



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

HARRISON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 17 April 2017, the Applicant, a former staff member of the United Nations Mission in Kosovo (“UNMIK”), challenges the alleged failure to follow proper performance evaluation procedures, as well as delays in the completion of his 2013-2014 performance evaluation by withholding a rebuttal panel report and grievances of harassment and intimidation that he had reported.
2. The Respondent filed his response on 6 June 2017, arguing *inter alia* that the application is not receivable *ratione materiae*.
3. On 7 and 8 February 2018, the Tribunal held a hearing on the merits and on 28 February 2018, both parties filed their closing submissions.

Facts

4. At the end of the 2013-2014 Performance Appraisal cycle, the Applicant’s First Reporting Officer (“FRO”) gave him a rating of “partially meets performance expectations”. The Applicant signed-off his performance evaluation document (“e-PAS”) on 22 May 2014, and by memorandum dated 3 June 2014 he rebutted his 2013-2014 performance evaluation rating.
5. In its report to UNMIK Administration, dated 13 August 2014, the rebuttal panel unanimously decided to change the Applicant’s performance rating to “successfully meets performance expectations”.
6. By memorandum dated 19 August 2014, the Applicant gave notice of his resignation from the Organization effective 12 September 2014.
7. Between 24 August 2015 and 19 November 2015, the Applicant addressed several emails to the Payroll Helpdesk in New York and to colleagues at the Field Personnel Division, Department of Field Security (“FPD/DFS”) inquiring *inter alia* about the status of the payment of his separation entitlements, and of his request for a “Certificate of Service, as well as a statement that shall refer to the quality of work according to previous e[-]PAS, including 2013/2014 rebuttal”.

8. By facsimile dated 25 May 2016, the then Chief of Mission Support, UNMIK, sent a copy of the Applicant's rebuttal panel report and e-PAS to the then Director, FPD/DFS, for onward transmission to the Office of Human Resources Management ("OHRM").

9. By letter dated 10 October 2016, the Applicant wrote to the Assistant Secretary-General for Human Resources Management ("ASG/OHRM"), requesting several information and documents. Among the requested documents was an official written decision on the outcome of the rebuttal panel, a copy of his amended e-PAS and the remedial action taken by UNMIK's Human Resources or by OHRM with respect to his FRO, in light of the finding of the rebuttal panel that the operation and management of the security Section at UNMIK was such that it would constitute intimidation and harassment.

10. On 7 November 2016, the then Director, FPD/DFS, responded to the Applicant's email to the ASG/OHRM and provided him with a copy of his 2013-2014 e-PAS and of the rebuttal panel's report as well as some other documents that the Applicant had not requested.

11. On 30 November 2016, the Applicant filed a request for management evaluation in connection with the matters set forth in para. 1 above. He received a reply on 17 January 2017, finding his request for management evaluation not receivable on the grounds that it was time-barred and that he had not identified a contestable administrative decision.

12. By email of 24 March 2017, an Associate Investigator, Investigations Division, Office of Internal Oversight Services ("OIOS"), advised the Applicant that it had been determined that his 2 March 2017 complaint, related to allegations of prohibited conduct, would be best addressed by the Under-Secretary-General, DFS. By email dated 28 September 2017, the Applicant advised this Tribunal's Geneva Registry that "following MEU advise and OIOS referral, [he had] been able to file [a] ... harassment complaint against UNMIK and specific staffers".

Parties' submissions

13. The Applicant's principal contentions are:

- a. He was never informed of the outcome of the rebuttal panel;
- b. UNMIK's Human Resources and Senior Management failed to follow established procedures and withheld the "Performance rebuttal panel conclusion", leading to a constructive dismissal;
- c. On 13 August 2014, UNMIK's Administration failed to follow its obligations to acknowledge grievances and allegations of misconduct that he had reported for further investigation, and withheld key reports while expediting his redeployment to the United Nations Support Mission in Libya ("UNSMIL") before 31 August 2014 for a position with lower remuneration; and
- d. UNMIK's Administration failed to provide key documents for his signature, the "report of the rebuttal panel—of 13 August 2014—and the Performance rebuttal panel Conclusion"—of 25 August 2014—prior to his resignation.

14. The Respondent's principal contentions are:

- a. No administrative decision has been made stemming from the Applicant's e-PAS for 2013-2014; therefore, the application is not receivable *ratione materiae*;
- b. The facsimile dated 25 May 2016 from UNMIK Administration to FPD/DFS, transmitted the Applicant's performance documents to OHRM;
- c. The Applicant filed his complaint under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment and abuse of authority) only on 2 March 2017, which has not been the subject of Management Evaluation;

d. The Applicant's allegation of constructive dismissal is without merit since he voluntarily resigned from the Organization by letter dated 19 October 2014; and

e. The Applicant is not entitled to any compensation because he has not provided any evidence of pecuniary or non-pecuniary damages.

