



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

SAMUEL THAMBIAH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

Edward Patrick Flaherty
Ford Shanahan

Counsel for Respondent:

Jorge Ballesterro, UNICEF

Introduction

1. The Applicant contests the content of his Performance Evaluation Report (“PER”) for the period 22 October 2007 to 30 October 2008 which he contends resulted in the non-renewal of his contract and in him suffering undue injury and harm. The Applicant further emphasizes that he is also contesting the United Nations Children’s Fund (“UNICEF”) failure to complete a PER during his appointment; and, UNICEF’s failure to adhere to ST/AI/2002/3 (Performance Appraisal System).

2. The Respondent submits that the application is not receivable as the Applicant did not contest his PER within the imparted time limit, nor did he follow the applicable procedure to contest its content. Furthermore, the Respondent submits that, should the application not be found time-barred, the only issue before the Tribunal is the one which the Applicant initially submitted for management evaluation, namely the rebuttal of his PER.

Relevant facts

3. On 22 October 2007, the Applicant was appointed as Chief of Operations (P-4 level), UNICEF Afghanistan Country Office, on a fixed-term contract which was due to expire on 31 October 2008.

4. On 25 July 2008, the Applicant’s supervisor informed him that she had previously completed a draft of his PER, including sec. 2.1, and was awaiting that he review it and provide her with comments.

5. On 5 August 2008, the Office of Internal Audit (“OIA”), UNICEF was provided with a 10 February 2008 email containing allegations of sexual harassment concerning the Applicant.

6. On 6 August 2008, the Applicant’s supervisor contacted him and reminded him that they were supposed to have met that day to discuss the content of his PER

and that seeing that he did not make the appointment she was hoping they could reschedule for the following day.

7. Between 14 and 23 October 2008, the Applicant and his first supervisor exchanged emails regarding the status of his PER. The Applicant reminded her that his performance appraisal was outstanding. The supervisor reminded the Applicant that she had attempted to meet with him on several occasions and that he had yet to provide her with comments regarding the draft PER which she had sent to him in July 2008. In response to her comments, the Applicant provided her with some suggested text and stated that with his contract ending soon he was hoping she could complete his PER as he anticipated needing it in the future.

8. On 26 October 2008, an OIA fact-finding panel was established for the purpose of interviewing the Applicant as part of its investigation into allegations that he had sent an inappropriate e-mail in February 2008. The panel informed him that he was “the subject of a preliminary investigation for which the purpose was to establish facts” and that “having knowledge that [his] contract will expire on 31 October 2008 ... the investigation was in no relation to the contract status”.

9. On 27 October 2008, the Applicant received an email titled “Letter” which “attached the letter regarding [his] separation from UNICEF Afghanistan, effective 31 [October] 2008”.

10. On 30 October 2008, the Applicant received an email from his senior supervisor addressed to him and other senior staff members in response to an email the Applicant had sent titled “termination letter”. Within this email his senior supervisor stated that he had

met and discussed this contract situation on several occasions. We have also discussed [with the department of human resources] + audit. I personally advised staff member in a meet[ing] in [K]abul last [J]anuary of serious weaknesses in his performance ...

11. That same day the Applicant wrote a memorandum addressed to several parties, including the Ombudsperson, in which he addressed the content of his supervisor's email dated 30 October 2008. As part of the memorandum he stated, *inter alia*, that:

... He has tacitly admitted that my fate was sealed nine months ago in January 2008. ...why did [Human Resources] wait until 27 October to inform me that my contract terminates in 3 days? ...

...

My Rep has not even done my PER for the entire year. So what is [he] referring to ??? Is it therefore not reasonable to assume that to my Rep these supposed weaknesses were either nonexistent or addressed during the past 9 months and she did not have a problem.

[He] also states he “advised staff member of serious weaknesses in his performance - in presence of the representative”. ...

...

12. On 31 October 2008, the Applicant's contract expired without his PER having been completed.

13. On 18 November 2008, OIA completed its investigation into the allegations of sexual harassment filed against the Applicant. Due to the Applicant having already been separated from service, no further actions were taken with regard to OIA's findings. To avoid any due process violation, OIA's investigation report was not added to the Applicant's Official Status File (“OSF”).

