



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/071/
JAB/2006/066
Judgment No.: UNDT/2011/085
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

1. This is the second of three inter-related cases before the Dispute Tribunal regarding the following issues: the Applicant's electronic performance appraisal system ("e-PAS") reports from 2006-2009, her three unsuccessful applications to different P-4 positions, and her contention that she has been harassed and intimidated by the Administration for a number of years. The three cases are: UNDT/NY/2009/084/JAB/2009/048 (decided in a separate Judgment issued on 16 May 2011), UNDT/2010/071/JAB/2006/066 (the instant Judgment) and UNDT/2010/077 (to be rendered at a later date).

2. For a general overview of the issues in the three cases, the Tribunal refers to Judgment No. UNDT/2011/084 in Case. No. UNDT/NY/2009/084/JAB/2009/048.

3. As for the present case, based on the application to the Dispute Tribunal filed on 26 August 2009, the issues are defined as follows:

a. Issue 1: Whether the Applicant's electronic performance appraisal ("e-PAS") report for 2006–2007 was timely completed;

b. Issue 2: Whether the Applicant's candidature to the P-4 post in the Office of Programme Planning, Budget and Accounts ("OPPBA") with the vacancy number 06-ADM/DM-OPPBA-408902-R-New York ("the Post") was fully and fairly considered;

c. Issue 3: Whether management of OPPBA had intimidated and harassed the Applicant;

d. Issue 4: Whether the Joint Appeals Board ("JAB") was unduly delayed in rendering its Report No. 2034 considering Issues 1, 2 and 3.

4. In Order No. 30 (NY/2011) of 2 February 2011, based on a request by the Applicant, the Tribunal decided to handle the case on the papers, even though the Respondent had proposed to hold an oral hearing. The Tribunal's reasons were that the relevant administrative decisions of the case did not impose a disciplinary measure in accordance with art. 16 of the rules of Procedure of the Dispute Tribunal and that the parties did not appear to disagree on the facts of the case. In the Applicant's subsequent closing statement, with only a few insignificant additions, she also fully consented to the outline of facts that the Respondent had set out in his reply.

5. 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.

Scope of the case

The application is not time-barred and is receivable

6. In his reply, the Respondent contended that the application was time-barred and therefore not receivable. However, the Tribunal rejected this argument in Order No. 326 (NY/2010) of 10 December 2010 and reaffirms that finding now.

7. The United Nations Appeals Tribunal has in several cases emphasised the importance of adhering to time limits. For instance, in *Ibrahim* 2010-UNAT-069, it stressed "the importance of time limits". However, in *Mezoui* 2010-UNAT-043, while

underlining the importance of time limits, it declared the application receivable, even though it was untimely. The reasoning was the following:

20. Mezoui was caught in the transition between the old and new internal justice systems. In April of 2009 she requested an extension of the time-limit to file an application with the former Administrative Tribunal to 31 July. She contends that she received no answer, though one was surely sent. That letter granted an extension until 30 June, after which date the former Administrative Tribunal ceased to accept new cases. She sent another letter on 16 June. At that point it is questionable if anyone could have granted an extension—the new UNDT had not officially started, and the former Administrative Tribunal was winding down. And there was some understandable confusion because the cases which would have been commenced before the former Administrative Tribunal were to be commenced before the new UNDT, not the new United Nations Appeals Tribunal.

21. This case is limited to its specific facts, and we emphasize that this court has been strictly enforcing, and will continue to strictly enforce, the various time limits. The old system was perhaps too generous in extending or waiving time—we will not be. But this case was directly in the path of the changeover, and we grant some leeway here. We remand to the UNDT for consideration on the merits.

8. The Applicant's situation in this case was very similar to that of the Applicant in *Mezoui*. In both cases: (1) the Applicant had requested from the former United Nations Administrative Tribunal an extension of time in which to file their applications; and (2) such extension was granted with a time limit of 30 June 2009 (the last day of the functioning of the former United Nations Administrative Tribunal). Unlike *Mezoui*, the Applicant here, though, did not request for any further time extensions before the expiry of this time limit.

9. The Tribunal, nevertheless, takes note of the following additional facts in this case: the Applicant's personal circumstances that would excuse any requirement of strict adherence to time limits, namely the fact that the Applicant was self-represented and on extended sick leave at the time of the expiry of the time limit; the significant delays of the

JAB proceedings (the case was filed in 10 August 2006, but not decided by the JAB before 28 January 2009), compared to the relatively short delay on the part of the Applicant (her extended time limit for filing her application with the former Administrative Tribunal was 30 June 2009 (the last day of existence of the Administrative Tribunal), but she filed it with the Dispute Tribunal on 26 August 2009); and the Applicant's difficulties in finding out where to file her application due to the transition to the new system of internal justice. Further, soon after the expiry of the time limit, the Applicant was in a severe automobile accident, which further compounded the Applicant's difficulties.

10. Pursuant to art. 8.3 of the Statute and art. 35 of the Rules of Procedure, the Tribunal therefore confirms the finding of Order No. 326 (NY/2010) that the Applicant's case is exceptional, and allows her application for the abovementioned reasons and in the interest of justice. For further facts and analysis, the Tribunal refers to Order No. 326 (NY/2010).

