



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/104
Judgment No.: UNDT/2011/197
Date: 21 November 2011
Original: English

Before: Judge Coral Shaw

Registry: New York

Registrar: Hafida Lahiouel

GABRIEL-VAN DONGEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
François Lorient

Counsel for Respondent:
Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant contests two administrative decisions: (i) the alleged decision not to carry out her performance evaluation for the period of 1 May 2005 to 31 March 2006 in a lawful manner and in accordance with the established procedures; and (ii) the decision to reassign the Applicant from the functions of Director, Americas and Europe Division (“AED”), Department of Political Affairs (“DPA”), to the functions of Director of the Special Project for Charter Analysis, DPA.

2. The Applicant requests the Dispute Tribunal to grant equitable relief as well as monetary compensation and costs.

Legal issues

3. At the two case management hearings held by the Tribunal, the parties agreed on the substantive legal issues before the Tribunal, namely:

a. Was the evaluation of the Applicant’s performance for the period of 1 May 2005 to 31 March 2006 carried out in a lawful manner and in accordance with the established procedures?

b. Was the Applicant lawfully reassigned?

c. If the Applicant’s rights were violated, what is the appropriate remedy?

4. However, at the substantive hearing held on 25–27 October 2011, Counsel for the Applicant submitted that the Applicant wished to reserve issues related to the Applicant’s allegations of harassment for a separate hearing or mediation proceedings. Counsel for the Respondent objected to this request on the grounds that the case should be dealt with fully at the hearing. The Tribunal made an oral ruling at

the hearing, rejecting the Applicant's request and advising the parties that its ruling would be provided in writing. This written ruling was provided to the parties by Order No. 252 (NY/2011), dated 28 October 2011. The Order stated that the Applicant was bound by the scope of her application to the Tribunal, which was limited to the two administrative decisions identified in para. 1 above.

5. The Tribunal found that the claim of harassment was not a separate substantive claim in the application, but was only referred to in the context of the two contested administrative decisions in this case, as well as in the Applicant's claims for exceptional relief (i.e., as a possible aggravating factor). There is no separate, independent claim of harassment before the Tribunal. The Tribunal ruled that there would be no separate hearings in relation to any issues of harassment outside of the scope of this case.

6. In accordance with that Order, to the extent that references to harassment are contained in the present application, they were addressed in the course of these proceedings. The synopses of the Applicant's evidence and of the evidence of other witnesses, provided before the hearing, covered in significant detail various aspects of the contested decisions, including claims that the two contested decisions constituted harassing behaviour. It was open to Counsel to cross-examine each other's witnesses in relation to these claims and it was a matter of their judgment whether they took that opportunity at the hearing.

7. There were a number of additional matters raised in the Applicant's extensive documentation, including with respect to the proceedings of the Joint Appeals Board ("JAB"), but the Applicant did not pursue these matters before the Tribunal.

8. It is common cause that the Applicant's separation from service on medical grounds is not an issue before the Tribunal. The Applicant neither sought administrative review of that decision nor contested her separation in her application.

9. At the commencement of the hearing, Counsel for the Applicant indicated that he wished to restrict the scope of the case. Although he wished to address the issue of compliance with the electronic performance appraisal system (“e-PAS”) process, he did not want to have the question of the Applicant’s performance canvassed.

10. It is not the role of the Tribunal to re-evaluate the performance of any staff member. However, in this case, as agreed by both Counsel at the case management hearing of 30 August 2011, the process used to evaluate the Applicant’s performance is a central issue. Once the issue of whether the process was fair was raised, inevitably the Applicant’s performance was brought up by the witnesses. It is also discussed in the documents in the context of performance management. For this reason, the case could not be strictly limited in the manner sought by Counsel for the Applicant.

11. At the hearing held on 25–27 October 2011, the Tribunal received testimony from the Applicant and eight other witnesses, including the Applicant’s former first and second reporting officers and other staff members of DPA who had worked with her.

Facts

12. The Applicant, Ms. Lara Gabriel-van Dongen, joined the United Nations Secretariat in New York on 1 May 2005 as Director, AED, at the D-2 level on a two-year fixed-term contract. In that role, she was the first reporting officer to several D-1 staff members who reported to her.

13. At the time she took up her appointment, the Applicant’s first reporting officer was Mr. Danilo Türk, Assistant Secretary-General for Political Affairs, and her second reporting officer was Mr. Kieran Prendergast, Under-Secretary-General for Political Affairs. They prepared a work plan for the Applicant when she took up her position. Although the Applicant was aware of the agreed work plan, it was not entered into e-PAS and no official record of it exists.

14. Mr. Türk left the Organization on 27 June 2005 and Mr. Prendergast left on 30 June 2005. According to the Applicant, they had expressed a high degree of satisfaction with her performance in May and June 2005, although this was not documented.

