAS rests with the supervisor (sec. 7.4 ST/AI/2002/3). However, these provisions do not contemplate a situation where the staff member fails to honour agreements with their supervisor. In circumstances such as this, the staff member must bear responsibility for their behaviour;

h. Accordingly, the Applicant did not have a work plan because of her own failure. It was the Applicant's failure in October 2007 and December 2007 to revise her e-PAS, despite clear direction as to how she should go

about it, and her subsequent withdrawal from the process was the reason she did not have a finalized work plan. All other members of the Service duly completed their work plans following the circulation of the Service work plan in June 2007;

i. Ultimately, the Applicant's failure to submit a work plan obstructed the e-PAS procedures and no e-PAS was completed for the year 2007-2008;

j. However, under sec 6.6 of ST/AI/2006/3 (Staff selection system), the Applicant did not suffer any harm as a result of her not having completed her work plan. By not completing her work plan she avoided having her performance assessed.

41. The Respondent's primary contentions concerning the e-PAS reports for 2008-2009 may be summarised as follows:

a. The Applicant cooperated in the production of her work plan for the 2008-2009 e-PAS cycle. Accordingly, the required steps were completed;

b. The Respondent admits that he is unable to provide any detailed explanation as to why the end of cycle sign-off was late, but notes that the Applicant was absent from the office on sick leave for a period; however, it is unclear whether this had any impact on the late sign off.

The selection processes

42. The Respondent's primary contentions regarding the selection processes for Post 1 and Post 2 may be summarised as follows:

a. The candidates for Post 1 were assessed on the basis of their background and experience stated in their PHP and on their interview performance;

b. In addition to the PHPs, the interview panel would have received the most recent e-PAS of the candidates. Whether or not a candidate was able to submit a completed e-PAS did not impact on the assessment of their candidacy for the following reasons:

i. In the absence of an e-PAS, satisfactory performance was assumed. This assumption is mandated in sec. 6.6 of ST/AI/2006/3, which provides that where an e-PAS is not completed “the staff member shall be deemed to have fully met performance expectations during the period for which there is no performance record or appraisal”;

ii. The candidates were all internal candidates and satisfactory performance was assumed for all of the short-listed candidates;

iii. Finally, from a practical point of view, since different units within OPPBA had different compliance rates in terms of the timely production of e-PAS reports, the absence of an e-PAS did not reflect in any way on the staff member;

c. Accordingly, the Applicant received full and fair consideration for Post 1 and there is no merit to the allegation that her incomplete e-PAS impacted in any way on the selection decision;

d. As for Post 2, the Applicant failed to apply prior to the 30-day mark. She did not apply until 8 November 2007, when the assessment

exercise was complete and the recommendations had been sent to the CRC. As such, whether or not the Applicant's e-PAS had been completed was irrelevant to the outcome of the selection exercise.

Consideration

The e-PAS report for 2007-2008

The work plan

43. Both parties appear to agree that the Applicant's e-PAS report for 2007-2008 was delayed, due to the fact that the Applicant's work plan was not completed on time. The Tribunal will examine the issue in light of ST/AI/2002/3 (Performance appraisal system), which has since been abolished by ST/AI/2010/5, currently into force.

44. The Tribunal observes that the individual work plan forms the basis both for midterm performance review (see sec. 8 of ST/AI/2002/3, "In the middle of each performance year, the first reporting officer reviews with each staff member the manner in which the individual work plan has been carried out") and the eventual performance appraisal at the end of the performance year (see sec. 9 of ST/AI/2002/3, "Prior to the appraisal meeting [at the end of the performance year] between the first reporting officer and the staff member, the staff member should review the manner in which he or she has carried out the work plan defined at the beginning of the performance year ...").

45. Basically, without an individual work plan, neither of these obligatory assessments of a staff member's performance can be carried out, which also means that the e-PAS report cannot be completed.

