



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/023

Judgment No.: UNDT/2020/127

Date: 27 July 2020

Original: English

**Before:** Judge Rachel Sophie Sikwese

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

HOSSAIN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for the Applicant:**  
Self-represented

**Counsel for the Respondent:**  
Teresa Posse, UNDP

## **Background**

1. In this application, the Applicant is challenging the decision of the Rebuttal Panel maintaining a rating of “partially satisfactory” that he received in his 2016 Performance Management and Development (“PMD”) assessment (“the impugned decision”). He argues that his due process rights were not respected during the rebuttal process and seeks the relief of having his performance re-reviewed, re-assessed and rating changed. The Respondent argues that the application is not receivable and that it should be dismissed.

## **Facts and Procedure**

2. At the time of the impugned decision, the Applicant held a fixed-term appointment as Finance Specialist for the Zimbabwe Resilience Building Fund (“ZRBF”) programme, which is managed and supported by the UNDP Zimbabwe Country Office (“UNDP Zimbabwe”) at the P-3 level.

3. The Applicant received the impugned decision on 29 May 2018.<sup>1</sup>

4. 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 21 February 2016, the Applicant commenced his employment as Finance Specialist in UNDP Zimbabwe. The Applicant’s initial one-year fixed-term appointment was subsequently extended successively until 30 June 2019.

b. On 1 February 2017 and on 3 February 2017, the Applicant discussed his performance for the year 2016 with his supervisor, the Head of the ZRBF Programme Management Unit.

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<sup>1</sup> Application, annex 12.

- c. On 6 February 2017, his supervisor assessed his overall performance for the 2016 performance evaluation cycle as “partially satisfactory”.
- d. That same day, the Applicant expressed his disagreement with his supervisor about the rating of his 2016 PMD.
- e. On 13 February 2017, the Applicant had a third discussion regarding his performance with his supervisor. At this meeting, the Applicant disputed his performance rating, presented arguments in support of his position and asked his supervisor to provide him with evidence in support of her rating.
- f. In February and March 2017, the Applicant approached the Resident Representative and Country Director, UNDP Zimbabwe, for advice and guidance regarding his disagreement with his 2016 PMD rating.
- g. On 9 March 2017, the Resident Representative convened the Talent Management Review Group (“TMRG”) to hear the Applicant’s case.
- h. On 24 April 2017, the Country Director convened a meeting to inform the Applicant about the outcome of the TMRG process. At this meeting, the Applicant was informed that the TMRG: (1) noted areas where he performed well; (2) recognized that there were some areas which required improvement in his performance; (3) decided to maintain his supervisor’s rating of partially satisfactory; and (4) changed the Applicant’s contract extension from six months to one year.
- i. By e-mail dated 6 June 2017, the Deputy Country Director, Operations, UNDP Zimbabwe, notified the Applicant in writing that the TMRG had endorsed the partially satisfactory rating of his 2016 PMD.
- j. On 1 August 2017, the Applicant filed a rebuttal of his 2016 PMD rating. On 8 August 2017, he was informed about the composition of the Rebuttal Panel that was assigned to conduct the review of his case.

- k. On 8 September 2017, the Applicant had an individual session with the Rebuttal Panel via Skype conference.
- l. On 29 May 2018, the Report of the Rebuttal Panel was shared with the Applicant reflecting the findings and recommendations of the Panel, including the decision to maintain the Applicant's 2016 PMD rating of "partially satisfactory".
- m. By e-mail dated 30 May 2018, the Applicant expressed concern that the Rebuttal Panel had not followed due process and, on 7 June 2018, he sent the Panel an extensive submission disputing its decision to maintain his 2016 rating.
5. On 26 February 2019, the Applicant filed this application challenging the impugned decision.
6. The Respondent filed his reply on 1 April 2019.