15. The new Under-Secretary-General for Political Affairs, Mr. Ibrahim Gambari, assumed his functions on or around 1 July 2005 and acted as the Applicant's first reporting officer until the replacement Assistant Secretary-General for Political Affairs, Ms. Angela Kane, took up her post on 1 December 2005.

16. Not long after assuming his duties, Mr. Gambari began to receive adverse written and oral comments about the Applicant's performance from senior staff who attended the daily DPA morning meetings as well as from outside parties, including from ambassadors. Mr. Gambari also personally observed her interaction with her colleagues and her performance when she accompanied him to meetings with ambassadors and high-ranking officials.

17. In view of the feedback received about the Applicant, Mr. Gambari asked Ms. Judith Karam, his Special Assistant, to prepare talking points for him to take to the first one-on-one meeting with the Applicant on 3 November 2005. Notes of the meeting were taken by Ms. Magali Gutierrez, Administrative Officer, DPA Executive Office. These notes record that Mr. Gambari raised a number of performance-related concerns with the Applicant. She asked if "she was being let go", but he said no, it was an opportunity for her to reflect on the complaints and to convince him that these observations were not warranted. He said it was his responsibility to bring matters to her attention for her to reflect upon. He wanted to meet again in two months. Later in the day, at another meeting with him, she said that she wanted to learn and asked for the parameters of the meeting in two months. Mr. Gambari told her that he would like to see an improvement in all areas. The Applicant was given a copy of the notes of that meeting and, on 11 November 2005, sent a response, in which she gave what she called a more complete reply to the allegations.

18. On 15 November 2005, during a morning meeting of DPA Directors, the Applicant made remarks about the political situation in a Central American country that were regarded by those attending the meeting as inappropriate. The Applicant later wrote a note explaining what she had said and the next day sought a meeting with Ms. Kane, who was yet to take up her new post as Assistant Secretary-General for Political Affairs.

19. There is a dispute about how the meeting of 16 November 2005 was set up and what was said at it. The Applicant told the Tribunal that she was making a courtesy call to offer briefings, but, at the beginning of that meeting, Ms. Kane informed her that she did not want her in the Division and she should consider resigning. Ms. Kane denies that. She said at the hearing that the Applicant had called for an urgent meeting and Ms. Kane had agreed to it on the assumption that there was some political crisis. Ms. Kane made a contemporaneous note of the meeting, which sets out, in some detail, both the substance and the tone of the meeting. Ms. Kane's note of this meeting reflects that the Applicant spoke about her managerial and substantive performance and stated that she had thought about resigning because of attacks on her from colleagues over matters she described as most ridiculous, such as the incident that had occurred the day before about her remarks on the Central American country.

20. In light of the contemporaneous notes of the meeting, the Tribunal is satisfied that the Applicant, who did not have her own note of that meeting, has not properly recalled it and may have confused what was said then with later meetings. The Applicant's account is also improbable given that Ms. Kane had not yet taken up her new position and, although she had heard some talk about the Applicant's performance issues, had not received any formal briefings on this. Finally, in a later note dated 26 December 2005, in which she recalled this meeting, the Applicant said that Ms. Kane had informed her that she needed to get things under control, that it was up to her, and that she had a lot to overcome. There was no mention in that note

that she had been told to resign. The Tribunal is satisfied that Ms. Kane did not say that at that meeting and accepts her version of what was said.

21. On 1 December 2005, when Ms. Kane assumed her new position, she became the Applicant's first reporting officer. The Applicant alleged in her testimony that Ms. Kane was absent for much of December 2005 and would not have had a chance to properly evaluate her performance that month. Ms. Kane agreed that she travelled often, but stated that she was only absent for several days in December 2005 and was still in constant touch electronically. Ms. Kane testified that, after she assumed her functions on 1 December 2005, she had regular daily meetings with the Applicant regarding the work of AED, and, in addition, several extensive meetings that specifically concerned her performance.

22. On 23 December 2005, Ms. Kane met with the Applicant about her performance. Again, there was a difference in the accounts of the meeting given to the Tribunal. The Applicant told the Tribunal that Ms. Kane had said that she should resign as she was a failure at her job. Ms. Kane gave evidence that this was a meeting on performance-related issues and that she raised some shortcomings in the Applicant's performance, but the Applicant did not accept any of them. They discussed the interpersonal dynamics in AED and Ms. Kane spoke of her own professional experiences in an attempt to counsel the Applicant. Ms. Kane told the Tribunal that, at the meeting, the Applicant enquired about her legal status, to which Ms. Kane replied that the Applicant had a two-year contract, that her performance would be reviewed, and that she should reflect on her position in DPA.

23. Ms. Kane made a contemporaneous note of this meeting for Mr. Gambari and personally gave a copy to the Applicant. The Applicant produced a reply note three days later. These notes show some divergence, but cover similar areas, except for the topic of the Applicant's curriculum vitae, which Ms. Kane does not recall. Ms. Kane felt that the note subsequently prepared by the Applicant was incorrect and, therefore,

decided that all future meetings about performance should be conducted with a note-taker to avoid inaccuracies.