Scope of Issue 1

11. In her application, the Applicant described Issue 1 as “[t]he failure to observe the Organization's Staff Regulations and Rules with regard to the timely and proper completion of the Performance Appraisal”. However, the Applicant failed to state exactly *which* specific e-PAS reports she was challenging.

12. The Tribunal reminds all staff members, including the Applicant, to present their claims with specificity. Even where a staff member is self-represented, the Tribunal is not obligated to accept applications that are imprecise, vague and ambiguous. To do so would be unduly wasteful of judicial resources.

13. The Tribunal observes that the former United Nations Administrative Tribunal has already adjudicated on the completion of the Applicant's e-PAS reports from 2001 to

2006 in its Judgments No. 1437 (the e-PAS reports covering 2001-2004) and No. 1462 (the e-PAS report covering 2005-2006)—matters in that relation are therefore now *res judicata* (see the United Nations Appeals Tribunal’s judgment in *Fagundes* 2010-UNAT-057).

14. Concerning the Applicant’s e-PAS reports for 2007-2008 and 2008-2009, the Tribunal notes that these were considered by this Tribunal as part of case No. UNDT/NY/2009/084/JAB/2009/048 in Judgment No. UNDT/2011/084.

15. The timeliness of the Applicant’s rebuttal of her e-PAS for 2006–2007 is to be dealt with by the Tribunal in case No. UNDT/NY/2010/077 (see Judgment No. UNDT/2011/084 for an overview of the Applicant’s related cases before the Dispute Tribunal).

16. Thus, the only issue remaining herein regarding the Applicant’s e-PAS reports is that of the preparation and completion of her 2006–2007 e-PAS report. In the Applicant’s comments to the Respondent’s closing statement, she spells this out by stating that:

The Tribunal will note that the case referenced by the Respondent, which is before the UNDT [in case No. UNDT/NY/2010/077] deals with [the rebuttal of] the e-PAS for period 2006–2007 but it does not deal with the preparation and completion of the [2006–2007 e-PAS] report. [Case No. UNDT/NY/2010/077] focuses on the delay of the Executive Office/Administration in considering my request for rebuttal. Therefore, this makes the subject matter of the cases distinct and separate from each other.

Scope of Issue 2

17. In her application, the Applicant described Issue 2 as follows: “The inadequate and unfair consideration of [the Applicant’s] candidature to fill vacant P-4 posts in [OPPBA]”.

18. As with her articulation of the e-PAS issue (paras. 11-12 above), the Applicant did not further explain for which specific posts she was contesting the consideration of her candidature; the only reference the Applicant made was to JAB Report No. 2034 of 28 January 2009, which merely concerned a post at the P-4 level of Programme Budget Officer, OPPBA. In the Respondent's reply, his Counsel identified a Vacancy Announcement No. 06-ADM-DM OPPBA-408902-R-New York ("the Post").

19. In the Applicant's closing statement—even though she states that she agrees with the facts presented by the Respondent in his reply, which only deals with the Post—the Applicant also makes the following reference to what appear to be three additional vacancy announcements (emphasis added):

21. A careful analysis of the [Programme Case Officer's] evaluations of my candidacy to fill a number of vacant posts in PPBD [Programme Planning Budget Division] from 2006–2007, including.... *VA:06-ADM-DM-40894 P4-OPPBA-VA; #07-ADM-415428; and VA-#07-ADM-DM-415191-R-New York* highlights the unfairness of management in evaluating my applications. There is a noticeable trend that suggests an attempt to conspire against my career interest by not giving full and fair consideration to my candidature. The Respondent claims that it followed the procedural steps as outlined in the Staff Rules but this is too easy an excuse. This was a facade to give the impression that the selection was properly done. ...

20. In the Respondent's closing statement, his Counsel maintains that the Applicant's present case only concerns the Post ("06-ADM-DM OPPBA-408902-R-New York").

21. In the Applicant's comments to this closing statement, the Applicant now changes here reference from three posts to two posts ("Two P4 posts in OPPBA"). While it is clear that the Applicant contests the selection exercise for the Post (06-ADM-DM OPPBA-408902-R-New York), the Applicant makes no reference to any other vacancy announcements.

22. As with the e-PAS issue, the Tribunal has had to spend an inordinate amount of time trying to determine which post is properly under consideration, and which post(s) are not properly before the Tribunal. For failure to present her claims with adequate specificity, the Applicant's claims in the future may be dismissed by the Tribunal as not stating a claim with sufficient specificity. A vague and ambiguous application is potentially a waste of judicial resources and the Respondent would be justified in moving to strike out such a vague application.

23. Nevertheless, the Tribunal in this case has examined the record. The Tribunal notes that the selection exercises related to "P4-OPPBA-VA#07-ADM-415428-R-New York" and "VA-#07-ADM-DM-415191-R New York" were considered by this Tribunal as part of case No. UNDT/NY/2009/084/JAB/2009/048 in Judgment No. UNDT/2011/084.