46. The parties seem to disagree, as a legal matter, on who is to be responsible for completing the individual work plan under ST/AI/2002/3—the staff member or the first reporting officer.

47. Section 4.1 of ST/AI/2002/3 states (emphasis added):

4.1 A first reporting officer shall be designated for each staff member at the beginning of the cycle. *The first reporting officer is responsible for:*

- (a) *Setting the work plan with the staff member;*
- (b) Conducting the mid-point review and final appraisal;
- (c) Providing supervision on the overall work of the staff member throughout the reporting period.

48. From this provision, it directly follows that in addition to conducting the midterm review and the performance appraisal, as well as supervising the staff member, the first reporting officer is also responsible for “[s]etting the work plan with the staff member”.

49. Sec. 7.1 specifically states that “[h]eads of departments and offices are responsible for the implementation of PAS” and sec. 7.3 places the “primary responsibility” for the “timely execution” of the PAS upon the head of department/office, who also is responsible for overall compliance as well as consistent and fair implementation of the PAS procedures. Sec. 7.2 further clarifies (emphasis added):

7.2 *The head of the department or office shall hold all managers and staff with supervisory responsibilities accountable for the effective use of the PAS process as a management tool, and provide advice and recommendations where warranted. This shall cover all phases of the system, including the planning stage, establishment of the work plan, required competencies and planning for development, ongoing feedback, the mid-point review and the final appraisal.*

50. Accordingly, under ST/AI/2002/3, it is the duty of the first reporting officer, as well as the head of department and managers with supervisory authority to make sure that the staff member's individual work plan is completed on time.

51. Such interpretation is also in line with the notion that the first reporting officer is the staff member's supervisor and that the e-PAS is a "management tool" which not only empowers the supervisor but also holds her/him accountable and responsible for managing and motivating her/his staff, as per sec. 2. Otherwise, it would be left to the individual staff member to define her/his own role within the given work unit; this is a function that is obviously a management prerogative.

The Applicant's responsibility under ST/AI/2002/3

52. It is clear that a staff member has a responsibility and role to play under ST/AI/2002/3 regarding the e-PAS evaluation system. The Applicant herself recognizes that the e-PAS process is "not a unilateral assessment by the Administration" and that, under ST/AI/2002/3, sec. 2.2, the e-PAS is to "promote two-way communication between staff members and supervisors". Certain rights and corresponding obligations are attached to the staff member as a result.

53. Insofar as the individual work plan is concerned, after the head of department/office has developed the general "departmental and work unit plans" in consultation with the staff, the staff member is entitled to—and must—prepare a timely draft of this plan for further discussions with the first reporting officer. Before doing so, under secs. 6.1 and 6.2 of ST/AI/2002/3 (as recited below), the first reporting officer shall first meet with the given staff member, either individually or with the entire work unit, to ensure that s/he has understood the general plan for the given department/unit, and it is for the staff member to initiate the process in preparing the draft (emphasis added):

6.1 In the light of the departmental and work unit plans, *managers meet with the staff under their direct supervision to ensure that the objectives of the work unit are understood and annual individual work plans are drawn up*. Supervisors may meet with the staff in their work unit either as a group or individually.

6.2 The staff member works with the first reporting officer to devise the plan for the performance cycle and to determine the competencies that will be used to carry out the work plan. The work planning stage includes: (a) work plan; (b) competencies; and (c) planning for development, as follows:

(a) Work plan: *on the basis of the departmental and work unit plans, each staff member prepares, in a timely manner, a draft work plan for discussion with the first reporting officer*. The format of the work plan may vary depending on the functions of the staff member but must include goals and/or a statement of performance expectations for the reporting period. When more than one staff member performs the same function, performance expectations may be collectively developed, while allowing for individual variations where appropriate;

...