24. On 6 January 2006, Ms. Kane asked the Applicant if she had complied with the e-PAS process. She had not, so Ms. Kane provided the Applicant with a copy of the guide to the e-PAS process to assist her. After some delays the Applicant produced a hard copy of her work plan on 19 January 2006, in which she indicated that she had received a copy of the work plan for AED.

25. In the meantime there were continuing complaints about the Applicant's performance, including from outside stakeholders. A note to the file, dated 19 January 2006, records that a meeting of staff with Ms. Kane to discuss, *inter alia*, management issues in AED, centered on the Applicant's performance.

26. On 23 January 2006, Ms. Kane and the Applicant had a meeting to discuss her work plan. It was apparent to Ms. Kane that the Applicant did not appear to be familiar with the process and needed guidance on correctly formulating such a plan. Ms. Kane told the Tribunal that the draft work plan provided to her by the Applicant listed her regular responsibilities and trips she wanted to undertake, whereas what was expected of her was, in effect, a more general programme of work based on her vacancy announcement and the Division's work plan. By the end of the meeting it was agreed that the Applicant would revise the work plan and then they would sit down together to finalise the mid-term cycle review around 11 or 12 February 2006.

27. On 6 February 2006, the Applicant submitted her work plan to Ms. Kane, who approved it on 10 February 2006. The e-PAS report was by then in electronic form.

28. Ms. Kane had another meeting with the Applicant on 15 February 2006 to discuss her performance issues. A note-taker (Ms. Ann de la Roche, Executive Officer, DPA) recorded the meeting. The note indicates that, having gone over the specific concerns, Ms. Kane acknowledged that the Applicant worked hard, but the job was not going well. Ms. Kane noted that the situation was difficult and that AED

staff members were ready to walk out. She said there were two options: a buyout or working through the performance evaluation system, which would result in a negative evaluation. Ms. Kane did not want to go the e-PAS route if it could be avoided by a transfer. She asked the Applicant to think about it. They discussed other possibilities, including working in the field and exploring other opportunities with friends and professional connections. The Applicant told Ms. Kane she did not want to leave the UN and would look for other positions.

29. On 3 March 2006, Ms. Kane met with the Applicant again in the presence of Ms. Gutierrez, who took notes. The purpose was to get an update on the available options, as well as to discuss some performance issues. The Applicant rejected the buyout option and said she was looking for another post. She added that if she received a negative e-PAS report or if Ms. Kane was not helpful, it would indicate lack of cooperation on Ms. Kane's part. Ms. Kane said she could not be responsible for finding her a job, but would support her with respect to specific posts. She reminded her that the deadline for completing the e-PAS cycle was approaching and she could not draw out the process indefinitely. If there was no progress, she would have to complete the e-PAS report. The Applicant replied that the e-PAS report was only due after the end of March 2006. There was a discussion with Ms. Gutierrez about the timeliness of the e-PAS procedure.

30. Ms. Kane subsequently made some enquiries about possible postings for the Applicant.

31. Throughout this time there was increasing unrest amongst the staff members in AED about the Applicant's leadership. Some of them met with Mr. Gambari on 5 April 2006, after which Mr. Gambari formed the view that the situation was becoming intolerable.

32. Although Ms. Kane and the Applicant had a number of meetings regarding her performance, the mid-point review was not formally finalised in the e-PAS until 6 June 2006. The evidence indicates that the finalisation was delayed at the

Applicant's request, to allow her to apply for other jobs without being prejudiced by a negative performance evaluation. The Applicant denies this. However, Ms. Kane's evidence is supported by a notation made by her in the e-PAS on 6 June 2006, which stated that "[u]pon [the Applicant's] request, the completion of the PAS process was delayed", as well as by Ms. Gutierrez's note of the meeting between Ms. Kane and the Applicant of 3 March 2006.

33. When she received the mid-point review, the Applicant responded the same day that she would not sign it and that she would contest it. On 15 June 2006, Ms. Kane emailed the Applicant, pointing out that the e-PAS procedure had been explained to her and the e-PAS report had still not been returned. Ms. Kane said: "[I]ts completion is thus being further delayed. If you will not return the e-PAS to me, I will take this as a refusal and proceed accordingly".

34. The Applicant signed off on her e-PAS mid-point review on 22 June 2006. However, the e-PAS process remained with the Applicant as she needed to initiate the end-of-cycle appraisal process. After the mid-review point, the e-PAS report for the period of 1 May 2005 to 30 March 2006 was not completed.

35. On 12 July 2006, the staff members who had met with Mr. Gambari on 5 April 2006 prepared a note about the continuing problems in AED, expressing concerns with the Applicant's leadership, discussing the continuing problems in AED, and asking to be informed what steps were contemplated to remedy the situation.

36. Ms. Kane continued to monitor the Applicant's performance and, on 4 August 2006, sent an email expressing dissatisfaction with how she had handled some AED issues and asking her to "exert better quality control, both in substance and presentation".