24. Accordingly, aside from the Post, the only remaining position which might conceivably be considered as part of the present case and which is mentioned in the Applicant's closing statement is "VA:06-ADM-DM-40894 P4-OPPBA". The Tribunal therefore assumes that this is the "second" post that the Applicant refers to in her comments to the Respondent's closing statement. However, in her comments to the Respondent's closing statement, the Applicant makes no references to this vacancy whatsoever, as all of her contentions solely focus on the Post (06-ADM/DM-OPPBA-408902-R-New York).

25. In other words, the only direct reference in any of her submissions to the Tribunal concerning "VA: 06-ADM-DM-40894 P4-OPPBA" is from her closing statement, which is recited above in paragraph 36. In examining this reference, however, it does not follow that the Applicant actually wishes to appeal the selection exercise regarding this post; her objections are merely of general character regarding how she felt that she was treated and none of them have any other relation to the specific matters of process in

question. If anything, her mentioning of that vacancy announcement rather appears to relate to Issue 3 concerning intimidation and harassment.

26. The Tribunal finds that the only selection exercise to be considered in the present case is therefore that concerning the Post (06-ADM/DM-OPPBA-408902-R-New York) (see also the Appeals Tribunal in *Planas* 2010-UNAT-049, para. 21: “[t]herefore, the UNDT was correct in finding that, as Planas did not contest in precise terms her non-selection for any post, she did not identify any administrative decision in her application”).

Scope of Issue 3

27. The Tribunal notes that the Applicant in her application defined Issue 3 as follows: “The continued, albeit sometimes subtle, level of intimidation, harassment towards [the Applicant] and abuse of authority by the management of OPPBA”. However, in her closing statement and her comments to the Respondent’s closing statement, she refers to “abuse of authority” and “retaliation”, instead of “intimidation”. Under the circumstances of the specific case, including the fact that the Applicant is self-represented, the Tribunal finds that these definitions are overlapping.

Facts

28. In the following, the Tribunal has attempted to group the facts with the relevant issues, wherever possible, but all facts within this Judgment are to be considered as a whole.

Issue 1: the preparation and completion of the Applicant’s e-PAS report for 2006–2007

29. In case No. UNDT/2010/077 concerning the rebuttal process for Applicant’s e-PAS report for 2006–2007, the Respondent attached the e-PAS report for 2006–2007.

Although this e-PAS report for 2006–2007 has not been formally submitted before the Tribunal in the present case by either party, with reference to Order No. 242 (NY/2010), and since the Tribunal could have ordered this report to be produced under art. 9.1 of the Statute and 18.2 of the Rules of Procedure, the Tribunal takes judicial notice of this e-PAS report as part of the evidence before it in the present case.

30. On 1 April 2006, the performance period for the Applicant for e-PAS report for 2006–2007 started.

31. On 13 April 2006, the Applicant submitted her work plan for 2006-2007, which was approved the same day by her first reporting officer, and in November 2006 her midterm review was conducted (this latter piece of information is taken from her e-PAS rebuttal for the e-PAS report for 2006–2007, dated 9 May 2008 (reproduced in Annex 5 to the application), and the Respondent has not objected to it in any of his written submissions to the Tribunal).

32. On 31 March 2007, the reporting cycle of the e-PAS report for 2006–2007 ended.

33. In Interoffice Memorandum of 7 December 2007 (Annex 10 to the application) titled “USG/DM 2007 Compact – Urgent Action Required”, the Under-Secretary-General for Management stated: “*I urge all managers to complete by the end of this month any outstanding e-PAS requirement for the period April 2006 through March 2007. The current status of DM’s [Department of Management] e-PAS compliance for the 2006–2007 evaluation cycle is as follows: OPPBA 54.0% ...*” (emphasis in original).

34. On 5 March 2008, the first reporting officer electronically signed off the e-PAS report for 2006–2007 providing his rating of and written comments to the Applicant’s performance during the reporting period—from 1 April 2006 to 31 March 2007. In these comments, which were drafted in present tense, the first reporting officer made some general, but critical remarks about the Applicant (amounting in total to two paragraphs of

seven and ten lines, respectively). On 8 March 2008, the second reporting officer signed the report off, making no further comments. On 1 April 2008, the Applicant electronically signed off the report, inserting her comprehensive and detailed observations to the first reporting officer's comments (five paragraphs, totaling 53 lines). All this information follows from the report.

35. On 7 April 2008, both the first and the second reporting officers physically signed the e-PAS report, and the Applicant did so on 10 April 2008.

Issue 2: the Applicant's candidature for the Post

36. 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 OPPBA at the United Nations Secretariat, New York, and was assigned to the Political, Legal and Humanitarian Service of the Programme Planning and Budget Division, OPPBA, effective 2 November 2001. She is currently working in this position.

37. On 2 February 2006, OPPBA issued the vacancy announcement for the Post, in which it was stated that the deadline for submission of applications was 3 April 2006. 163 candidates applied for the post and 23 candidates, each of whom was either a 15-day or 30-day candidate, including the Applicant (a 30-day candidate), were short-listed.

38. On 10 March 2006, the Applicant was invited for a written test. As one candidate did not respond, the remaining 14 candidates completed a written assessment. On 25 March 2006, following the written assessment, the Applicant was invited to participate in a competency-based interview, which took place on 10 April 2006. Aside from the Applicant, twelve other candidates were interviewed.

39. The panel concluded that five of the thirteen interviewed candidates met all or most of the requirements for the Post, based on a review of the available documentation, the written assessment and the results of the competency-based interview. The Applicant was not amongst the successful candidates and her evaluation, *inter alia*, read as follows (emphasis added):

... The Panel also noted that during the interview process, the candidate did not provide cogent examples in the area of communication or teamwork. The Panel was of the view that the candidate met a number of the requirements of the position, *however, she did not, through her responses, fully evidence grasp of the breadth and scope of exposure required for the functions at the higher level.*

40. A detailed assessment of all candidates who had been evaluated and interviewed was forwarded to the Central Review Committee (“CRC”), together with a list of the five recommended candidates. Following its consideration of the material provided, the CRC concurred with the Panel’s recommendation.

41. On 9 June 2006, the Applicant was verbally informed by the Chief, Service III, Programme Planning and Budget Division, that she had not been selected for the Post. On the same day, the Chief informed the Applicant by email that she had not been placed on the roster.

Issue 3: intimidation and harassment of the Applicant

42. In her application, the Applicant presents the following facts regarding her being intimidated and harassed:

a. [The Applicant] continues to experience subtle and open forms of harassment and intimidation. Even the JAB Panel considers her as stubborn and unyielding because she has failed to allow the Administration to abuse its authority and violate the Staff Rules and her rights. The culture within the UN is one of subservience and challenging the powerful administration is met with disdain and scorn.

... It is maintained that the JAB erred in its assessment of the Administration's actions and the working environment to which [the Applicant] have been subjected. It has failed to adequately consider the Respondent negative action that has been brought to bear on [the Applicant] over the last nine years.

43. In her closing statement, the Applicant makes the following submissions of factual character concerning intimidation and harassment:

- a. Since the day [the Applicant] filed [her] first case before the JAB in May 2004, [she] has been exposed to a hostile environment in which managers abuse their discretionary authority to deny [her] of an opportunity for career advancement;
- b. The retaliation is not always open but is carefully woven in with exercise of normal supervisory authority;
- c. [T]he JAB has contributed to level of harassment by considering her fight for justice as being uncooperative.
- d. [T]he problem is made worse by lack of enforcement of the whistleblower protection facility that the organization only cites in speeches but which is not implemented.

44. In reply, the Respondent contends that the Applicant has not produced any evidence of her being either intimidated or harassed.

Issue 4: delays attributable to the JAB

45. On 9 August 2006, the Applicant submitted her statement of appeal to the JAB.

46. Following constitution of a JAB panel on 23 October 2007, on 13 November 2007, the Panel met in executive session and considered the preliminary issues in the matter, resolving to request details of the evaluations of candidates from the CRC. Between November 2007 and May 2008, the Panel received further material and submissions to assist it in its deliberations.

47. In September 2008, following the retirement of the Panel's Chairperson and the reassignment of the Secretary of the Panel to another duty station, a new Panel was constituted to consider the case. Due to a heavy workload, one of the Panel Members was unable to attend panel meetings and he was replaced in December 2008. The Panel met in executive session on 15 December 2008 to consider the case.

48. On 28 January 2009, the JAB Report No. 2034 was unanimously adopted and signed by the Secretary of the JAB.

Applicant's submissions

General remarks

49. The Applicant is self-represented and although her submissions are generally well-drafted, they are not, from a strict legal standpoint, set out in a coherent manner, as many refer to issues not before the Tribunal in the present case. What follows is the gist of the Applicant's submissions, with direct quotes as much as possible. But where the submissions are repetitive, incomprehensible or do not touch upon subjects relevant to the present case, they have been omitted.

Issue 1: the preparation and completion of the Applicant's e-PAS report for 2006–2007

50. The Applicant's contentions regarding Issue 1 may be summarised as follows:

- a. In her closing statement, the Applicant submits that "an effort was made to conduct [her] PAS for the period 2006–2007", but in footnote 2 she states that "at the time of submitting my application the e-PAS for 2006–2007 had not been completed";

b. In her comments to the Respondent's closing statement, she contends that her e-PAS "was not prepared in a timely and proper manner by the officers who were under obligation of the Staff Rules to ensure that it was so prepared".

Issue 2: the Applicant's candidature for the Post

51. The Applicant's principal contentions regarding Issue 2 are the following:

a. [T]he broad discretion of the Secretary-General cannot be exercised in an arbitrary manner;

b. The interview panel consisted of 'favoured' individuals who have benefited from successive and multiple promotions in a short period in OPPBA, some of whom [the Applicant] have competed against at the P-3 level and they became the victor of the post.

c. Whether the Panel members prejudice [sic] toward [the Applicant's] candidacy was guided by a conflict of interest or by their loyalty to the former controller for their own promotions under the circumstances, any evaluation of [the Applicant's] applications to fill a P-4 post in OPPBA is tainted with bad faith and a subtle retaliation. PCO [Programme Case Officer]/OPPBA understood too well the impact of selecting [the Applicant] to the roster because they would have to consider [her] candidacy as an internal candidate and for this reason ensured that [she] would not be rostered;

d. In determining the fake/bogus scores, the PCO had to ensure that the scores assigned to [the Applicant] were marginally below the recommended minimum score, knowing fully well that from a legal standpoint, the Tribunal cannot substitute its judgment for that of the Secretary-General;

e. Most of the negatives expressed by the PCO in evaluating [the Applicant] candidature are issues that should/could be aptly and effectively addressed through e-PAS, had it been completed in a timely manner and if there were legitimate performance issues in the first place the e-PAS process would have been the appropriate time to address them and provide the necessary guidance to [her];

f. [The Applicant] met all the requirements of the post except for the one area which ... can be easily manipulated the area of 'Other skills' and subjectively report[ed] upon to give the impression that [the Applicant]

did not meet the requirement to fill the vacant post ... this competency alone ... carries only 15 marks of the overall competency interview of 100 marks. Whereas areas like Education and work experience carries the bulk of the score of 70 marks;

g. [T]he PCO/OPPBA Panel ... rate[d] [the Applicant's] candidacy an overall 80 marks out of 100 as follows: Work Experience: 40/45, Education: (the maximum) score of 25/25 and in Language: 10/15 the areas which are all substantively relevant requirements yet they seem not to have same decisive power as 'Other Skills' where they rated [her] a 5/15 the question is based on what? Particularly, in the absence of [her] formal e-PAS for an extended period. Having scored so high in all substantive requirements it is simply an injustice not to recommend [her] candidature to the CRC. It is arbitrary and wrong to have [her] candidature failed on the basis of the manipulated score under the least significant aspect of the vacancy announcement 'other skills';

h. [The Applicant] was successful at the written exam (the Respondent has yet to reveal the score received but it is assumed that [she] met the minimum qualifying grade/score);

i. [The Applicant's] candidature was deemed unsuccessful following the competency-based interview and written test;

j. If the recommendation was based solely on the outcome of the interview then it suggests that the process of evaluation in the recruitment process is like a 'Knock out', 'Playoff' or elimination process to use a sports analogy. i.e., one is knock off at any stage that he does not meet the recruitment standard and his scores are not accumulated and taken into account in the next round of evaluation;

k. [The Applicant's score] was not the lowest score ... Yet the PCO/OPPBA claimed that [the Applicant] did not qualify to be a P-4 Budget Officer at the UN after more than 10 years as a P-3 Budget Officer with another decade of relevant financial experience in the areas of accounting and auditing;

l. [T]wo other candidates, one internal to the Division and the other external scored 80 marks and they were both recommended by the PCO/OPPBA Panel to be placed on the roster;

m. [A]nother external candidate who scored 75 marks was given the benefit of the doubt and was also recommended by the PCO/OPPBA Panel to be rostered;

- n. As one of the only two internal candidates in the Division who both scored 80 marks for this post the other internal candidate was recommended for the roster and [the Applicant] was not;
- o. [T]he overall post recommendation went to an external candidates [sic] not having the budget specific skills prior to being selected ... [and] was the only candidate who could earn a perfect score in an area that is unique to the Budget Division;
- p. [The Respondent] wilfully did not recommend [the Applicant's] candidacy for the roster in 2006 and selected [her] to fill other P-4s in the Division;
- q. [T]he CRC has failed to perform its role as the check and balance mechanism in the staff selection system;
- r. [T]he evidence before the Tribunal cannot justify [the Applicant's] non recommendation to the CRC nor can it justify why the CRC would not question [her] non-inclusion among the list of recommended candidates as it has the statutory authority to do.

Issue 3: intimidation and harassment of the Applicant

- 52. The Applicant's principal contentions regarding Issue 3 are the following:
 - a. [Referring to the judgment in *Burlington N. & Santa Fe Ry. Co. v. White*, 2006:] ... retaliation against employees includes any acts that are 'materially adverse' to a reasonable employee—whether or not those acts result in a loss of pay, benefits, or any other privileges of employment [E]mployers can be held liable for retaliation absent taking a 'tangible employment action' such as firing, failing to promote, reassignment with significantly different job responsibilities or a decision causing a significant ... change in pay or benefits. It also includes any action that the employer that actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination. According to the court, retaliation claims so dangerous is that there are an infinite number of ways for an unwitting employer to do something that looks like retaliation even though it isn't intended to be. In fact, to prevail on a retaliation claim, there's no requirement that whatever the employee complained about in the first place was actually illegal. All that's required is that the employee reasonably believed s/he was complaining about something that was illegal;

b. The problem is made worse at the [United Nations] due to the delay in justice system the lack of accountability and the lack of enforcement of the whistleblower's protection facility;

c. Once a staff member files a case, report the failure to adhere to Staff Rules or attempt to report any wrong doing, the staff member is branded with the adjectives associated with words such as uncooperative, difficult, stubborn, obstinate, intransigent which are used to describe the staff.