54. In the present case, the general work unit plan for the Applicant's office for 1 April 2007 to 31 March 2008 was "circulated to all staff for comments on 11 June 2007 and finally cleared and distributed on 18 June 2007". Thereafter, the Applicant submitted her first draft on 16 July 2007. Under the given circumstances, this submission would appear to be timely, as per sec. 6.2(a) of ST/AI/2002/3.

55. However, after discussing this work plan for two months, her first reporting officer suggested that her previous work plan for 2006-2007 should instead be used as the basis for the 2007-2008 work plan, and requested the Applicant to revise the work plan accordingly. On 26 September 2007, the Applicant's first reporting officer sent the Applicant the following email (emphasis added):

Further to our e-PAS discussions on 27 July and 24 September 2007, the workplan for the period 2007-2008 was returned to you yesterday,

for review and revisions with a view to making the plan more objective, measurable and specific. As I mentioned on 24 September, the 2006-2007 workplan could be used as the basis for 2007-2008. ...

56. Two weeks later, the Applicant instead submitted her original draft to her first reporting officer without any revisions. On 27 September 2007, the Applicant replied:

I acknowledge receipt of my workplan returned to me on 24 September, 2007 for review and revisions with a view to making the plan fore objective, measurable and specific. ... In order to improve the plan as you suggested, I would much appreciate proposed alternative language which would address in a timely manner your concerns.

57. As stated by the Respondent, the Applicant provided no explanation or justification for the resubmission of her original plan. She did not contact her supervisor prior to submitting the unrevised plan, nor did she explain why she had unilaterally decided not to implement what was agreed.

58. In light of the clear responsibility placed upon the staff member (here, the Applicant), the Tribunal does not consider the Applicant's response to the first reporting officer's 26 September 2007 email to be a sufficient or meaningful attempt to revise the work plan, as was suggested by the first reporting officer.

59. By asking for the Applicant's revision of the work plan, the first reporting officer was attempting to implement the provisions of ST/AI/2002/3 regarding e-PAS. Contrary to her contentions, the Applicant did *not* try to cooperate with the Administration "without success" to get her e-PAS completed; rather, it was the conduct of the Applicant herself that partially thwarted completion of the e-PAS for 2007-2008.

60. In this regard, by resubmitting the unrevised work plan, the Applicant was demonstrating behaviour that was fully consistent with the evaluation the Applicant had received during her competency-based interview for Post 1 (see para. 26 above): Under the category of “Planning and Organizing” the interview panel wrote that:

The Panel found the candidate’s response to be marginal at best, placing undue emphasis on the responsibility of the supervisor to identify priorities when in effect these should be routine decisions of the Incumbent without awaiting further instructions ...

61. Here, too, the Applicant placed “undue emphasis on the responsibility of the supervisor to identify priorities”, when the Applicant herself should have taken the suggestion of her first reporting officer and revised her work plan. It was not incumbent on the first reporting officer to have to “propose alternative language”, for that alternative language also may not have been acceptable to the Applicant. ST/AI/2002/3, sec. 6.2(a), requires each staff member to prepare, in a timely manner, a draft work plan for discussion with the first reporting officer.

62. What the Applicant desired was a one-way communication, not a two-way dialogue. The Applicant’s behaviour was not appropriate or cooperative, and it placed her first reporting officer in a difficult position. The Tribunal queries whether any conduct of the first reporting officer would have been satisfactory to the Applicant.

The Respondent’s responsibility under ST/AI/2002/3

63. Having determined that the Applicant’s behaviour regarding the 2007-2008 e-PAS was not appropriate or cooperative, the inquiry nevertheless must be made whether the Organization met its responsibilities under ST/AI/2002/3, in particular as it pertains to the preparation of the Applicant’s work plan. In this regard, ST/AI/2002/3 sets out the following provisions of relevance (emphasis added):

2.1 The purpose of the Performance Appraisal System (PAS) is to improve the delivery of programmes mandated by the General Assembly by optimizing performance at all levels. The PAS will achieve this by (emphasis added):

- (a) Promoting the desired culture of high performance and continuous learning;
- (b) *Empowering managers and holding them responsible and accountable for managing and motivating their staff;*
- (c) Encouraging a high level of staff participation in the planning, delivery and evaluation of work;
- (d) Recognizing successful performance and addressing underperformance in a fair and equitable manner.