14. On 24 August 2009, the Applicant received a copy of his PER for the period 22 October 2007 to 31 October 2008. The PER was dated 24 August 2009 and stated that it was “the supervisor who prepared [the work planning – setting objectives, key assignments, training plans and related competencies] of PER of [staff member] as he failed to do so himself”. Upon receiving a copy of the PER, the Applicant requested that he be provided with access to documents used in support of drafting the PER, including the OIA investigation report. More specifically, sec. 5.6(a) of the PER referred to findings stemming from the OIA investigation.

15. A redacted copy of the investigation report was provided to the Applicant on 15 June 2010.

16. On 14 July 2010, the Applicant requested management evaluation of the “Performance Period covering 22 October 2007 to 31 October 2008”. The Applicant stated that he wished to “rebut [his] PER in full for the said period on the legal basis that the process was flawed, arbitrary, discriminatory, vindictive, retaliatory and most importantly the entire process failed to adhere to the due process of PAS procedures”.

17. The following week, on 21 July 2010, the Chief, Policy and Administrative Law Section, Division of Human Resources, UNICEF, informed the Applicant that his request for management evaluation was not receivable as he had not “availed [himself] of the applicable internal procedure in 2008” for the purpose of contesting his PER.

18. On 14 October 2010, the Applicant filed a request for an extension of time to file an appeal with the Tribunal. By Order No. 278 (NY/2010), the Tribunal granted the Applicant an extension of time to file by 19 November 2010.

19. On 19 November 2010, the Applicant filed an application in the present case. The Respondent’s reply was received by the Registry of the Tribunal on 17 December 2010.

20. On 6 December 2010, the Applicant filed a submission contesting the OIA investigation, the failure of the Director of Human Resources to take a decision based on the investigation panel’s findings, and UNICEF’s failure to provide him with a copy of the report prior to 15 June 2010. Following the issuance of Order No. 320 (NY/2010), this submission was re-filed as a new and separate application on 15 December 2010 and was assigned Case No. UNDT/NY/2010/104. These cases are being considered separately.

21. On 31 January 2011, the Applicant, after having obtained leave from the Tribunal, filed comments on the Respondent's reply regarding the issue of receivability.

22. On 4 June 2012, the undersigned Judge was assigned to the present case.

23. On 14 September 2012, the Tribunal issued Order No. 189 (NY/2012) requesting that the Applicant identify "each single and specific administrative decision that he intends to appeal" and that he respond to each of the specific contentions on receivability raised by the Respondent. The Applicant filed his submission on 9 October 2012 and the Respondent filed his response on 17 October 2012.

24. On 11 December 2012, the Tribunal held a hearing for the purpose of discussing facts at issue in this case. The hearing was attended by both counsel for the Applicant and the Respondent as well as the Applicant himself.

Receivability ratione temporis

25. The Applicant filed his motion for an extension of time to file a submission with the Tribunal on 14 October 2010, a week prior to the expiration of the 90 day time limit for him to appeal the 21 July 2010 decision that his request for management evaluation was not receivable. The Applicant's appeal before the Tribunal was submitted within the applicable time limits and will be considered by the Tribunal.

Consideration

Applicable law

26. Chapter 7: Performance Appraisal System, Policies and Procedures Manual, UNICEF states in part:

SECTION 2: GENERAL GUIDELINES

Guidelines on Work Planning

Explanations or Rebuttals

7.2.38 Once the supervisor and the staff member sign Part 8.1 of the PER, the PAS process is complete and the PER is entered into the staff member's official status file unless the staff member indicates in Part 8.2 that he/she intends to submit either a statement of explanation or a formal rebuttal (under the criteria described in paragraph 7.2.38)). In either case, the staff member must submit the explanation or rebuttal within 30 calendar days of signing Part 8.1 of the PER. ...

