



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

FAIRWEATHER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Marta Mammana, UNOG, UN Secretariat

Introduction

1. On 17 October 2017, the Applicant, a retired staff member with the Office of the High Commissioner for Human Rights, filed an application concerning the rebuttal process of her performance appraisals for the periods 2010-11 and 2011-12 in which she received the ratings of “partially meets performance expectations”. The Applicant requested a rebuttal of these two performance appraisals in 2013 and yet had not received the rebuttal reports at the time of the filing of the application. The Applicant claims that as a result of these performance ratings she received in 2013, she did not receive the long-service step and could not apply for the young professionals programme (“YPP”) at the time.

2. In response, the Respondent claims that the application is not receivable on the grounds that the application does not concern any administrative decision subject to judicial review and that the application is time-barred.

Factual and procedural background

3. In May 2013, the Applicant’s performance appraisals for the periods 2010-11 and 2011-12 were completed, in which she received the ratings of “partially meets performance expectations”. The Applicant timely requested a rebuttal of her performance appraisals.

4. In July 2013, the Applicant followed up by email with the human resources office regarding the status of her rebuttal request, noting that the deadline for the YPP exam was 1 August 2013. In response, the Applicant was told that there was no news from the rebuttal panel and that the rebuttal process might take several months to complete. The Applicant also sent an email to the rebuttal panel members noting that the two negative performance appraisals suspended her long-service step and her eligibility for the YPP exam.

5. Between the initiation of the rebuttal process in 2013 and the Applicant's retirement on 31 October 2016, the Applicant followed up with the human resources office several times regarding the status of her rebuttal request.

6. On 31 October 2016, the Applicant retired from the Organization.

7. After retirement, the Applicant continued to follow up with the human resources office regarding the status of her rebuttal request.

8. On 19 July 2017, the Applicant requested management evaluation of the decision "not to respond to and/or take appropriate and timely action to consider, complete and report on request for rebuttal on her performance appraisal filed on 13 May 2013". The Applicant wrote that it caused her tremendous stress and anxiety and had a significant negative impact on her long-service step and retirement benefits. She also noted that she became ineligible to sit for the YPP exam and to apply for any temporary positions.

9. Having received no response to her management evaluation request, on 17 October 2017, the Applicant filed the present application.

10. On 20 November 2017, the Respondent filed the reply claiming that the application is not receivable.

11. On 17 October 2018, in accordance with Order No. 190 (NY/2018), the Applicant filed her comments on the Respondent's submission on the receivability issue.

12. On the same day (17 October 2018), in the Respondent's submission in accordance with Order No. 190 (NY/2018), the Respondent submitted the rebuttal reports for 2010-11 and 2011-12 performance appraisals which were issued on 29 November 2017. For the performance period for 2010-11, the rebuttal panel recommended the upgrade of rating to "successfully meets performance

expectations,” but for the performance period for 2011-12, the rebuttal panel recommended no change to the rating of “partially meets performance expectations”.

Consideration

13. In the present case, the Applicant challenges the decision “not to respond to and/or take appropriate and timely action to consider, complete and report on request for rebuttal on her performance appraisal filed on 13 May 2013”. The Applicant initiated the rebuttal process of her performance appraisals for the periods 2010-11 and 2011-12 in which she received the ratings of “partially meets performance expectations”, and she submits that the delay in the rebuttal process negatively affected her eligibility for long-service step and for the YPP exam and caused her stress and anxiety.

14. In response, the Respondent claims that the application is not receivable since no adverse decision was taken based on the contested Applicant’s performance appraisals. The Respondent notes that no performance improvement plan (“PIP”) was instituted, and that the Applicant remained in service until her retirement in October 2016. Since the Applicant is already retired, the Respondent claims that no decision will ever be taken which could affect her previous terms of appointment. Furthermore, the Respondent claims that the application is time-barred since the Applicant failed to request a management evaluation in a timely manner: she had to request a management evaluation when the rebuttal process started showing a delay and when her eligibility for a long-service step and for the YPP exam was affected.

15. The Applicant responds that the administrative decision in this case is the failure of the administration to respond to and to take timely action to complete the rebuttal process in a reasonable timeframe. The Applicant submits that the inordinate, excessive, and undue delay and its continuing failure to take appropriate action continued to cause her tremendous pain, anxiety, and loss and negatively affected her ability to advance her career, her longevity status and her retirement benefits.

16. In light of the Respondent’s challenge to the receivability of the application, the Tribunal will first address this issue.

The applicable law

17. Article 2.1(a) of the Dispute Tribunal’s Statute provides that the Dispute Tribunal shall be competent to hear and pass judgment on an application:

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

18. The Appeals Tribunal has consistently held that the key characteristics of an administrative decision subject to judicial review is that the decision must “produce direct legal consequences” affecting a staff member’s terms or conditions of appointment (see, for example, *Ngokeng* 2014-UNAT-460, para. 27, *Lee* 2014-UNAT-481, para. 49).