Considerations

15. The Tribunal has identified the following legal issues to be decided:

- a. Whether the application is receivable *ratione materiae*;
- b. Whether there was undue delay in notifying the Applicant of the outcome of his rebuttal and of the placing of the rebuttal panel report in his Official Status File ("OSF");
- c. Whether the actions of the Applicant's FRO amounted to constructive dismissal; and
- d. Whether the Applicant is entitled to any remedies.

Whether the application is receivable ratione materiae

16. The Tribunal first has to determine whether the present application is receivable *ratione materiae* since the Respondent argues, *inter alia*, that no administrative decision has been made stemming from the Applicant's 2013-2014 e-PAS.

17. The Respondent also argues that the Applicant's challenge to the handling of his complaint under ST/SGB/2008/5 is not receivable because the Administration is still reviewing it.

18. The Tribunal recalls that the scope of its jurisdiction is clearly determined and limited by art. 2.1(a) of its Statute, which provides:

1. The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment.

19. Moreover, staff rule 11.2(a), on management evaluation, provides that:

A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1(a) shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

20. In the case at hand, the Applicant is contesting the time taken by UNMIK Administration to provide him with a copy of his rebuttal panel report and to place it in his OSF.

21. The issue for determination is whether not providing him in a timely manner with a copy of the report constitutes an administrative decision within the meaning of the jurisdictional provisions of the UNDT Statute.

22. What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made and the consequences of the decision on the staff member's terms of appointment.

23. The decision at stake is implicit from the Administration's failure to act promptly. It is well settled that inactions or omissions by the Administration may be appealable decisions as long as they produce direct legal consequences on the concerned staff member's terms of appointment (*Tabari* 2010-UNAT-030).

24. The time UNMIK's Administration took to provide the Applicant with a copy of the outcome of his rebuttal, and to transmit the rebuttal panel's report to OHRM in New York in order for it to be placed in the Applicant's OSF, are both administrative inactions susceptible to affect the Applicant's rights stemming from ST/AI/2010/5 (Performance Management and Development System). Almost twenty months elapsed between the completion of the Applicant's rebuttal and UNMIK's transmission of the rebuttal panel's report to OHRM. During that period, the Applicant's 2013-2014 e-PAS showing a negative rating remained on record as the only testament to his performance, yet it had been changed in August 2014.

25. UNMIK's failure to timely act to inform the Applicant of the outcome of his rebuttal (13 August 2014) and to rectify his performance appraisal accordingly is an administrative inaction capable of being challenged. Consequently, the Tribunal finds the application receivable *ratione materiae* in this respect.

26. The Applicant's challenge to the handling of the complaint he made under ST/SGB/2008/5 is not receivable because he filed it only on 2 March 2017 and did not request management evaluation of either the Administration's handling of the complaint or the Administration not taking action on it. In fact, he filed his complaint after he received the response to his request for management evaluation. The Tribunal also notes that at the time of the Respondent's reply, the complaint was still under review and no decision had yet been made. The application is, therefore, not receivable *ratione materiae* in this regard.

Undue delay in notifying to the Applicant the report of the rebuttal panel and in placing it in his OSF.

27. It is the Respondent's responsibility to present clear and convincing evidence that the Applicant was informed of the outcome of his rebuttal in a timely manner.

28. The Respondent produced a memorandum dated 25 August 2014, addressed to the Applicant, from the former Chief Civilian Personnel Officer ("CCPO"), UNMIK. The Applicant testified that he never received the memorandum and that he saw it for the first time when the Respondent produced it during the proceedings before the Tribunal.

29. During the hearing, the CCPO, UNMIK, testified that sometime between 13 and 20 August 2014, she orally informed the Applicant about the outcome of his rebuttal and the change in his performance rating. Additionally, she stated that she signed an interoffice memorandum, dated 25 August 2014, addressed to the Applicant informing him of the outcome of his rebuttal. However, she was unable to testify as to how and if the memorandum was transmitted to the Applicant because she did not have an email proving its transmission; neither did she have a copy of an acknowledgement receipt signed by the Applicant in support that it had been hand-delivered to him.

30. The one person who was copied on the memorandum to the Applicant—the former Chief of Administrative Services, UNMIK—testified that he did not recall receiving a copy of the 25 August 2014 memorandum, but that the Chief, Mission Support, UNMIK, handled the issues related to the Applicant’s case.

31. The Respondent could not produce any other witness to testify that the Applicant, as a matter of fact, was informed of the outcome of his rebuttal. In the absence of irrefutable evidence that the Applicant was informed of the outcome of his rebuttal by memorandum dated 25 August 2014, this Tribunal cannot entertain that UNMIK formally informed the Applicant of the outcome of his rebuttal on 25 August 2014.

32. During the hearing, the Tribunal heard oral testimonies from two Security Officers, UNMIK, who testified to the delay by UNMIK’s Administration in the notification of the rebuttal report to the Applicant. These two witnesses were colleagues of the Applicant, they were performing similar functions in Security and Operations and had the same First and Second Reporting Officers. One of the Security Officers gave evidence that he was equally not informed of the outcome of his 2013-2014 e-PAS rebuttal, which he had filed on 6 May 2014. He testified that this delay was documented in an apology by the then Chief of Mission Support, who wrote to him on 19 May 2016 informing him that “[d]ue to an oversight, it appear[ed] that the recommendation of the panel was not communicated to you, which is regrettable”.

33. Accepting the conclusion that the Applicant only received a copy of his rebuttal panel's report on 7 November 2016, after writing to the ASG/OHRM asking for the outcome, the Tribunal will now turn into the analysis of whether the period elapsed between the conclusion of the rebuttal and the official communication to the Applicant of the rebuttal outcome constitutes a breach of the Applicant's due process rights.

34. The Respondent argues that there is no legal provision that requires the Applicant to be provided with a copy of the rebuttal panel's report and that the Administration complied with ST/AI/2010/5.

35. The relevant provision of ST/AI/2010/5 states as follows:

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. ... 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.

36. According to Section 5.3 of the Guidelines for Performance Rebuttal Panels, approved by the ASG/OHRM and published on 20 June 2012:

5.3 The overall process from the receipt of the rebuttal statement of the staff member until the submission of the rebuttal panel report should normally not exceed six weeks. If after six weeks the panel has not completed its review, the Chairperson of the panel should send a communication to the responsible administrative entity, setting out the achievements of the panel so far, and the anticipated timeframe for finishing the process.

37. The Tribunal is aware of the fact that these Guidelines do not constitute a legal framework nor they create rights for staff members. However, they are a useful interpretative tool allowing to withdraw inferences from the behaviour of UNMIK's Administration.

38. The Tribunal notes that ST/AI/2010/5 neither contains a provision regarding the timeline of when a rebuttal panel report and change in e-PAS rating are to be placed in a staff member's OSF, nor a provision determining the notification to the

staff member of such report. However, the fact that there is a *lacuna* in this respect does not mean that higher legal principles cannot be applied to the case at hand to adjudicate on its merits.

39. It is well-established case law that the Administration has a duty of care towards staff members and must act fairly and transparently (*see, Kusuma* UNDT/2014/143, *McKay* UNDT/2012/018 confirmed by the Appeals Tribunal in *McKay* 2013-UNAT-287 and also, *Pirnea* 2013-UNAT-311 and). Duty of care amounts to the nature of the bond between the United Nations and its staff members.

40. In *Kusuma*, the Dispute Tribunal held that:

The Appeals Tribunal has recognized that the Organization has an obligation to act fairly and in good faith with its staff and a duty of care concerning its employees.

41. Also, the Appeals Tribunal has confirmed that there is a general principle of due diligence and good faith towards staff members enshrined in the Charter of the United Nations, which constitutes a structural principle of good management practice, and that undue delay can constitute a failure on behalf of the Administration to apply those principles (cf. *Ho* 2017-UNAT-791, confirming *Ho* UNDT/2017/013).

42. Therefore, the Administration, as custodian of all official records of staff members, is responsible for timely informing its staff members of a rebuttal's result and, if requested, to timely provide them with a copy of a rebuttal panel's report. Whether positive or negative, the outcome of a rebuttal process ought to be communicated to the concerned staff member as soon as possible.

43. It is uncontested that, by memorandum dated 3 June 2014, the Applicant rebutted his performance rating of "partially meets performance expectations" for the 2013-2014 performance evaluation cycle. On 13 August 2014, a rebuttal panel recommended to change the Applicant's performance to "successfully meets expectations".

44. On 19 August 2014, the rebuttal panel submitted its final report and recommendation to UNMIK Administration. However, no action was taken until almost two years and a half later, when the report was transmitted to the ASG/OHRM for placement in the Applicant's OSF.