7.2.41 The proper procedure for completing a PER under dispute must be followed. All staff must be made aware that their signatures on PERs do not imply agreement as to the content. It is still the responsibility of all staff to complete and sign their PERs on a timely basis. If the PER, as well as the procedures for filing a disagreement, have been shared with the staff member but the staff member chooses not to respond and refuses to sign the PER because he/she disagrees with its content, the PER can still become a part of the staff member's official status file. In this instance, the PER should be officially transmitted to the staff member and should include a note of the attempts made to bring to his/her attention his/her responsibility for completing and signing the PER. In such cases, the requirement that the PER be brought to the staff member's attention has been met and non-action on the staff member's part does not preclude the addition of the PER to the staff member's official status file.

SECTION 3: PROCEDURAL GUIDELINES FOR COMPLETING THE PER

...

Part S - Final Review and Signature by Staff Member & Supervisor

Part 8.1 - Review and Signatures

7.3.35 To be completed by the supervisor and the staff member. At this point all substantive comments on the staff member's performance

have been entered into the PER. The supervisor and the staff member sign this section to acknowledge that they have seen and received a copy of the PER. Their signatures are not an indication of whether or not they agree with the contents of the PER. . . .

Part 8.2 - Explanations/Rebuttals

7.3.36 To be completed by the staff member. If the staff member has strong disagreement(s) with the content of the PER, he/she may submit either a statement of explanation or a formal rebuttal (see paragraphs 7.2.36-7.2.38). Either option must be initiated within 30 calendar days of signing Part 8.1 of the PER. The staff member indicates in Part 8.2 his/her intention to do so.

27. Article 8.1 of the Statute of the United Nations Dispute Tribunal states:

An application shall be receivable

(a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;

(b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required.

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;

(ii) In cases where a management evaluation of the contested decision is not required, within 90 calendar days of the applicant's receipt of the administrative decision;

(iii) The deadlines provided for in subparagraphs (d) (i) and (ii) of the present paragraph shall be extended to one year if the application is filed by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United

Nations Secretariat or separately administered United Nations funds and programmes;

(iv) Where the parties have sought mediation of their dispute within the deadlines for the filing of an application under subparagraph (d) of the present paragraph, but did not reach an agreement, the application is filed within 90 calendar days after the mediation has broken down in accordance with the procedures laid down in the terms of reference of the Mediation Division.

Contested decision(s)

28. As part of his reply, in addition to the issue of the receivability of the application as a whole, the Respondent submitted that the scope of the case before the Tribunal should be limited to the Applicant's desire to contest his PER relative to his tenure with UNICEF.

29. The Tribunal recalls that under art. 8.1(c) of its Statute, the scope of an application is limited to the decisions that were subject to request for management evaluation initially submitted by the Applicant (see, *Ibekwe* UNDT/2010/159, *Neault* UNDT/2012/123, *Syed* 2010-UNAT-061 and *Ibekwe* 2011-UNAT-179).

30. A review of the Applicant's 14 July 2010 request for management evaluation indicates that the purpose of his request was that he "wish[ed] to contest [his] PER in full for the said period", namely 22 October 2007 to 31 October 2008. However, as part of the factual background provided within his request for management evaluation, the Applicant also stated that "UNICEF failed to comply with the terms of appointment and contract of employment in giving [him] a fair chance to prove [his] ability and therefore shattered the reasonable expectation of extension and/or future employment".

31. In response to Order No. 189 whereby the Tribunal requested that the Applicant identify the contested decision(s) the Applicant responded:

2.a. Decision: Performance Evaluation Report (PER) issued to [the] Applicant

32. However, in response to that same Order's request that the Applicant respond to each of the specific contentions on receivability raised by the Respondent, the Applicant stated:

4. ... it became clear to him in June 2010 ... that the decision to not renew his contract was directly related to the inaccurate information in the PER...