...

4.1 A first reporting officer shall be designated for each staff member at the beginning of the cycle. *The first reporting officer is responsible for:*

- (a) *Setting the work plan with the staff member;*

...

7.2 *The head of the department or office shall hold all managers and staff with supervisory responsibilities accountable for the effective use of the PAS process as a management tool, and provide advice and recommendations where warranted. This shall cover all phases of the system, including the planning stage, establishment of the work plan, required competencies and planning for development, ongoing feedback, the mid-point review and the final appraisal.*

7.3 *Primary responsibility for the timely execution of the PAS rests with the head of department or office for overall compliance as well as consistent and fair implementation.*

...

64. The above relevant portions of ST/AI/2002/3 make clear that it is the Organization, through its head of department or office and supervisory managers

(including the first reporting officer), which remains ultimately responsible for the implementation of the e-PAS system, including the work plan.

65. The Tribunal recognizes that the first reporting officer was presented with a non-cooperative staff member in this case, but in such instances the responsibility for implementing the work plan remains with the Organization. The very purpose of an e-PAS is to assess a staff member's performance during the relevant reporting period (including whether the staff member has been cooperative and has met expectations, or not).

66. When presented with the Applicant's failure to comply with the first reporting officer's request to revise her work plan with a view to making the work plan "more objective, measurable and specific", and when the Applicant refused to do this by resubmitting her previous draft of the 2007-2008 work plan, the Organization was fully permitted, under ST/AI/2002/3: (a) to "set" the work plan (sec. 4.1); and (b) to address underperformance in a fair and equitable manner (sec. 2.1).

67. Faced with an uncooperative staff member, the Organization needs not sit helplessly on the sidelines, but is required to write an accurate e-PAS, whether or not the e-PAS is favourable to the staff member. If such an e-PAS ultimately has adverse ramifications on the staff member's career, including whether or not the staff member is retained within the Organization, then such is the function of the e-PAS system.

68. The Tribunal finds that the required procedures were not followed for completing the Applicant's electronic e-PAS reports for 2007-2008.

The e-PAS report for 2008-2009

69. It follows directly from the 2008-2009 e-PAS report that the Applicant's first reporting officer did not complete it until a year *after* the end of the reporting period (see para. 34 above).

70. In the Respondent's closing statement, his Counsel admits that the Applicant undertook all the required steps in a timely manner, and he cannot further explain why the one-year delay in completing the report occurred. In the closing statement, Counsel also requests for additional time to elucidate the matter, but since the dates are clearly established by the actual e-PAS report, any such submission would be unnecessary (see para. 34(a)-(e) above).

71. As already stated in the above, the Administration is responsible for implementing and completing the e-PAS report. A one-year delay in signing-off on an e-PAS report is clearly improper under sec. 9 of ST/AI/2002/3, which explicitly stipulates that the appraisal should be made "[a]t the end of the performance year". As admitted by the Respondent and demonstrated by her immediate counter-signing off the various steps in report (see para. 34(a)-(e) above), the Tribunal notes that the Applicant swiftly and diligently undertook her duties in the process.

72. The Tribunal finds that the required procedures for completing the Applicant's e-PAS report for 2008-2009 were not followed, and the Respondent is responsible for the delay.

Was the selection process for Post 1 proper?

73. Although the Applicant raises a number of specific criticisms concerning the selection process, it appears to the Tribunal that she admits that all relevant

procedures were followed, which also seem to be the case based on the facts presented to the Tribunal.