19. In the present case, the Applicant challenges the inordinate delay in the completion of the rebuttal process for her performance appraisals in which she received the ratings of “partially meets performance expectations”. The rebuttal process is governed by ST/AI/2010/5 (Performance Management and Development System), which provides in secs. 9 and 15 (emphasis in original):

Section 9

Rating system

...

Overall performance ratings

9.3 Staff who have met or exceeded performance expectations should be given one of the following two overall ratings:

- Exceeds performance expectations;

- Successfully meets performance expectations.

9.4 These two ratings establish full satisfaction with the work performed and justify awarding a salary increment in accordance with section 16.3 below. These ratings shall be so viewed when staff members are considered for selection for a post at the same or higher level, without prejudice to the discretionary authority of the Secretary-General to appoint staff members.

...

9.7 Staff who have not fully met performance expectations should be given one of the following two overall ratings:

- Partially meets performance expectations;
- Does not meet performance expectations.

These two ratings indicate the existence of performance shortcomings.

9.8 A rating of “partially meets performance expectations” should be considered when the staff member did not meet the defined success criteria and/or performance expectations for some of the goals/key results but demonstrates potential to develop the required skills.

9.9 A rating of “does not meet performance expectations” should be considered when the staff member did not meet the defined success criteria or performance expectations for the majority of the goals/key results; and the staff member demonstrates an inability to develop the required skills.

...

Section 15

Rebuttal process

15.1 Staff members who disagree with a “partially meets performance expectations” or “does not meet performance expectations” rating given at the end of the performance year may, within 14 days of signing the completed e-PAS or e-performance document, submit to their Executive Officer at Headquarters, or to the Chief of Administration/Chief of Mission Support, as applicable, a written rebuttal statement setting forth briefly the specific reasons why a higher overall rating should have been given. Staff members having received the rating of “consistently exceed performance expectations”

or “successfully meets performance expectations” cannot initiate a rebuttal.

...

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 also communicated to OHRM, or the Field Personnel Division of the Department of Field Support, as appropriate.

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.

15.6 Should unsatisfactory performance be the basis for a decision of non-renewal of an appointment and should the appointment expire before the end of the rebuttal process, the appointment should be renewed for the duration necessary to the completion of the rebuttal process.

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.

Is the delay in the completion of the rebuttal process an administrative decision subject to judicial review?

20. Under the jurisprudence of the Appeals Tribunal, the delay in the completion of certain procedures in itself is not an administrative decision subject to judicial

review. In *Auda* 2017-UNAT-786, citing *Birya* 2015-UNAT-562, the Appeals Tribunal distinguished the absence of a response to a staff member's request, which could constitute an implied administrative decision, from the case in which the requested process began and yet suffered inordinate delay. The Appeals Tribunal held in *Auda*:

30. Therefore, such a step is preliminary in nature and irregularities in connection with that decision, including alleged delay in reaching that decision, may only be challenged in the context of an appeal after the conclusion of the entire process. This final administrative decision that concludes the compound administrative process in administering the staff member's complaint is the only challengeable one and absorbs all the previous preliminary steps.

21. The *Auda* judgment was related to the delay for a fact-finding panel in submitting its investigation report under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment and abuse of authority), but its principle is perfectly applicable to the legal framework of the completion of the rebuttal process.

22. In *Gnassou*, both this Tribunal (UNDT/2018/010) and the Appeals Tribunal (2018-UNAT-865) found receivable the contestation of the findings of the applicant's rebuttal panel concerning her 2014-2015 performance appraisal in which she received the rating of "does not meet performance expectations". She went through the proper channels to rebut her 2014-2015 performance appraisal, but before the completion of the rebuttal process, the Administration imposed a PIP based on the negative appraisal. She submitted that the delay for the rebuttal process was excessive. However, the contested decision was not the delay, but the decision that stemmed from the final performance appraisal of the rebuttal panel ("the findings of the rebuttal panel concerning her 2014-2015 performance appraisal and MONUSCO's decision to place the report of the rebuttal panel in her OSF"). The delay was only a ground for contesting the decision. Therefore, the *Gnassou* judgment does not call into question the well-established jurisprudence according to which all the steps prior to the final adverse administrative decision arising from the performance appraisal

are not challengeable. The Appeals Tribunal set the same principle in *Ishak* 2011-UNAT-152 regarding the preparatory or intermediate steps “connected to the promotion session, but in no way were they capable of adversely affecting Ishak’s legal situation since they modified neither the scope nor the extent of his rights”.

23. Consequently, an inordinate delay in the rebuttal process of an appraisal may be a receivable ground for contesting an administrative decision, but is not an administrative decision, unless the Applicant demonstrates that it had, by itself, a direct and negative impact on a staff member’s conditions of service.

Did the delay in the completion of the rebuttal process for the performance ratings of “partially meets performance expectations” have direct legal consequences?