37. On 11 September 2006, Mr. Gambari had another meeting with senior staff members of AED at their request. The staff members expressed their dissatisfaction

with the performance of the Applicant, stated that the problems with her performance had been evident for over a year, and requested him to take prompt action to resolve the problem.

38. On 15 September 2006, Ms. Kane met with the Applicant and informed her that her contract would not be renewed and that consideration was being given to reassigning her laterally. The Applicant's note of the meeting confirms that this is what happened. She told the Tribunal that by that stage she was worn down by the criticism. She was also starting to suffer from a recurrence of a prior serious illness.

39. It appears that, sometime in September 2006, the Applicant requested a Permanent Representative to the United Nations to speak about her situation to Mr. Gambari, to make sure he was aware of the matter. Mr. Gambari did not recall this conversation as it took place many years ago and, in any event, he was careful not to be influenced by any outside parties in managing his department. If the Applicant's name did come up in one of the conversations between the Permanent Representative and Mr. Gambari, the Tribunal is satisfied that there was no untoward pressure either way, and that nothing followed from this exchange.

40. On 26 September 2006, the Applicant began an extended absence on sick leave.

41. Mr. Gambari had had talking points prepared for a meeting with the Applicant and asked Ms. Kane on 2 October 2006 to speak to her when the Applicant returned from medical leave on 10 October 2006. He wanted to inform her that she would be devoting herself full time to the Special Project for UN Charter Analysis. He explained to the Tribunal that this was important work requested by the General Assembly, but which had fallen behind. As a result of the Applicant's new assignment, two D-1 level staff members (the Applicant's deputies) would jointly manage AED.

42. On 4 October 2006, Mr. Gambari met with the Office of Human Resources Management (“OHRM”) to discuss various courses of action to deal with the Applicant’s situation. He also sent a note to the Chef de Cabinet of the Secretary-General, advising that the Applicant had refused to complete her final portion of the e-PAS evaluation for May 2005 to March 2006 so that “[they] have not even been able to document her performance for the official record”; that the Applicant would be notified of her non-extension beyond 30 April 2007; and that he had asked the Assistant Secretary-General, DPA, to ascertain whether the Applicant would accept an agreed termination. Should the Applicant refuse it, she would be given a special assignment and would no longer serve as the Director of AED until the expiration of her contract.

43. During this time Ms. Kane made attempts to contact the Applicant to meet with her. Ms. Kane scheduled a meeting on 13 October 2006, the day after the Applicant returned from sick leave, but the Applicant reported sick on that day. The same occurred on Monday, 16 October 2006, and, when Ms. Kane rescheduled for Tuesday, the Applicant said she would be out until Friday, 20 October 2006. Ms. Kane said that the Applicant never apologised for missing the meetings, she just “went silent”.

44. Ms. Kane was also told that the Applicant had made an appointment for 18 October 2006 to see someone in the office of the Secretary-General at 3:30 p.m. That morning, she called the Applicant’s mobile telephone and asked her to read an email that would be sent to her immediately. At 10:48 a.m., Ms. Kane sent an email to the Applicant, telling her that she had wanted urgently to meet with her for several weeks and suggested, since she would be in Headquarters, that they meet at 2:45 p.m. before the Applicant’s meeting in the Secretary-General’s office. The email contained two attachments: a note advising her that she was assigned to work on the UN Charter Analysis Project and a note from Mr. Gambari to DPA management confirming his decision to reassign the Applicant.

45. The Applicant denies that she received this call on 18 October 2006 or that any efforts were made to meet with her. However, the events of 18 October 2006 were recorded in a note of the same date, prepared by Ms. Karam, which reflects the sequence of events, including the calls to the Applicant. In addition, Ms. Kane email, sent at 10:48 a.m. on 18 October 2006, specifically referred to “[their] telephone conversation just now”. Further, the next day the Applicant called her former Secretary and asked for Ms. Kane’s message to be forwarded to her personal email. On the basis of the evidence given, the Tribunal is satisfied that the Applicant knew of the appointments made, that Ms. Kane did speak to her on 18 October 2006, and that she did receive the email and the notes advising her of her change of functions.

46. On 30 November 2006, the post of the Director of AED was advertised on Galaxy, the UN’s job website.

47. The Applicant subsequently applied for disability in connection with her illness. Her fixed-term contract, which was due to expire on 30 April 2007, was extended pending the decision on her application for disability. In May 2007, prior to her separation, she had been given an automatic within-grade increment, but it was later determined that this increment was incorrectly applied and it was reversed. In June 2007, the Applicant started receiving disability payments. On 25 June 2007, she was separated on the grounds of disability.

48. The Applicant requested administrative review of the decisions and, subsequently, submitted a statement of appeal to the JAB. On 26 September 2008, the JAB issued its report, rejecting her appeal. By letter of 19 November 2008, the Deputy Secretary-General informed the Applicant that the Secretary-General had agreed with the findings of the JAB and decided to take no further action in her case.