## **Submissions**

### *The Applicant*

7. The Applicant argues that his supervisor, Ms. Natalia Perez, did not assess his performance based on evidence and actual performance, but rather based on her biased personal perception. The assessment was made to "oust" him from his job. His PMD assessment was completed on 6 February 2017 and his contract extension was made on 9 February 2017 only for six (6) months. Therefore, there is a clear link between his performance and contract extension. To extend his contract for six months, his supervisor assessed his performance as partially satisfactory intentionally.
8. A few of his functions were taken away from him and attached to the newly created "Grants Management Unit". Eventually, his position was abolished with effect from 31 December 2018. The abolition of his post was not implemented after

he challenged the decision.

9. His mid-term evaluation was assessed as “On-Track” and there was no reminder from his supervisor concerning his performance subsequent to the mid-term assessment. This is more evidence that the performance assessment was made intentionally to make him an underperformer and to eventually remove him from his position.

10. One of his key results “Value for Money” was assessed by his supervisor as not achieved while this was achieved and still the agreed tools/indicators are being used by ZRBF/UNDP. This further demonstrates that his performance was not assessed objectively.

11. In respect to the goal of “Sharing of knowledge and knowledge building”- his supervisor wrongly blamed him for the delivery of products with wrong specifications, which in fact he and another colleague detected.

12. His supervisor assessed his 2016 PMD twice. He highlighted a statement in his TMRG submission which indicated his supervisor’s motive, especially her departure from the first assessment, to make his performance appear comparatively bad during her second assessment.

13. Having worked within the United Nations system for over 14 years, none of his performance has ever been rated as partially satisfactory. The sudden change of performance rating should be supported by evidence, which his supervisor has not provided.

14. He completed many other complex tasks, none of which were assessed as part of his performance evaluation. Some of the tasks were time consuming and took more than three months.

15. The TMRG process was not conducted in accordance with the proper procedures. For example, the TMRG agreed with his supervisor’s rating without

further details or opportunity provided to him to present his case, there was no formal TMRG meeting and no notification was received from the TMRG Focal Point and no meeting minutes were shared except the TMRG decision.

16. The Rebuttal Panel upheld his supervisor's and the TMRG's decision without taking into account any of the evidence that he submitted. The rebuttal report mostly included wrong and incorrect information which he had challenged.

17. The Applicant submits that in some vacancy announcements, a strong rating of three consecutive performances is of dire necessity and that this is affecting him in applying for few good jobs and thereby, affecting his career.

18. The Applicant seeks the following reliefs:

- a. his performance to be re-reviewed, re-assessed based on his actual achievements and the ratings should be changed;
- b. "exemplary action so that no one can repeat this type of heinous work";
- c. the UNDT to ensure justice and create an example so that the supervisor cannot use the PMD as a weapon to harass staff; and
- d. for UNDP to consider this issue as harassment and abuse of authority on the part of his supervisor and accordingly take appropriate actions.

### *The Respondent*

#### *Receivability*

19. In the present case, no adverse administrative decision has been taken on the Applicant's terms of appointment or contract of employment based on his 2016 performance rating resulting from the rebuttal process. Consequently, the Respondent submits that the Rebuttal Panel's decision to maintain the Applicant's performance rating is not a contestable administrative within the meaning of staff rule 11.2(a) and

of art. 2.1(a) of the Dispute Tribunal's Statute since the contested decision did not have any direct legal consequences on the Applicant's terms and conditions of appointment.

## **Considerations**

### *Preliminary Issue: Applicant's request for an oral hearing*

20. On 8 July 2020, the Applicant requested the Tribunal to organize an oral hearing of his case because there were several issues that he needed to explain and to clarify.

21. Oral hearings are governed by art. 2(e) of the Dispute Tribunal Statute and art. 16 of the Dispute Tribunal Rules of Procedure. Under arts. 16.1 and 16.2 of the Rules, a judge hearing a case may hold oral hearings and a hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure. Under art. 19 of the UNDT Rules, the Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties. As the Dispute Tribunal does not find that an oral hearing would assist it any further in resolving the issues on appeal, the request for an oral hearing is denied.