45. The Respondent cannot argue that because the rules do not provide for a fixed timeline of notification of the outcome of a rebuttal, the Organization can take almost two years to update its records in this regard.

46. Accepting the Respondent's argument would be tantamount to declaring a rebuttal process as a futile exercise just because there is no definite time period to inform the staff member of an outcome or time frame when the same should be duly recorded in the staff member's OSF.

47. In fact, the Respondent was not able to provide credible evidence that the rebuttal panel's report was disclosed to the Applicant in due time. On the contrary, the evidence showed that he only got a copy of it over two years later, when he had already resigned from the Organization.

48. During that period, the information on his personal status file was not updated and the original challenged performance rating remained unchanged. The Respondent has not provided the Tribunal with a reasonable explanation for this behaviour from UNMIK's Administration. Thus, in light of the above, the Tribunal is of the view that by failing to timely provide the Applicant with a copy of the rebuttal report and to put it in the Applicant's OSF, the Administration violated his due process rights under ST/AI/2010/5.

Constructive Dismissal

49. The Applicant argues that the breaches of ST/AI/2010/5, which included procedural irregularities, delays, violations of due process, harassment and intimidation and the lack of support from the mission management, led him to resign from the Organization.

50. From the Applicant's testimony and that of current staff members of UNMIK Security Operations, it appears that the supervisory and working conditions of the Unit were less than conducive for staff members. This was also noted in the Applicant's rebuttal panel outcome.

51. The actions of the Applicant's FRO may have been such that the Applicant did not see any other option for a remedy but to resign from the Organization. However, in this case, the Tribunal is dealing only with the Applicant's rebuttal of his 2013-2014 e-PAS. The Tribunal recalls that the present case does not concern harassment or intimidation. As seen above, any claim in the present application relating to the Applicant's complaint under ST/SGB/2008/5 is not receivable.

Remedies

52. The Applicant claims compensation for violations of due process leading to his constructive termination, for delay and breaches of procedure, for lost earning capacity and benefits resulting from premature separation from service and for failure to address the allegations of intimidation and harassment by his supervisor. He also requests accountability for withholding critical information and preventing him from requesting wider investigations.

53. Art. 10.5 of the Tribunal's Statute, as amended by General Assembly resolution 69/203 adopted on 18 December 2014, delineates the Tribunal's powers regarding the award of remedies. It provides in its relevant part that:

As part of its judgement, the Dispute Tribunal may only order one or both of the following:

...

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation, and shall provide the reasons for that decision.

54. The fundamental purpose of compensation is to place an aggrieved party in the position he or she would have been in but for the breach in contractual obligations (see *Mmata* 2010-UNAT-092 and *Iannelli* 2010-UNAT-093). In the case at hand, the breach consists in the undue delay to notify the rebuttal panel's report to the Applicant. Furthermore, the Dispute Tribunal may award compensation for actual pecuniary or economic loss and non-pecuniary damage, which includes *inter alia* stress and anxiety. Finally, it must be recalled that the Applicant bears the burden of proof to support a claim for compensation.

55. The Appeals Tribunal recently ruled on the threshold required to prove harm and, consequently, to receive compensation in accordance with the provisions of Article 10(5) of the UNDT Statute, namely that "the harm for which compensation is requested must be supported by evidence and that a staff member's testimony alone is not sufficient to present evidence supporting [it]" (see Concurring Opinion by Judge Sabine Knierim, para. 2, and Joint Partial Dissenting Opinion by Judge Deborah Thomas-Felix, Judge Richard Lussick and Judge Rosalyn Chapman, para. 12 in *Kallon* 2017-UNAT-742; see also *Auda* 2017-UNAT-787, para. 64).

56. In *Auda*, the UNAT found that "[g]enerally speaking, the testimony of an applicant alone without corroboration by independent evidence (expert or otherwise) affirming that non-pecuniary harm has indeed occurred is not satisfactory proof to support an award of damages". In this connection, Judge Sabine Knierim specified in her above-mentioned concurring opinion, while recalling that general principle, that "[c]oming from a civil law system, [she] cannot easily acknowledge the allegations of an applicant as 'evidence' under Articles 9(1)(b) of the Appeals Tribunal Statute and 10(5)(b) of the UNDT Statute as, in such system, the applicant is not regarded as a witness".

57. The undersigned Judge also comes from a civil law system where, indeed, the allegations of an Applicant are not acknowledged as evidence given that she/he has a vested interest in the outcome of the case and, contrary to witnesses, an Applicant is supposed to be partial. However, it is worth recalling that the system of administration of justice of the United Nations is one that embraces both civil law and common law features, "is based on different national systems and endeavours

to make them compatible” (see Judge Weinberg de Roca’s Partial Dissenting Opinion in *Landgraf* 2014-UNAT-471, para. 4).