5. ... It wasn't until the Applicant received the full report did he become aware of the prejudice that was likely linked to the decision to not renew his contract, prompting the need to rebut the PER. ... The Applicant finally contents that his right to contest the PER extends to the decision to not renew his contract as an extension of a pattern of prejudice

33. When an applicant is represented by counsel, and following a direct order on that subject, there should no longer be any doubts as to the decision being contested. Nevertheless, in the present case, the Applicant, after specifically only identifying the contested decision as that related to his PER, appears to submit that the issue of the non-renewal of his contract is directly related to his PER and therefore properly before the Tribunal.

34. While the Tribunal considers this link tenuous, it will nevertheless address it in order to remove any uncertainty regarding the issue.

Non-renewal

35. As evidenced from the documents provided to the Tribunal, the Applicant was informed of the decision to not renew his contract on 27 October 2008 and that, as stated by his second supervisor on 30 October 2008, the cause for his non renewal was the "serious weaknesses in his performance".

36. Based on the above, and irrespective of the Applicant's contention that "his right to contest the PER extends to the decision to not renew his contract as an extension of a pattern of prejudice", he was fully aware upon his separation from service that the decision to not renew his contract was directly linked to the views of his second supervisor regarding his performance. Consequently, any request for

administrative review of the decision to not renew his contract should have been filed within 60 days from the 27 October 2008 notification of the contested decision, namely by 26 December 2008.

37. Consequently, even if the Tribunal was to entertain the proposition that the Applicant's request for management evaluation attempted to also contest the decision not to renew his contract, it finds that such a claim is out of time and not receivable.

Informal process

38. The Tribunal notes that the Applicant copied the Ombudsman on an email whereby he requested that its recipients intervene with regard to the non-renewal of his contract. However, there are no documents before the Tribunal that would support the contention that the Applicant actively pursued any type of informal resolution of this decision which could have resulted in the applicable time limits for him to file a request for administrative review of the non-renewal of his contract being suspended.

39. The use of the informal conflict resolution process should not prejudice an applicant's right to pursue a matter using the formal judicial process. The fundamental human right to have free access to the judicial system must be an effective right without being absolute and must be used by an applicant in good faith. However, such a process cannot be used by an applicant as a reason to delay the formal process for an extended period of time. A case must be brought in front of the Tribunal as soon as possible and applicants must attempt to resolve their cases diligently.

40. By its very nature the right of free access to justice requires regulations both at the national and/or international level, which may vary on time and space depending on community resources and needs of individuals. So, limitations are required and accepted as to the need to pursue a legitimate aim and without affecting the substance of type law. Any person has the right to have free access to justice (proceedings and legal reviews), but to become effective this right must be exercised

within the time limits established for each formal procedure. The time limits are established to prevent procedural abuses and to protect the diligent person.

41. An applicant's right for free access to justice is directly linked to the obligation that any application be submitted within the applicable time limits to the competent authorities as they are the ones vested with the power, under exceptional circumstances, to waive the applicable time limits.

Receivability ratione materiae

42. The Applicant stated as part of his submissions and during the oral hearing that the Applicant only actually became aware that his non-renewal was prejudiced and biased upon receiving a copy of his PER on 24 August 2009, a year after his separation from service, followed by the later receipt of the 15 June 2010 OIA investigation report that was referred to therein. While such a submission appears to contradict the Applicant's statement within his 30 October 2008 email, the Tribunal will nevertheless address whether these two events constitute exceptional circumstances that suspended the applicable time limits to contest the content of his PER and, by correlation, the non-renewal of his contract.

43. The Respondent submits that the application before the Tribunal is not receivable due to the fact that the Applicant did not avail himself of the appropriate internal procedures to contest his PER and that, notwithstanding the prior, his application for management evaluation is time-barred.

44. The Applicant submits that his request for management evaluation was receivable as he filed his request within 60 days of receiving the OIA's investigation report on 15 June 2010. The Applicant contends that the fact that he did not file his request within 60 days from his separation from service on 31 October 2008, nor within 60 days from receiving his PER on 24 August 2009, is not relevant as he did not consider that he had been provided with a complete PER. It is only upon receiving the OIA's investigation report that "it became clear to [him] ... that

the decision to not renew his contract was directly related to the inaccurate information in the PER”.