Applicant's submissions

49. Based on the written and oral submissions given in the course of this case, including at the hearing, the Applicant's primary contentions may be summarised as follows:

a. The Administration failed to comply with the established performance evaluation procedures. Both Mr. Gambari and Ms. Kane failed to provide proper supervision, guidance, and mentoring to the Applicant. The Applicant was never properly familiarised with the e-PAS procedures when she joined the Organization. Mr. Gambari participated only in two performance meetings during her employment. The meetings the Applicant had with Ms. Kane, who was biased against her, were tense and stressful. The Applicant was subjected to hostile environment;

b. A number of violations of the e-PAS procedures took place, including:

(i) Ms. Kane did not consult with her previous first reporting officer, Mr. Türk, and the previous second reporting officer, Mr. Prendergast, which resulted in the exclusion of her achievements in the period of May to December 2005 from the mid-point and end-of-cycle reviews;

(ii) There was no formal performance improvement plan;

(iii) The Applicant never agreed to combine her mid-point review with the end-of-cycle review. The Applicant was entitled to a six-month period between her mid-point review and the completion of the performance period to allow for improvements in performance;

(iv) By failing to conduct a final appraisal at the end of the cycle, Ms. Kane prevented the Applicant from exercising her right to rebut the e-PAS report.

c. The fact that the Applicant, a D-2 level staff member, was granted a step increment from step 1 to step 2 in May 2007 demonstrates that her performance was satisfactory;

d. The decision to reassign the Applicant was unlawful and procedurally flawed. There was never a fully complete performance evaluation that would justify the Applicant's removal from her post in AED. Further, Mr. Gambari and Ms. Kane did not have the authority to reassign the Applicant.

Respondent's submissions

50. The Respondent's primary written and oral contentions may be summarised as follows:

a. The Administration did not engage in any material procedural irregularities in the Applicant's e-PAS process. The Applicant was informed of the issues with her performance and provided with relevant details in formal meetings and in writing in a timely and consistent manner. She was provided with guidance appropriate for a senior staff member at the D-2 level on how to better approach the performance issues identified. The Applicant availed herself of the opportunity to respond to these performance-related concerns during and after the meetings, both orally and in writing;

b. The finalisation of the mid-point review in the e-PAS was delayed until June 2006 because the Applicant indicated that she did not want the e-PAS process to proceed so that she could apply to other positions based on her then-existing records, and Ms. Kane agreed to hold the process temporarily in abeyance. The Applicant signed off on the mid-point review on 22 June 2006, but her e-PAS report remained at that stage because it required her input to move it forward to the end-of-cycle stage;

c. The Applicant was fully aware of the performance evaluation procedures as she engaged in the first portions of her own e-PAS evaluation and regularly engaged in the e-PAS process with staff members under her supervision. Unlike in *Rees* UNDT/2011/156, the e-PAS process was complied with by the Administration to the maximum extent possible, taking into account the Applicant's refusal to initiate the end-of-cycle process. It is through the inaction of the Applicant that the e-PAS report for the period of May 2005 to March 2006 cycle had not completed;

d. The Applicant was aware that she was entitled to rebut a negative performance rating after the end-of-cycle stage of the performance evaluation process. If she wanted to complain about a lack of a formal improvement plan she was entitled to do so at that time. Instead, despite Ms. Kane's promptings, the Applicant did not proceed to initiate the end-of-cycle process and disengaged from the e-PAS process altogether;

e. The Respondent submits, in the alternative, that if the Tribunal finds that any of the alleged irregularities in the performance evaluation process occurred, any such irregularity was not of sufficient magnitude to impact the overall fairness of the process. None of the alleged irregularities impacted the course of events or the Applicant's ability to defend herself in the event of an adverse decision;

f. The decision to reassign the Applicant was a lawful exercise of the Secretary-General's discretion under staff regulation 1.2(c). The reassignment was an appropriate managerial response to the extraordinary situation in AED. The Applicant was informed about her possible reassignment on several occasions in September and October 2006 and was provided with the reasons for her reassignment.

Consideration

Was the evaluation of the Applicant's performance carried out in a lawful manner and in accordance with the established procedures?

General procedures for performance evaluation

51. Pursuant to sec. 3.1 of the administrative instruction on the performance appraisal system (ST/AI/2002/3), which was in force at the material time, each performance evaluation cycle starts on 1 April of each year and ends on 31 March of the following year.

52. Section 4.1 of ST/AI/2002/3 provides that a first reporting officer shall be designated for each staff member at the beginning of the cycle. The first reporting officer is responsible for: (i) setting the work plan with the staff member, (ii) conducting the mid-point review and final appraisal, and (iii) providing supervision on the overall work of the staff member throughout the reporting period. If the staff member remains in the same functions but serves under successive supervisors during the year for periods of less than six months, the supervisor in functions at the end of the performance cycle shall complete the appraisal in consultation with the prior supervisors (sec. 3.3).