58. In *Landgraf*, the Appeals Tribunal ruled, by majority, that art. 9 of the UNDT Statute and arts. 17, 18 and 19 of the UNDT Rules of Procedure “are sufficiently comprehensive to give the UNDT the discretion to allow a party to the proceedings to give oral evidence as it deems necessary. If a party is permitted by the UNDT to give oral evidence, then that party becomes a witness in the case and must make the declaration prescribed in Article 17(3) of the UNDT Rules [of Procedure]”.

59. It follows that applicants before the UNDT can give oral evidence under oath. It should then be left to the court to decide whether the testimony provided is credible, reliable and satisfactory to sufficiently discharge the burden of proof.

Pecuniary damage

60. For the Applicant to claim pecuniary damages arising from the undue delay in the notification of the rebuttal’s panel report, he must establish that he suffered actual economic harm as a result of it. The Applicant did not provide any evidence of such harm. He could have done so by producing, for example, evidence of posts to which he had applied to and for which he was not considered due to his above performance appraisal.

61. Moreover, during cross-examination the Applicant stated that he had not applied for any positions because he knew he would not succeed because of the negative e-PAS. That does not constitute evidence of material harm.

Non-pecuniary damages

62. At the hearing, the Applicant testified and explained how the situation affected him. He affirmed that the former Chief of Mission Support, UNMIK, tried to persuade him, during a meeting in June 2014, to drop the rebuttal of his 2013-2014 e-PAS, to put “everything behind” and accept an offer to work in another Peacekeeping mission in Libya. The Applicant refused to accept this because the “bad rating” would still be kept in his records. The Applicant also explained how

frustrated he was with how the Administration handled his request for rebuttal and failed to notify and provide him with a copy of the rebuttal panel report in due time.

63. The Applicant also shared with the Tribunal that after having had several conversations with both his supervisor and the CCPO UNMIK, he lost hope in a quick solution of his case and finally realised that he wouldn't be able to apply for any other posts due to the "bad rating" in his 2013-2014 e-PAS.

64. The testimony of the Applicant was supported by two security officers who worked with him in UNMIK. These witnesses clarified how the delays caused by UNMIK's Administration to provide timely e-PAS and or rebuttals' outcomes impacted negatively the working environment and caused stress and anxiety to all the staff members affected by it.

65. These two witnesses also confirmed that the Applicant felt disappointed and unduly treated by UNMIK's administration, which in their view led him to leave the mission where he had been working for almost ten years by the month of August 2014.

66. The two witnesses also testified that between May and July 2014 the Applicant was always talking about his e-PAS and how angry he was with it and how unfair the whole situation seemed to him.

67. The Tribunal finds the evidence heard to be credible, reliable, and satisfactorily supported by testimony, the facts of the case and documents therein. Said evidence must then be assessed to determine whether it warrants the award of compensation for stress and anxiety arising from the undue delay, between 2014 and 2016, to notify to the Applicant the outcome of his rebuttal.

68. The evidence in question points to systemic performance evaluation shortcomings at UNMIK. It is also indicative of frustration amongst UNMIK staff of the Security and Operations Section at least up to the date of the Applicant's date of separation from service following his resignation in 2014. Such evidence, however, does not relate to the subject matter of the instant case, namely the almost two years that the Applicant had to wait to learn about the outcome of his rebuttal.

69. In the absence of evidence of harm arising from the violation of the Applicant's due process rights (see also para. 48 above), the threshold required to grant compensation is not met.

70. Finally, any compensation that could arise from the above-mentioned shortcomings within UNMIK are outside the scope of this case (see para. 51 above). Even if they were not, it is worth noting that, in the Applicant's case, there was no delay in addressing his rebuttal. Indeed, a little over two months elapsed between his filing a rebuttal (3 June 2014) and the rebuttal panel reaching a decision (13 August 2014).

Conclusion

71. In view of the foregoing, the Tribunal DECIDES that:

- a. The application with respect to the decision to provide the Applicant with a copy of the rebuttal panel report and to place it on his OSF with undue delay is receivable, *ratione materiae*;
- b. The Applicant's challenge to the handling of his allegations of harassment and abuse of authority by his former supervisor is not receivable; and
- c. All other pleas are rejected.

(Signed)

Judge Teresa Bravo

Dated this 31st day of May 2018

Entered in the Register on this 31st day of May 2018

(Signed)

René M. Vargas M., Registrar, Geneva