45. Within UNICEF, Chapter 7 of its Policies and Procedures Manual governs how UNICEF has to conduct a staff member’s performance appraisal. In addition to establishing the obligations that UNICEF has towards its staff members, the Manual, at paras. 7.2.38 and 7.3.36, also establishes the procedure that a staff member has to follow should he or she wish to rebut the content of his PER.

46. The Respondent submits that the Applicant should have contested his PER, or the lack of its completion, within 30 days from his separation from service. However, as the Respondent has often suggested, acts and decisions taken by the Secretary-General benefit from a presumption of regularity and an applicable time limit would start to run following such a decision being taken by the Organization. Nevertheless, the Tribunal considers that under certain circumstances unique to an individual case, certain facts may come to light that either suspend the applicable time limit or result in a new administrative decision having been taken.

47. It appears from exchanges between the Applicant and his first supervisor that while an initial draft PER had been prepared, it was never finalized prior to his separation as the parties never got together to discuss its content.

48. In the present case, the Applicant received a copy of a PER dated 24 August 2009, nearly a year after he had separated from service, which had been drafted without any input from the Applicant. Furthermore, the PER also reflected comments based on findings from an investigation that was unrelated to his contractual status and which had not been completed at the time of his separation from service. Therefore, while the Applicant could have contested the lack of completion of a PER upon his separation from service, the finalization in 2009 of a PER which became part of his official status file is in of itself a separate contestable administrative decision.

49. A review of the PER, which the Applicant received on 24 August 2009, indicates that sec. 8.2 of the PER titled “Explanation/Formal Rebuttal” serves the purpose of enabling a staff member to state whether “he/she intends to issue a statement of explanation or a rebuttal”. This section further states that any rebuttal action has to be undertaken “within 30 days of signing Part 8.1 of this report”.

50. While the Applicant did not sign part 8.1 of the PER, this does not mean that the time limit to rebut its content did not start to run upon its receipt seeing that it clearly identifies the process, as well as applicable time limit, that a staff member has to follow should he or she wish to contest the content of the PER. Furthermore, para. 7.2.41 states that “[i]t is still the responsibility of all staff to complete and sign their PERs on a timely basis. If the PER, as well as the procedures for filing a disagreement, have been shared with the staff member but the staff member chooses not to respond and refuses to sign the PER because he/she disagrees with its content, the PER can still become a part of the staff member's official status file”.

51. The Applicant is therefore deemed to have been aware of his responsibility regarding the process to rebut his PER, as expressed in chapter 7 of UNICEF’s policies and procedures manual, at the latest by 24 August 2009. Consequently, the Tribunal finds that the Applicant did not contest his PER using the applicable internal remedy within 30 days of his receipt of the PER.

52. The Tribunal notes that even if it was to consider that the Applicant could have requested management evaluation of the PER for the purpose of completing the rebuttal process without first rebutting it directly with UNICEF, any such decision would have had to have been filed within 60 days of him received the PER, namely by 24 October 2009 which is still over a year prior to the date on which the actual request was filed.

OIA investigation report

53. Nevertheless, the Applicant submits that the time limit for him to contest the PER, and by correlation the non-renewal of his contract, did not start to run until

15 June 2010 upon his receipt of the OIA investigation report which was directly referred to in the PER.

54. What the Tribunal has to consider is whether, but for receiving the OIA investigation report on 15 June 2010, the Applicant could and should have contested the content of his PER or if the time limit to rebut or appeal its content was suspended pending the receipt of the OIA investigation report.

55. In *Zhouk* UNDT/2011/102 the Tribunal found that

[w]hile the mentioned documents may have added weight to the Applicant's argument to reclassify, the Tribunal does not accept that the Applicant was prevented from filing an appeal of the 2000 decision simply because the documents had not been provided to the Applicant or because the Applicant was unaware that these documents were in existence. Had the documents been provided and an appeal sought, the Applicant's appeal may have had a greater chance of success, but the crucial fact remains that the Applicant failed to exercise his right to file an appeal, within the time limits imposed, of the classification decision, of which he was informed. The Respondent's failure to provide these later-discovered documents did not prevent him from exercising that right.