Issue 4: delays attributable to the JAB

53. In essence, the Applicant's principal contentions are that: the delay of the JAB was not attributable to her; such a delay is a proper administrative decision; and the Respondent is liable for shortcomings of the JAB.

Respondent's submissions

Issue 1: the preparation and completion of the Applicant's e-PAS report for 2006–2007

54. The Respondent's principal contentions regarding Issue 1 may be summarised as follows:

a. The only evidence before the Tribunal is the Applicant's rebuttal submission, her response to comments submitted by the Administration on e-PAS rebuttal for the period April 2006–2007 and the rebuttal report;

b. Based on this, the Applicant has failed to discharge the burden of proof that falls on her to demonstrate that any delay in the e-PAS procedures was caused by the Respondent (referring to *Bye* UNDT/2009/083, para. 59).

Issue 2: the Applicant's candidature for the Post

55. In essence, the Respondent's contentions regarding Issue 2 may be summarised as follows:

- a. it is for the Applicant to establish that the interview panel biased against her, which she has not done;
- b. the candidacy of the Applicant was given full and fair consideration; and
- c. the Applicant's candidacy was not disadvantaged due to her e-PAS being incomplete.

Issue 3: intimidation and harassment of the Applicant

56. Effectively, the Respondent contends that the Applicant is to produce evidence that she has been intimidated and/or harassed, but that she has not managed to do so.

Issue 4: delays attributable to the JAB

57. The Respondent's principal contentions can be summarized as follows:

- a. The reason for delay in the hearing of appeals before the JAB was the systemic problems within the former system of justice, not any action or inaction on behalf of the Respondent. The former internal justice system suffered from a lack of staff and a lack of resources. For many years prior to the period complained of, and at the time the Applicant brought her appeal to the JAB, the Secretary-General was making consistent efforts to obtain additional resources and to speed up the JAB's work;

b. The Report of the Redesign Panel on the United Nations system of administration of justice, A/61/205, 28 July 2006 (para. 67), records that: “The entire process generally takes at least three years from beginning to end”. The report itself and the facts that it describes are so well known that they cannot be refuted;

c. The inadequacy of the former system provides both the justification and departure point for the new system of internal justice;

d. The Applicant commenced the JAB proceedings in August 2006 and the final report of the JAB was issued in January 2009, i.e., in two years and five months. While not being an insubstantial time for an appeal, this does not constitute undue delay under the former system;

e. Following the commencement of the appeal in August 2006, the Respondent provided his reply in October 2006 and, continuing until September 2007, the parties filed additional comments and observations with the JAB Secretariat;

f. In October 2007, following the submission of the final pleadings of the parties, a JAB panel was composed to consider the case. During November 2007, the JAB panel considered the material before it and requested additional documentation in regard to the selection process the subject of the case. The formal request for additional information was made in May 2008;

g. The systemic problems with the JAB confronted the panel in this case. The Panel’s chairperson retired and the Secretary was re-assigned to a new duty station. As a result, a second Panel needed to be constituted. This caused unavoidable delays to the proceeding. A second panel was composed in late September 2008. However, due to the heavy workload of one of the members of

the panel he was unable to attend second panel hearings. Thereafter, a third panel was constituted in early December 2008. This panel met in a timely manner on 15 December 2008 and submitted its report in an equally timely manner on 28 January 2009.

Consideration

Issue 1: the preparation and completion of the Applicant's e-PAS report for 2006–2007

58. The Applicant's contention concerns whether the e-PAS report for 2006–2007 was completed in time. From the facts, it directly follows that the first reporting officer only signed off the e-PAS report on 5 March 2008, which is almost one year *after* the end of the appraisal period, namely 31 March 2007.

59. As stated by this Tribunal in Judgment UNDT/2011/084, paras. 63–68 (the Applicant's first case), the Administration shoulders the responsibility for implementing, and therefore also completing the e-PAS report. A one-year delay in signing off 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”.

60. The Tribunal notes that the Respondent has not provided any explanation why the first reporting officer needed a full year to complete the Applicant's e-PAS report, and it is puzzling that the length of his final evaluation was eventually only seventeen lines in total.

61. Although not to be adjudicated here, the Tribunal also notes that the e-PAS evaluation was drafted using the present language tense, when it mostly related to a performance which was one to two years *previous* in time; as the critical remarks read, they clearly relate to then-contemporary issues. This suggests that the e-PAS evaluation did not properly reflect an evaluation of the Applicant's performance for the period 2006-

2007, but rather was an evaluation done using information gained later in time, which would be improper procedure. This shortcoming is further exacerbated by the fact that the Under-Secretary-General for Management had explicitly urged all managers to finish all “any outstanding ePAS requirement” by the 31 December 2007.

62. The Tribunal finds that the Applicant’s e-PAS report for 2006–2007 was not completed in a timely fashion and that the Respondent is responsible for this delay.