53. Each 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 (sec. 6.2). The work planning stage includes: (i) work plan; (ii) competencies; and (iii) planning for development. Each staff member prepares, on the basis of the departmental and work unit plans, in a timely manner, a draft work plan for discussion with the first reporting officer (sec. 6.2(a)). 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.

54. Section 7.3 provides that primary responsibility for the timely execution of the e-PAS process rests with the head of department or office. Section 7.4 states that timely implementation of all aspects of the e-PAS process and compliance with the spirit and the letter of the process, including completion of the forms and development of remedial action rests with the supervisor acting as the first reporting officer. Section 7.5 provides that officials acting as second reporting officers shall be held accountable for the fair and consistent implementation of the e-PAS process by the first reporting officers.

55. Section 8.1 states that 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 provides performance feedback and guidance for the accomplishment of the goals and/or performance expectations set out in the work plan. At that time, the work plan may be revised if there have been significant changes in the nature of the functions carried out by the staff member, or if such revision is required to pursue revised goals of the work unit. Comments are required only in cases where there are changes in assignments or priorities, or where remedial action is proposed to improve performance. Pursuant to sec. 8.2, staff members and first reporting officers are encouraged to take the initiative to have ongoing performance discussions throughout the performance year, in addition to the mid-point performance review.

56. Section 8.3 provides that, as soon as a performance shortcoming is identified, the first reporting officer should discuss the situation with the staff member and take steps to rectify the situation, such as the development of a performance improvement plan, in consultation with the staff member. Accordingly, performance improvement measures may be instituted based on the ongoing performance evaluation, including mid-point review, and prior to the finalisation of the e-PAS report (*Jennings UNDT/2010/213*).

57. Pursuant to sec. 9.1, at the end of the performance year, the first reporting officer and the staff member shall meet to discuss the overall performance during the reporting period. The first reporting officer appraises the extent to which the staff member has achieved the performance expectations as agreed in the work planning phase. Section 9.2 provides that, prior to the appraisal meeting between the first reporting officer and the staff member, the latter should review the manner in which he or she has carried out the work plan defined at the beginning of the performance year.

58. Section 10.5 states that a rating of “does not meet performance expectations” may lead to a number of administrative actions, such as transfer to a different post or function, the withholding of a within-grade increment as further clarified in section 16.6, the non-renewal of a fixed-term contract or termination for unsatisfactory service.

59. The evaluation is placed on the staff member’s official status file (sec. 11.5). Where a staff member disagrees with the performance rating given at the end of a performance period, he or she may submit a written rebuttal statement in accordance with and pursuant to sec. 15. This statement is placed on the staff member’s file, as is management’s written reply to it. Thereafter, a rebuttal panel considers the matter and provides a written report, with reasons, on whether the original appraisal rating should be maintained or not. The rebuttal panel makes a binding determination of the appropriate performance rating and makes a notation on the final appraisal section of the e-PAS report, marking any change in the rating as a result of the rebuttal. The rebuttal panel’s report is also placed on the staff member’s file and the rating resulting from the rebuttal process cannot be appealed (sec. 15.4).

60. The Respondent’s actions in relation to the Applicant will be assessed against these requirements.

Work plan

61. As the Applicant joined DPA on 1 May 2005, her performance evaluation cycle covered the period of 1 May 2005 to 30 March 2006.

62. The Applicant did not initiate her e-PAS report until January 2006, when she was prompted to do so by Ms. Kane. It is the Applicant's own submission that, prior to that period, she worked based on the work plan she had prepared with Mr. Türk and Mr. Prendergast, although that work plan was not formally recorded in the e-PAS. After Ms. Kane assumed her functions, she had a series of meetings with the Applicant, during which it became apparent that the Applicant's work plan at the time did not meet the established requirements and had to be updated.

63. Accordingly, although she was appointed on 1 May 2005, the Applicant's work plan was not formally initiated in the electronic performance evaluation system until January 2006. This was remedied by the inclusion of a revised plan in January 2006. On her own evidence, the Applicant was not entirely without a work plan throughout 2005, but it is obvious from the evidence that she could have benefitted from a formal plan and closer supervision during the first months of her tenure. This did not happen, at least in part, because of the management changes during 2005.

Mid-point review

64. Since the Applicant's appointment began in May 2005, according to sec. 8.1 of ST/AI/2002/3, her mid-term review should have been around November 2005. However, the results of the mid-point review were formally added to the Applicant's e-PAS report in June 2006. The Respondent submits, in effect, that the delay was due to the Applicant's own request and that the Applicant had a number of substantive performance review meetings in the relevant time period.

65. The record shows that after six months in service, on 3 November 2005, Mr. Gambari, who acted as the Applicant's first reporting officer prior to Ms. Kane's

arrival, met with the Applicant to discuss her performance. There is a question as to whether that meeting was a mid-term review assessment of her performance as prescribed by ST/AI/2002/3. The notes of that meeting reflect that various performance-related matters were discussed and that Mr. Gambari raised a number of concerns with the Applicant's performance. This meeting was not contemporaneously reflected in the Applicant's e-PAS report as that was not formally initiated until Ms. Kane's arrival. However, it was a substantive performance-related meeting during which the Applicant was given specific details of the performance problems and a time within which her performance was to be reviewed.

66. Shortly after she became the Applicant's first reporting officer on 1 December 2005, Ms. Kane also conducted a mid-point review with the Applicant for the performance cycle ending on 31 March 2006. This review commenced on 23 December 2005 and was followed by substantive meetings on 23 January 2006, 15 February 2006, and 3 March 2006. During these meetings, Ms. Kane and the Applicant discussed the Applicant's work plan and the manner in which it was carried out. Ms. Kane brought performance shortcomings to the Applicant's attention and provided performance feedback and guidance.

67. The Tribunal finds that, substantively, the requirements of sec. 8 of ST/AI/2002/3 were complied with, although there was a delay in when the results of the mid-point review were noted in the e-PAS. The Tribunal finds that the reason for this delay was that the inclusion of information regarding the mid-point review into the e-PAS report was postponed at the Applicant's own request.

Improvement plan

68. It is required, under sec. 8.3 of ST/AI/2002/3, that, as soon as performance shortcomings are identified, they be brought to the attention of the staff member and appropriate steps taken to rectify the situation.

69. Within the first months of the Applicant's employment, performance shortcomings were identified. The Applicant's supervisors brought them to her attention and discussed them with her in a series of meetings beginning in November 2005.

70. From the numerous contemporaneous notes recording the discussions she had with Mr. Gambari and Ms. Kane, records on file and emails, it is clear that the purpose of these meetings was to provide the Applicant with feedback concerning her performance and ways to improve it and to give her guidance as to her work objectives. There is no doubt that the Applicant was aware of her supervisors' negative views concerning her performance. Unfortunately, rather than accepting advice and taking the opportunity to make suggested improvements, she characterised the meetings as harassment.

71. The Tribunal finds that her supervisors made genuine and good faith efforts to bring the concerns with the Applicant's performance to her attention and improve the situation.

End-of-cycle review

72. The Applicant did not dispute that, following Ms. Kane's signing off on the mid-point review on 6 June 2006, the e-PAS report was with the Applicant and required further action by her to be finalised. Although she counter-signed the mid-point review on 22 June 2006, she did not initiate the end-of-cycle review, and thus the e-PAS report stayed with her from that time.

73. The Tribunal finds that the Applicant was aware of the procedures for finalising the e-PAS report. Ms. Kane gave her the e-PAS guide in early 2006 and informed her of the action she needed to take. The Applicant had completed her work plan in January 2006 and reviewed and signed off on her mid-point review in June 2006. Further, she herself acted as the first reporting officer for several staff members reporting to her in the same time period and processed their e-PAS reports.

74. The Tribunal finds that the Applicant made a conscientious decision not to initiate the end-of-cycle process as she did not agree with her supervisors' assessments of her performance. Accordingly, the report was not finalised due to the Applicant's failure to follow the procedures established for the end-of-cycle appraisal in the e-PAS report.

Consultations with additional supervisors

75. Although the Applicant submits that Ms. Kane was required to consult Mr. Türk and Mr. Prendergast when evaluating her performance, such requirement would be relevant only at the end of the performance cycle. In this case, the Applicant's e-PAS report never reached that stage as no end-of-cycle review was initiated by her.

76. Further, Mr. Türk and Mr. Prendergast supervised the Applicant for only two months at the very beginning of her appointment. The Tribunal finds that, even if the e-PAS report proceeded to the end-of-cycle stage and Ms. Kane had consulted with them, in view of the performance problems noted by Mr. Gambari in the months prior to November 2005, it is unlikely that this would have had any significant positive effect on the Applicant's e-PAS report.

Step increment

77. In her application, the Applicant contended that the fact that she was granted a step increment after one year of service demonstrates that her performance was, in fact, satisfactory. The Respondent explained that the step increment was generated automatically by the computer payment system while the Applicant was on sick leave, of which the Applicant was subsequently informed. The error was later realised and the increment was reversed. This was not disputed by the Applicant at the hearing. The Tribunal finds that the increment in May 2007 was made in error and was not an acknowledgment of good performance.

Conclusions regarding performance evaluation procedures

78. Although pursuant to ST/AI/2002/3, the heads of departments and offices have the primary responsibility for the timely execution, overall compliance with, and fair implementation of the e-PAS, staff members also bear responsibility for complying with the established procedures.

79. The Tribunal identified the following deviations from the standard evaluation procedures as envisaged in ST/AI/2002/3. Specifically:

a. The Applicant's work plan was not formally initiated in the e-PAS until January 2006, although she was appointed on 1 May 2005. The responsibility for the failure to initiate the work plan until January 2006 rests primarily with the Respondent. The delay in recording the work plan in the e-PAS is explained, at least in part, by the significant management changes in 2005. It is also clear that the Applicant did have a work plan during that period, although it had not been formally entered in the e-PAS.

b. The results of the mid-point review were not added to the e-PAS report until June 2006 at the request of the Applicant. The Tribunal is satisfied that the Applicant had several substantive performance meetings with Mr. Gambari and Ms. Kane and the substantive requirements of ST/AI/2002/3 in that respect have been complied with.

c. The Applicant's end-of-cycle report was not initiated and, as a result, the e-PAS report was not finalised. This was due to the Applicant's failure to follow the procedures established for the end-of-cycle appraisal in the e-PAS report. As a result, the Applicant relinquished her opportunity to rebut the assessment of her performance by failing to bring the e-PAS cycle to an end.

80. The contemporaneous records indicate that, throughout the time period Ms. Kane acted as the Applicant's first reporting officer, she consistently followed-up with the Applicant with regard to her performance and the progress of her e-PAS

report. It is evident that, in assessing the Applicant's performance, her supervisors relied on their first-hand experience of her performance as well as unsatisfactory reports from other staff members, various client departments, and permanent missions.

81. The Tribunal finds that the Applicant's supervisors, in good faith, took steps to manage the documented concerns with the Applicant's performance even before the e-PAS report was formally initiated. However, because the Applicant unjustifiably perceived her reporting officers' attempts as harassment rather than genuine attempts to solve her performance problems, no progress was made.

82. Almost all of the notes of the meetings between Ms. Kane and the Applicant were prepared by note-takers who gave evidence to the Tribunal that their notes were accurate and reflected the discussions that took place. They observed no indications of harassment in any of the meetings in which they were present as note-takers and stated that, had anything improper occurred, they would have stepped in. The Tribunal finds that there was no bad faith, harassment or improper motivation with respect to the performance evaluation procedures as they were applied to the Applicant.

83. Not every violation of due process rights will necessarily lead to an award of compensation (*Wu* 2010-UNAT-042, *Antaki* 2010-UNAT-095). Compensation may only be awarded if it has been established that the staff member actually suffered damages (*James* 2010-UNAT-009, *Sina* 2010-UNAT-094, *Abboud* 2010-UNAT-100, *Hastings* 2011-UNAT-109).

84. The Tribunal finds that no identifiable harm warranting compensation was caused to the Applicant, including to her career, by the identified deviations in the e-PAS process. The Applicant separated for medical reasons and is not contesting the circumstances of her separation. The performance evaluation procedures were not tainted by any harassment or improper motivation. Further, as discussed below, she suffered no prejudice with respect to her reassignment and, in any event, the

deviations in the formal procedures in the e-PAS stemmed primarily from the Applicant's own unwillingness to proceed with the completion of her e-PAS report. In the circumstances of this case, in the absence of any proven harm to the Applicant, the Tribunal will not award any compensation.

Was the Applicant lawfully reassigned?

85. Staff regulation 1.2(c) gives the Secretary-General broad discretion in making reassignment decisions, but this discretion is not unfettered and must not be tainted by improper motives. Pursuant to ST/AI/234/Rev.1 (Administration of the Staff Regulations and Rules), Annex IV (Matters within the authority of the heads of departments and offices), the head of department is delegated the authority to "assign staff members to any activity with the department or office". This provision is reflected in ST/AI/2002/4 (Staff selection system), which was in force at the relevant time, and which provides that the head of department or office has the authority to transfer staff laterally within his or her department or office (see sec. 2.4 and Annex I).

86. The Tribunal finds that the decision to reassign the Applicant to new functions was made for proper reasons and was justified given the situation that existed at the time in AED. The reasons for this decision were discussed with the Applicant and are well-documented. Although no finalised e-PAS report existed at that time, that was primarily due to the Applicant's failure to initiate the end-of-cycle review. Further, the evidence demonstrates that the Administration had significant and, on the evidence before the Tribunal, well-founded concerns with the Applicant's performance and the situation in AED.

87. There were extensive consultations among the senior management about the decision to reassign the Applicant and the decision was, in fact, made by Mr. Gambari, who had the proper authority to assign staff members in his department as he found appropriate.

88. The Tribunal further finds that the Administration made good faith efforts to inform the Applicant of her reassignment and discuss it with her (*Rees* UNDT/2011/156) and that, in fact, the Applicant was notified of the decision in October 2006. In the end, although there was a decision to reassign the Applicant, she remained on extended sick leave from September 2006 until her separation in June 2007, with the exception of several days in October 2006, and never took up her new duties.

89. The Tribunal therefore finds that the decision to reassign the Applicant to the functions of Director of the Special Project for Charter Analysis, DPA, effective October 2006, was lawful.

Conclusion

90. The application is rejected in its entirety.

(Signed)

Judge Coral Shaw

Dated this 21st day of November 2011

Entered in the Register on this 21st day of November 2011

(Signed)

Hafida Lahiouel, Registrar, New York