### *Receivability*

22. Article 2.1(a) of the UNDT Statute provides that:

1. The Dispute Tribunal shall be competent to hear and pass judgement 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 noncompliance 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 non-

compliance.

23. For a decision to be challengeable under art. 2.1(a) of the UNDT Statute, it must be final and produce direct legal consequences to the legal order.<sup>2</sup> Conversely, a decision that is final but produces no direct legal consequence on a staff member's terms of appointment or the contract of employment is not receivable by the Tribunal.<sup>3</sup>

24. There are two questions before the Tribunal namely; was there a final decision and secondly, if there was a final decision, did it produce any direct legal consequence on the Applicant's terms of appointment or his contract of employment?<sup>4</sup>

***Was there a final decision?***

25. The present case concerns a rebuttal process that was initiated in accordance with para. 50 of the UNDP PMD Policy.<sup>5</sup> On 25 May 2018, the Rebuttal Panel issued its report recommending that the administration maintain the original overall rating of "partially satisfactory". In accordance with para. 52 of the UNDP PMD Policy, the performance rating of "partially satisfactory" became binding on the Applicant because of the Rebuttal Panel's recommendation of 25 May 2018. In light of the foregoing, there was a final decision<sup>6</sup>.

***Did the final decision produce any direct legal consequence on the Applicant's terms and conditions of appointment?***

26. The Applicant alleges several procedural flaws with the rebuttal process. For instance, he argues that the Rebuttal Panel did not review his important documents like minutes and emails. The Tribunal however finds that despite the Rebuttal Panel's

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<sup>2</sup> Former United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003); *Andati-Amwayi* 2010-UNAT-058; *Elasoud* UNDT/2010/111 confirmed by Judgment No. 2011-UNAT-173.

<sup>3</sup> See generally *Fairweather* UNDT/2019/134 confirmed by *Fairweather* 2020-UNAT-1003.

<sup>4</sup> See generally *Kebede* UNDT/2019/144.

<sup>5</sup> Reply, annex 9.

<sup>6</sup> See generally *Kebede op. cit.*



decision not to review documents which it could not validate and to maintain the rating, this decision did not adversely affect the Applicant. UNAT's established principle is that, to succeed, the Applicant must show that the decision has direct legal consequences on the conditions of service.<sup>7</sup>

27. The Tribunal has taken into account the Applicant's arguments that one adverse consequence of the performance rating was his six-month contract extension, however, on 24 April 2017, the Country Director convened a meeting to inform the Applicant about the outcome of the TMRG process where he was informed, *inter alia*, that his contract extension had been changed from six months to one year. The Applicant has not challenged this.

28. The Applicant further argues that in "some vacancy announcements, strong rating of three consecutive performance is of dire necessity and that this is affecting [him] to apply for few good jobs and thereby, affecting [his] career". The Applicant has not disclosed any such vacancies or his application and negative responses thereto citing his rating as the reason for not getting the job. UNAT held that:

In the absence of applications for the long-service step or the YPP exam, the Appellant cannot seek to backtrack and presume the direct negative legal consequences of a decision that might have existed but never did<sup>8</sup>.

In the absence of any provable direct legal consequences stemming from the Rebuttal Panel's decision, the Applicant has not demonstrated that he has a challengeable administrative decision for appeal under the Tribunals' Statute<sup>9</sup>. As such, the application is not receivable.

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<sup>7</sup> *Ngokeng* 2014-UNAT-460, para. 30, "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."

<sup>8</sup> *Fairweather* 2020-UNAT-1003, para. 42.

<sup>9</sup> See for example *Fairweather* *ibid.*, at paras. 35, 40 and 42 and *Ngokeng op.cit.*, para. 30.

**Judgment**

29. The application is not receivable and is accordingly dismissed.

*(Signed)*

Judge Rachel Sophie Sikwese

Dated this 27<sup>th</sup> day July 2020

Entered in the Register on this 27<sup>th</sup> day July 2020

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi