



Before: Judge Goolam Meeran

Registry: Nairobi

Registrar: Abena Kwakye-Berko

GNASSOU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Monika Ona Bileris

Counsel for the Respondent:
Nicole Wynn, ALS/OHRM

INTRODUCTION

1. The Applicant is a former staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”). She was separated from service on 31 August 2015. She filed an application on 5 October 2016 to contest the findings of a rebuttal panel concerning her 2014-2015 performance appraisal (“e-PAS”) and MONUSCO’s decision to place the report of the Rebuttal Panel in her Official Status File (“OSF”).

THE CLAIM

2. The Applicant submits that her application is receivable because the decision to accept her final e-PAS appraisal and to place it in her OSF constitutes administrative decisions which have produced direct legal consequences and affected her contract of employment and her eligibility for a continuing appointment. She submits that the administration’s reliance upon her negative e-PAS resulted in the issuance of a PIP, which ultimately led to her separation from service.

3. The Applicant’s case is that the contested decisions breach ST/AI/2010/5 and that the following procedural and substantive defects with the Rebuttal Panel report violated her due process rights:

- a. In contravention of section 15.3 of ST/AI/2010/5, there was a delay of seven months in completing the rebuttal process. This affected her career development, besmirched her reputation and caused her great stress.
- b. It was unlawful for MONUSCO to attempt to implement a PIP when the e-PAS rebuttal process had not been completed.
- c. The Rebuttal Panel erroneously accepted the informal agreement regarding her reporting officers.
- d. The subsequent contract renewals directly contradict the negative rating in her e-PAS.

e. Her performance could not have suddenly become “so abysmal” after more than a decade of good performance.

4. The Applicant seeks the removal of both the 2013-2014 and 2014-2015 e-PASes from her OSF and moral damages in the amount of USD90,000 for damages she has suffered as a result of the Organization’s errors.

THE REPLY

5. By a reply dated 7 November 2016, the Respondent submitted that the application is not receivable because:

a. A rebuttal panel report is not a contestable administrative decision within the meaning of art. 2.1(a) of the UNDT Statute and that no administrative decision had been taken on the basis of any final performance rating resulting from the rebuttal process. Relying on *Staedtler* 2015-UNAT-546 and *Ngokeng* 2014-UNAT-460, the Respondent submits that only decisions stemming from final performance appraisals may be reviewed by the Dispute Tribunal.

b. The placement of the report in the Applicant’s official status file is not an administrative decision but rather an administrative requirement pursuant to section 15.4 of ST/AI/2010/5/corr.1 (Performance management and development system)

6. The Respondent also submitted that the application is without merit for the following reasons:

a. The rebuttal process was lawful and complied with ST/AI/2010/5 (Performance management and development system). There were no procedural or substantive violations of the Applicant’s rights.

b. The delay in the submission of the FRO’s statement to the Rebuttal Panel was due to exigent circumstances. He was on an emergency medical evacuation and remained away from the duty station for four months. Additionally, he was unable to provide a statement within 14 days of his

return due to operational crises that he had to respond to as the head of the Goma office. After the FRO submitted his statement on 23 February 2016, the Rebuttal Panel finalized its report in less than a month.

FINDINGS OF FACT

7. The Tribunal did not consider that an oral hearing would assist in establishing the relevant primary facts.

8. The Tribunal considered a substantial number of documents provided by the Applicant who made several allegations against the decision-makers whom she considered as having acted improperly in breach of the Organization's rules and procedures on recruitment and performance appraisal.