74. The Applicant in essence contends that, since her e-PAS reports were not taken into account when evaluating her candidature for Post 1 (as the e-PAS reports were not completed due to the mistakes of the Administration), she was not properly considered for Post 1. Instead, the relevant decision-makers had solely—and erroneously—relied on the results of competency-based interviews and a written test. The Respondent replies that the missing e-PAS reports did not impact the Applicant’s candidature, since she was deemed to have “fully met performance expectations”, in accordance with ST/AI/2006/3, sec. 6.6. This “fully met performance expectations” is a rating which all the other candidates were also assumed to have obtained.

75. The Tribunal observes that for a candidate to be successful in a selection exercise regulated by ST/AI/2006/3, s/he had to pass several hurdles prescribed in secs. 7.4 and 7.5 of ST/AI/2006/3. The first was to satisfy the “criteria pre-approved by the central review body”—a determination based on the written documentation provided by the Applicant, including her/his PHP and latest e-PAS reports (see sec. 7.4). If the candidate was found to meet “all or most of the requirements of the post”, s/he was short-listed (see sec. 7.5). The next hurdle was then to succeed in the “competency-based interview” and/or “other appropriate evaluation mechanisms, such as written tests or other assessment techniques” (see sec. 7.5). Such a competency-based interview was mandatory whenever dealing with a recruitment or promotion case (see sec. 7.5). Based on her/his performance at the competency-based interview and/or the other tests, if a candidate did not demonstrate that s/he had the requisite skills for the post, this would be sufficient for not recommending her/him for selection.

76. That the evaluation of the staff member's e-PAS reports and her/his performance at competency-based interview were separate steps in the evaluation process also follows clearly from sec. 9 of the selection guidelines, which states as follows:

... [Programme Case Officers] should indicate the basis for the evaluation (PHP, interview, PAS, or other evaluation mechanism). This is particularly important when the evaluation is based on information obtained through an interview rather than from written documentation submitted by the candidate.

77. In the present case, concerning the Applicant satisfying the criteria pre-approved by the central review body, even though the Applicant in terms of "experience" and "languages" was deemed to meet "only some of the requirements of the post" (i.e., not "all or most of the requirements" as per sec. 7.5 of ST/AI/2006/3), she was nevertheless short-listed for a competency-based interview.

78. Following the interview, the panel found that the Applicant did not possess the necessary competencies for the post, since she only met "some of the competency requirements for this post". The panel seems to have based this finding on what it perceived as some very significant deficiencies in the Applicant's competencies concerning planning and organizing ("[t]he Panel found the candidate's response to be marginal at best") as well as accountability ("[t]he Panel found the candidate's response to be weak"), as expressed in its evaluation of her (see para. 26 above).

79. Based on this, the Tribunal finds that even though some of the Applicant's e-PAS reports were not available for evaluating her candidacy, this ultimately did not impact the decision not to recommend her for Post 1, since the Applicant failed to convince the interview panel that she possessed the necessary competencies.

80. In addition, the Applicant has failed to demonstrate that she was actually harmed by these missing e-PAS reports—in any event, she made it to the competency-based interview, which indicates that she was deemed to have “fully met performance expectations during the period for which there is no performance record or appraisal” under sec. 6.6 of ST/AI/2002/4. For the same reason, despite the fact that the Respondent has now admitted that the Applicant actually complied with the language requirements for Post 1, the initially mistaken assessment of her language skills did not make any difference.

81. The Applicant additionally contends that the interview panel was biased and prejudicial against her, since all its members were former or current OPPBA staff members. It follows from a consistent practice from the Appeals and Dispute Tribunal that when an applicant alleges bias, or any other improper motivation, against her/him, the onus is on her/him to provide “sufficient evidence” to prove the contention (see *Parker* 2010-UNAT-012, and also *Bye* UNDT/2009/083). The Applicant has not been able to explain or substantiate why any potential job affiliation with OPPBA in itself would disqualify any of the panel members from sitting on the interview panel. In addition, there does not appear to be any other legal and/or factual basis that should *per se* exclude them from assuming this task. The Tribunal therefore rejects this submission of the Applicant.