56. In the present case only two paragraphs of the PER, albeit in a very direct manner, refer to the adverse findings of the OIA investigation report whose details were unknown to the Applicant at the time of his receipt of the PER.

57. The Tribunal, taking into consideration the 30 October 2008 memorandum, as well as the earlier communications between the Applicant and his supervisor, finds that the Applicant was on notice of the potentially inaccurate information contained therein upon receiving the PER in August 2009. The Applicant had more than a sufficient amount of information, as well as all the necessary elements, to either rebut or appeal the content of the PER upon receiving it. Consequently, the fact that the Respondent only provided the OIA investigation report referred in the last two paragraphs of the PER on 15 June 2010 did not prevent the Applicant from exercising the right to contest either the PER or the non-renewal of his contract within 60 days of his 24 August 2009 receipt of his PER.

58. The Tribunal considers that the 15 June 2010 transmittal of the OIA investigation report, while potentially providing the Applicant with additional information regarding two entries within his PER, did not extend the Applicant's time limit to contest its content or the potentially related non-renewal of his contract. The Applicant therefore failed to exercise his right to file a request for management evaluation within the imparted time limits.

59. As stated in *Costa* UNDT/2009/051, the Tribunal "has no jurisdiction to waive the time limits for requests for management evaluation requests of requests for administrative review". In accordance with art. 8.1 from the Statute of the Dispute Tribunal, for an application before the Tribunal to be receivable the applicant must formulate, as a first step, a request for management evaluation within 60 days from the date on which the staff member or, as in the present case, the former staff member, received notification of the administrative decision.

60. The Applicant's request for management evaluation was correctly deemed to be time-barred and the present application is therefore not receivable *ratione materiae*.

Nota bene

61. The Tribunal regrettably notes that in the present case the actions of both parties with regard to the requirements of initiating, discussing and completing the PER were not respected. After receiving a copy of his PER, on 24 August 2009, the Applicant did not respect his obligation to sign it. Furthermore, he neither completed sec. 6 of the PER, nor did he identify the rating comments with which he disagreed. Finally, he did not address within sec. 8 of his PER whether he wished to submit an explanatory statement or rebut its content within 30 days of receiving it. More importantly, the extensively delayed completion of the PER, which was never signed by the Applicant, resulting in it being actually considered incomplete, as well as its drafter's knowledge and direct references to potentially non-relevant facts

regarding the Applicant's performance, raises serious questions regarding the objectivity of its drafter.

62. The Applicant complained about the findings of his first supervisor to the senior supervisor who, instead of respecting his duties as a second supervisor who should have tried to mediate the matter, wrote to the applicant and to other colleagues that there is no point in further discussing the Applicant's contract and PER as it was clear since January 2009 that his contract would not be renewed. The PER was not completed prior to the Applicant separation from service and the second supervisor never signed off on its content prior to it being added to the Applicant's OSF.

63. The Respondent submitted to the Tribunal that as a result of the Applicant's separation from service prior to the conclusion of OIA's investigation, no further action was taken by Human Resources regarding the findings of the OIA investigation report. The Respondent further stated that the case was considered closed and that no references to the report's findings were maintained in the Applicant's OSF. However, by directly referring to the findings of the investigation report, the PER incorporated the report and its findings by reference into the Applicant's OSF.

64. A PER can only contain information which is sustainable by official documents. Per a contrario, no findings from the investigation report should be contained in the PER and therefore, by reference, in the OSF.

65. The Tribunal therefore strongly recommends that the Respondent consider, in order to be consistent with their high standards and best practices, redacting any references to the findings of the investigation report which have no connection with the Applicant's performance during his appointment with UNICEF.

Decision

66. In view of the foregoing, the Tribunal DECIDES:

67. The application is rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 3rd day of April 2013

Entered in the Register on this 3rd day of April 2013

(Signed)

Hafida Lahiouel, Registrar, New York