Issue 2: the Applicant’s candidature for the Post

The interview panel’s motivation

63. The Applicant contends that the interview panel was biased against her. It follows from the jurisprudence of the Appeals and Dispute Tribunals 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, e.g., also *Bye* UNDT/2009/083).

64. The Tribunal agrees with the Respondent that there is no evidence in the case record that the interview panel held any bias against the Applicant. Rather, it follows from the written evaluations of the interview panel of all the short-listed candidates (all admitted into evidence) that the panel gave each candidate a full and fair consideration. Neither do any of the standardised interview questions (also admitted into evidence) appear to have been drafted in bad faith—they all appear reasonably tailored to competencies relevant to the Post.

65. Accordingly, the Applicant’s submission that the interview panel was biased against her in consideration for the Post is dismissed.

The consideration of the Applicant's candidacy

66. With reference to art. 101.1 of the Charter of the United Nations stating that “[t]he staff shall be appointed by the Secretary-General under regulations established by the General Assembly”, and the consistent jurisprudence of the Dispute Tribunal (see, e.g., *Krioutchkov* UNDT/2010/068 and *Rolland* UNDT/2010/095), the Respondent, or anyone to whom he has delegated his authority, has a broad discretion in matters of staff selection and promotion. However, the Respondent's margin of appreciation is not unfettered as such decisions may not be tainted by ulterior motives or extraneous considerations. Accordingly, it is not for the Tribunal to replace the judgment of an interview panel, but to ensure that it followed procedure, and gave each candidacy a full and fair consideration (see *Krioutchkov*, para. 28).

67. The Tribunal observes that for a candidate to be successful in a selection exercise regulated by the now abolished ST/AI/2002/4 (Staff selection system), which was applicable at the time of the selection exercise, 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.

68. It clearly follows from the facts that the interview panel found that the Applicant was not suitable for the Post, since she did not fully demonstrate “grasp of the breadth and scope of exposure required for the functions at the higher level”. That the Applicant was awarded more points than a recommended candidate in some specific competences makes no difference, since the Applicant failed other competences, which the other candidate, on the other hand, passed. In addition, compared to a narrative evaluation that is clear in its conclusions, numerical scores are of no more than indicative value (see *Antaki* UNDT/2010/59, para. 47–48, later upheld by the Appeals Tribunal in *Antaki* 2010-UNAT-096).

69. The Tribunal finds that the Applicant’s candidature for the Post was fully and fairly considered.

70. The Applicant has not met her burden of proving that the decision of the interview panel regarding the Post was tainted by ulterior motives or extraneous considerations, and the Applicant’s contention in this regard is dismissed.

Impact of the missing e-PAS reports in the selection process

71. The Applicant appears to contend that her candidature for the Post was disadvantaged by some of her e-PAS reports having not been completed in time.

72. However, based on the above, the Tribunal finds that even though some of her e-PAS reports were not available for evaluating her candidacy, this ultimately did not impact the decision not to recommend her for the post, since the Applicant failed to convince the interview panel that she possessed the necessary competencies. In addition, the Applicant has failed to demonstrate that she was actually harmed by these e-PAS reports missing—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.

73. The Applicant’s (possible) contention concerning her missing e-PAS reports is therefore dismissed.

Issue 3: intimidation and harassment of the Applicant

74. The Applicant claims to have been intimidated and harassed by the management of OPPBA over the years.

75. Just as with the discussion of bias and other improper motivation (see para. 63 above), jurisprudence of both the Appeals and Dispute Tribunals makes it clear that if an applicant alleges to have been harassed, s/he must prove the contention by providing “sufficient evidence” (see *Parker*, and, e.g., also *Bye*). This Tribunal finds that this doctrine can also be extended to what the Applicant defines as “intimidation” (see para. 27 above).

76. Aside from her unsuccessful candidatures in addition to that for the Post (reference is made to the discussion concerning Post 1 and Post 2 in her first case, Case No. UNDT/NY/2009/084/JAB/2009/048) and the delayed completion of some e-PAS reports (reference is made to the discussion in Case No. UNDT/NY/2009/084/JAB/2009/048), the Applicant has not offered any evidence of specific incidents of what she considers to be either intimidation or harassment. Rather, she makes some general statements concerning a difficult relationship with a superior and the general management of OPPBA, which, however, is not corroborated by any proof.

77. The Tribunal finds that neither the repudiation of her candidatures, nor the delays to her e-PAS report (even if these are to be blamed the Respondent), amount to a finding of either intimidation or harassment in themselves. As for the delayed e-PAS reports, it

also follows from the Under-Secretary-General's message to managers, dated 7 December 2007, that 46% of "e-PAS requirement[s]" for the reporting period of 2006–2007 in OPPBA continued to be "outstanding" by that date. The problem of delayed e-PAS reports 2006–2007 was therefore not one that only related to the Applicant, but to almost half of the OPPBA; the Applicant's case was therefore not an isolated one, but a general trend in the entire office.

78. The Tribunal finds that the Applicant failed to meet her burden of proof in this regard and that management within OPPBA did not intimidate and/or harass the Applicant.