82. The Tribunal finds that the selection process for Post 1 was proper and, accordingly, the Applicant’s appeal concerning this is dismissed.

Did the Applicant apply for Post 2 too late in time?

83. It follows from the facts enumerated at the outset that the Applicant applied for Post 2 too late in time and after the selection process had actually been completed (see sec. 7.1 of ST/AI/2006/3).

84. Since the Applicant applied for Post 2 too late in time and after the selection process had actually been completed, the Tribunal rejects the Applicant's appeal regarding the selection process for Post 2.

Compensation

85. In her application, the Applicant claims no less than two years' net base salary for all the violations of her "due process rights", including the late completion of her e-PAS reports for 2007-2008 and 2008-2009.

86. The purpose of compensation is to place the staff member in the same position he or she would have been in, had the Organization complied with its contractual obligations (see, for example, the Appeal Tribunal's judgment in *Wu* 2010-UNAT-042). Under *Antaki* 2010-UNAT-096, a compensation award may be for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury. Compensation may not be awarded where no harm at all has been suffered (see *Sina* 2010-UNAT-094 and *Antaki* 2010-UNAT-096).

87. The Tribunal awards the Applicant the sum of USD500 for the procedural violations of the delay in her e-PAS report for 2007-2008 and for the resulting stress caused to the Applicant.

88. Based on the case record, the Tribunal finds that the delay in the Applicant e-PAS report for 2008-2009 for over a year has caused the Applicant considerable and unreasonable stress for which the Respondent is to compensate her (see *Antaki*, paras. 20-21).

89. The Tribunal awards the Applicant the sum of USD3,000 for the procedural violation of the delay in her e-PAS report for 2008-2009 and for the resulting stress caused to the Applicant.

90. The Tribunal rejects the Applicant's request to order her immediate promotion to the P-4 level.

91. The Tribunal will not enter an order that the Applicant is to receive full and fair consideration for promotion, at the earliest possible date, to a suitable vacant post for which she is qualified and in which she may be interested, for it is up to the Applicant to demonstrate her competencies for any post for which she might apply.

Observation

92. With the Tribunal's analysis in this Judgment on the e-PAS within OPPBA, the Tribunal has placed responsibility for the so-called "e-PAS breakdown" on OPPBA. Clearly, something is amiss and remedial action needs to be taken within the department to ensure that timely e-PAS is completed for all staff members.

Conclusion

93. The Tribunal finds that the required procedures for completing the Applicant's e-PAS reports for 2007-2008 were not followed.

94. The Tribunal finds that the required procedures for completing the Applicant's e-PAS reports for 2008-2009 were not followed.

95. The Tribunal finds that the selection process for Post 1 was proper and the Applicant's appeal concerning this selection process is dismissed.

96. Since the Applicant applied for Post 2 too late in time and after the selection process had actually been completed, the Tribunal rejects the Applicant's appeal regarding Post 2.

97. The Tribunal rejects the Applicant's request for an award of reasonable compensation as the Tribunal sees fit, but in event no least than two years net base salary, for the continued violation of her due process rights, as the Tribunal finds that sum is not warranted in this case;

98. The Tribunal awards the Applicant the sum of USD500 for the delay in her e-PAS report for 2007-2008, the sum of USD3,000 for the delay in her e-PAS report for 2008-2009 and for the resulting stress caused on the Applicant. The Tribunal rejects all other pleas.

99. Under art. 10.5 of the Statute of the Dispute Tribunal, the Respondent shall pay the Applicant the total sum of USD3,500 as compensation. This sum is to be paid within 60 days of the date of this Judgment becomes executable during which period the US Prime Rate as at that shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Marilyn J. Kaman

Dated this 16th day of May 2011

Entered in the Register on this 16th day of May 2011

(Signed)

Santiago Villalpando, Registrar, New York