9. The Tribunal finds the following facts proven on the basis of the documentary evidence and taking into account the submissions of the parties:

a. On 1 July 2004, the Applicant commenced employment with MONUSCO on a fixed-term appointment as an Economic Affairs Officer at the P-4 level in the Political Affairs Division ("PAD"). She worked in PAD until her separation from service on 31 August 2015.

b. On 1 July 2015, the Applicant's first reporting officer ("FRO") assessed her overall performance for the 2014-2015 performance evaluation cycle as "does not meet performance expectations".

c. By an email dated 14 July 2015, the Applicant sought guidance from the Chief of the MONUSCO Human Resources Section (HRS) on the rebuttal of her 2014-2015 e-PAS.

d. On 15 July 2015, the Applicant submitted her rebuttal request to the Chief HRS. The request comprised of two tables of 25 pages and 32 annexes of 713 pages to the Chief HRS. On the same day, the Chief HRS requested that the Applicant provide a copy of her e-PAS that had been signed by all parties.

- e. By email dated 22 July 2015, the Office of the DMS requested that the Applicant's first reporting officer ("FRO") respond to the Applicant's rebuttal statement within 14 days (by 5 August 2015). The FRO did not respond so the Office of the DMS sent a reminder on 5 August 2015. The FRO responded the next day that he was on emergency medical evacuation.
- f. On 23 July 2015, the Applicant sent an email to the Director of Mission Support ("DMS") again requesting a rebuttal of her 2014-2015 e-PAS. Subsequently, she provided the DMS with her partially signed performance appraisal and the 32 annexes.
- g. The Applicant received a hard copy of her signed e-PAS on 28 July 2015.
- h. The Applicant was separated from service on 31 August 2015.
- i. The Applicant's FRO returned to the duty station on 21 December 2015. On 5 and 28 January 2016 and 2 February 2016, the DMS' office took follow up action in relation to his reply to the Applicant's rebuttal statement, which he submitted on 23 February 2016.
- j. The Applicant received a copy of the FRO's reply to her rebuttal statement on 25 February 2016.
- k. The Rebuttal Panel interviewed the Applicant on 3 March 2016.
- l. On 14 March 2016, the Rebuttal Panel completed its report, changing the Applicant's overall performance rating from "does not meet performance expectations" to "partially meets performance expectations".
- m. The Applicant received a copy of the rebuttal panel report from MONUSCO on 29 March 2016 and was informed that a copy of the report would be placed in her OSF.

THE APPLICABLE LAW

10. Article 2.1(a) of the UNDT Statute provides that the Tribunal is competent to hear and pass judgment on applications appealing an *administrative decision* alleged to be in non-compliance with the terms of appointment or the contract of employment of the staff member. Art. 2.1(a) clarifies that the terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

11. In Judgment No. 1157, *Andronov* (2002), the former United Nations Administrative Tribunal defined an administrative decision as:¹

A unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. ... Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application and they carry direct legal consequences.

12. Section 15 of ST/AI/2010/5 concerning the rebuttal process provides that:

15.3 After receiving a copy of the rebuttal statement, the head of department/office/mission, or his representative, shall, within 14 days, prepare and submit to the rebuttal panel a brief written statement in reply to the rebuttal statement submitted by the staff member. A copy of the reply to the rebuttal statement shall be given to the staff member. Unless geographical location makes it impractical, the panel shall hear the staff member, the first and second reporting officers and, at the discretion of the panel, other individuals who may have information relevant to the review of the appraisal rating. Telephone statements may also be taken where geographical separation so dictates.

15.4 The rebuttal panel shall prepare, within 14 days after the review of the case, a brief report setting forth the reasons why the original rating should or should not be maintained. In the event that an overall rating should not be maintained, the rebuttal panel should designate the new rating on performance evaluation. The report of the rebuttal panel shall be placed in the staff member's official status file as an attachment to the completed e-PAS or e-performance document and communicated to OHRM, or the Field Personnel Division of the Department of Field Support, as appropriate.

¹ This definition has been endorsed in *Tabara* 2010-UNAT-030; *Tintukasiri* 2015-UNAT-526; *Kazazi* 2015-UNAT-557, etc.