24. The Appeals Tribunal held in *Ngokeng* 2014-UNAT-460 and *Staedtler* 2015-UNAT-546 that an overall satisfactory performance appraisal, despite the inclusion of some negative comments, does not constitute an administrative decision subject to judicial review since such performance appraisal, by itself, does not have a direct and negative impact on a staff member’s rights. It relied on sec. 15.7 of ST/AI/2010/5 that it cited. It is clear from these provisions that it is only the “administrative decisions that stem from any final performance appraisal and that affect the conditions of service of a staff member” that are reviewable by the Tribunal.

25. In accordance with *Ngokeng* and *Staedtler*, the Applicant needs to show that the delay in conducting the rebuttal process on her rating “partially meets performance expectations”, by itself, had a direct and negative impact on her conditions of service. In this regard, the Applicant claims that this delay negatively affected her eligibility for the long-service step and for the YPP exam. The Respondent contends that the negative performance appraisals had no negative effects on the Applicant’s terms of employment.

26. With respect to the long-service step, the Tribunal notes that this entitlement is governed by the information circular, and particularly ST/IC/2008/45 (Revised salary scales for staff in the General Service and related categories at Headquarters) in the Applicant's case, which provides that:

The qualifying criteria for in-grade increases to the long-service step are as follows:

- The staff member should have had at least 20 years of service within the United Nations common system and 5 years of service at the top regular step of the current grade;
- The staff member's service should have been satisfactory.

27. The guideline on long-service step, which is available on the United Nations Human Resources Portal and relied upon by the Applicant in her request for a management evaluation, specifically addresses the relationship between the rebuttal process and long service step. In particular, it provides as follows (emphasis added):

PAS REBUTTAL AND DENIAL OF LONG SERVICE STEP

☞ If the decision not to grant the long-service step was made while the staff member's PAS was under rebuttal, the decision should be reconsidered in light of the outcome of the rebuttal process when completed.

☞ When the staff member's performance rating resulting from the rebuttal process is considered "satisfactory" for long-service step purposes, the long-service step is granted and made effective as from the date on which it was due originally.

☞ *The decision whether to grant or deny the long-service step is not part of the PAS rebuttal process. Denial of long service step is an administrative decision, which may be appealed under Chapter XI of the Staff Rules.*

28. As this guideline clearly sets forth, the decision whether to grant or deny the long-service step is not part of the rebuttal process and its denial is a separate administrative decision that should be contested separately. This guideline is consistent with sec. 15.7 of ST/AI/2010/5, which separates the rebuttal process from

the challenge of any other administrative decisions that may stem from a final performance appraisal.

29. Based on the record, it is not clear when the decision to grant or deny the long-service step was made, if any, but the decision would have been made before the Applicant's retirement in October 2016 at the latest. There is no evidence that the Applicant proceeded to challenge such decision, whether it was properly notified to her or was implied, in a timely manner.

30. Therefore, the Tribunal finds that if the Applicant intended to challenge any administrative decision pertaining to a long-service step in the present application, her case would be not receivable as time-barred. The Tribunal also notes that the Applicant claims that her retirement benefits were negatively affected because she did not receive a long-service step, but since there was no reviewable decision concerning the long-service step, the Tribunal cannot review her claim regarding her retirement benefits.

31. With regard to the Applicant's eligibility for the YPP exam, sec. 4.6 of ST/AI/2012/2/Rev. 1 (Young professionals programme) provides that staff members who applied for the YPP exam and have been found to be ineligible to take the YPP exam shall be informed of the reasons for that determination and may request a review of the eligibility determination to the Central Examinations Board within the prescribed time limit. Reading this provision together with sec. 15.7 of ST/AI/2010/5, the Tribunal finds that any decision to find a staff member ineligible for the YPP exam also constitutes a separate administrative decision that should be contested separately.

32. Based on the record, it is not clear whether the Applicant applied for the YPP exam and was found to be ineligible to take the YPP exam in 2013 or any subsequent years. Even if the Applicant applied for the YPP exam and was found to be ineligible to take the YPP exam sometime between 2013 and her retirement in October 2016, she should have followed the procedures set forth in ST/AI/2012/2/Rev.1 and

requested a management evaluation within the time limit set forth in staff rule 11.2(c). Since the Applicant only requested a management evaluation in July 2017, long after the prescribed time limit from the date on which she could have been notified of the decision on her eligibility for the YPP exam, if any, the Tribunal finds that the Applicant's challenge to any administrative decision pertaining to her eligibility for the YPP exam is also not receivable as time-barred.

33. Except the Applicant's eligibility for long-service step and for the YPP exam, the Applicant did not clearly identify any other direct consequences stemming from her performance appraisals and therefore, there are no other issues for the Tribunal to review.

Conclusion

34. In light of the foregoing, the Tribunal rejects the present application as not receivable.

(Signed)

Judge Joelle Adda

Dated this 5th day of August 2019

Entered in the Register on this 5th day of August 2019

(Signed)

Nerea Suero Fontecha, Registrar, New York