Issue 4: delays attributable to the JAB

79. In essence, the Respondent submits that any delays in the Applicant's proceedings before the JAB were of systemic character and therefore not his responsibility, and that the Applicant's case, in any instance, was not improperly delayed since it only took two years and five months for the JAB to complete the process (the Applicant submitted her appeal to the JAB on 9 August 2006, which issued its report on 28 January 2009).

The Respondent's responsibilities for shortcoming of the JAB

80. Under former staff regulation 11.1, the Respondent was to:

... establish administrative machinery with staff participation to advise him or her in case of any appeal by staff members against an administrative decision alleging the non-observance of their terms of appointment, including all pertinent regulations and rules.

81. In former staff rule 111.1, the Respondent consequently established the JAB and set out the general provisions regarding its composition and procedures. On that basis, in *Bridgeman* UNDT/2011/018, the Tribunal there found that the Respondent would also be

responsible for any delays and/or flaws in the proceeding of the JAB (referring also to the former United Nations Administrative Tribunal in Judgment No. 1047, *Helke* (2002)).

82. This Tribunal affirms this finding, and wishes to add that the Respondent, as the Chief Administrative Officer of the Organization pursuant to art. 97 of the Charter of the United Nations (even though he, or to whom he has delegated his authority, may not personally be responsible for a mistake or a delay), is vicariously liable for the proper functioning of the Organization, also for damages committed to his own employees (under the doctrine of *respondeat superior*).

Was there undue delay?

83. Whether undue delay occurred depends on the specific circumstances of the case in question. From the facts of this case, it follows that from the time Applicant filed her appeal with JAB (9 August 2006) and until a panel was constituted (23 October 2007) more than one year and two months elapsed. The Respondent has not provided any explanation for this delay.

84. After the panel was constituted (23 October 2007) and until it issued its report (28 January 2009), another one year and three months passed. During this time period, the panel had its first executive session, the parties submitted material to it, a new panel had to be constituted, a member withdrew from this panel, it held a second executive session and it drafted its report.

85. The Tribunal finds that an undue delay occurred in constituting the JAB panel and that the Respondent has not been able to explain why a mere administrative matter would take more than one year and two months to accomplish.

86. After the panel was constituted, however, it seemed to have worked with the necessary due diligence that must be expected of such a quasi-judicial body.

87. The Tribunal finds that the JAB was unduly delayed in constituting a panel.

Compensation

88. Based on all of the foregoing, the Tribunal finds that the Respondent is liable for:

- a. The improper delay in completing the Applicant's e-PAS report for 2006–2007 ; and
- b. The undue delay in constituting a JAB panel.

89. In her application, the Applicant claims no less than one year's net base salary for all the violations of her "basic employment rights". Of relevance to the identified liabilities of the Respondent, the Applicant also claims that the Respondent shall pay punitive/exemplary damages. However, the Tribunal notes that it does not have the power to award such damages under the Statute (see art. 10.7).

90. Based on the case record, the Tribunal finds particularly that the delays in completing her 2006–2007 e-PAS report, but also in constituting a JAB panel, have caused the Applicant considerable and unreasonable stress for which the Respondent is to compensate her (see paras. 20-21 the Appeals Tribunal in *Antaki* 2010-UNAT-095).

91. The Tribunal therefore awards her the total sum of USD3,000.

Conclusion

92. The Tribunal finds that the Applicant's electronic performance appraisal ("e-PAS") report for 2006–2007 was not completed in a timely fashion and that the Respondent is responsible for the delay.

93. The Tribunal finds that the only selection exercise to be considered in the present case is that concerning the P-4 post in the Office of Programme Planning, Budget and Accounts (“OPPBA”) with the vacancy No. “06-ADM/DM-OPPBA-408902-R-New York” (“the Post”).

94. The Applicant’s submission that the interview panel was biased in consideration for the Post against her is dismissed.

95. The Tribunal finds that the Applicant’s candidature for the Post was fully and fairly considered.

96. The Tribunal finds that the Applicant has not met her burden of proving that the decision of the interview panel regarding the Post was tainted by ulterior motives or extraneous consideration.

97. The Applicant’s (possible) contention concerning her missing e-PAS reports is dismissed.

98. The Tribunal finds that the Applicant failed to meet her burden of proof in this regard and that management within OPPBA did not intimidate and/or harass the Applicant.

99. The Tribunal finds that an undue delay occurred of one year and three months in constituting the panel, that the Joint Appeals Board (“JAB”) was unduly delayed in rendering its Report No. 2034 and that the Respondent has not been able to provide any reasonable explanation for this delay.

100. The Tribunal finds that the Respondent is liable for:

- a. The improper delay in completing the Applicant’s e-PAS report for 2006–2007; and

b. The late constitution of the JAB panel.

101. The Tribunal finds that the Applicant is entitled to the total sum of USD3,000 as compensation in this case.

102. Under art. 10.5 of the Statute of the Dispute Tribunal, the Respondent shall pay the Applicant the total sum of USD3,000 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 applicant as at that shall apply. If the sum is not paid within the 60-day period.

(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