15.5 The performance rating resulting from the rebuttal process shall be binding on the head of the department/office/mission and on the staff member concerned, subject to the ultimate authority of the Secretary-General as Chief Administrative Officer of the Organization, who may review the matter as needed on the basis of the record. Any change in the final rating, and the date of the decision, shall be communicated to OHRM with an annotation that the rating was changed as a result of a review of the performance management and development rebuttal and the final rating recommended by the rebuttal panel.

15.7 The rating resulting from an evaluation that has not been rebutted is final and may not be appealed. However, administrative decisions that stem from any final performance appraisal and that affect the conditions of service of a staff member may be resolved by way of informal or formal justice mechanisms.

CONSIDERATIONS

13. The Applicant contests two decisions. The first challenge relates to what the Applicant refers to as “the flawed findings of the Rebuttal Panel Report”. The second challenge is to the decision of management to accept the report and to place it on her personal file.

14. The issues for determination are:

a. Has the Applicant distinguished her case from UNAT’s rulings in *Staedtler* 2015-UNAT-546 and *Ngokeng* 2014-UNAT-460 such that it is within the competence of the Tribunal to review the substance of the Rebuttal Panel Report on the ground that?

b. Whether the acceptance of the Report and the act of placing it on the Applicant’s personal file is an administrative decision which is subject to judicial review by the Tribunal?

15. As to the first issue the Tribunal finds that the delay in finalizing the Report was far in excess of the period contemplated under ST/AI/2010/5. In particular, the Applicant’s concern at the failure of Mr. Daniel Ruiz, the Director of PAD to submit a brief written statement in response to the Applicant’s rebuttal statement within the 14-day period called for a satisfactory explanation. Having considered the reasons for delay the Tribunal accepts that the absence of the Director of PAD on

medical leave and his responsibility to deal with the inter-ethnic crisis in South Lubero, Democratic Republic of the Congo, on his return in late December, was legitimate particularly since it would not have been appropriate to have delegated this task to someone else. The Tribunal rejects the Applicant's contention that the delay in this case constituted an error of procedure. As for the challenge to the assessment and findings of the Rebuttal Panel, the Tribunal finds that the Applicant has failed to distinguish her case from the UNAT authorities and that she has not shown that the findings of the Rebuttal Panel together with her final performance appraisal resulted in an administrative decision to her detriment.

16. The Applicant's claim challenging her separation from the Organization is dealt with in Judgment No. UNDT/2018/011.

17. The first part of her claim fails. As for the second part of her claim, it is clear from section 15.4 that the Administration is obliged to place the report of the rebuttal panel on a staff member's official status file. In *Oummih* 2014-UNAT 420², UNAT held that: "Under the applicable legislative framework as set out in ST/AI/2002/3 and ST/AI/2010/5, it was mandatory for the Administration to keep in the personnel file both the impugned appraisal and reports, and the rebuttal outcome."

18. Accordingly, the act of placing the Rebuttal Panel Report on the Applicant's OSF is not an administrative decision under the test in *Andranov* as adopted and further refined by UNAT in *Tabara* 2010-UNAT-030, *Tintukasiri* 2015-UNAT-526 and *Kazazi* 2015-UNAT-557.

19. Accordingly, the second limb of the Applicant's complaint that the Report was placed on her personnel file deals with an administrative requirement. Under section 15.4 of ST/AI/2010/5 and ST/AI/2010/5/Corr.1, the administration has no option but to place the report on the Applicant's OSF. It is not an exercise of discretion by the manager concerned. If it was, it may be challenged on the ground that it is an administrative decision which the Tribunal has the power to judicially

² Paragraph 16.

review. The authorities are clear and there is nothing in the Applicant's further submissions dated 26 January 2018, following a case management discussion ("CMD") on 25 January 2018, that persuades the Tribunal that this aspect of the claim is receivable. The Applicant does not challenge an administrative decision under article 2.1(a) of the UNDT Statute.

JUDGMENT

The Application fails and is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 29th day of January 2018

Entered in the Register on this 29th day of January 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi