



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/NBI/2018/088  
Judgment No.: UNDT/2021/080  
Date: 1 July 2021  
Original: English

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**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

MBOGOL

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Costin Simiyu Mulongo, Costin & Webster Law  
Alain Michel Ebele Dikor  
Miller Wanjala Bwire

**Counsel for the Respondent:**

Nicole Wynn, AAS/ALD/OHR, UN Secretariat  
Rosangela Adamo, AAS/ALD/OHR, UN Secretariat

## **INTRODUCTION**

1. The Applicant is a former staff member of the United Nations – African Union Hybrid Operation in Darfur (“UNAMID”). She served as a Political Affairs Officer at the P-4 level in the Political Affairs Section.

2. On 16 August 2018, the Applicant filed an incomplete application with the United Nations Dispute Tribunal (“UNDT/the Tribunal”) in Nairobi challenging a decision that she characterized as a “decision not to rewrite [her] September 2016-March 2017 performance evaluation in order to correct and finalize the document as instructed by the Chief HR on 19 October 2017, and its consequences”, among them, that she was not retained in service after a downsizing exercise. The Applicant also moved the Tribunal for a 30-day extension of time to complete her application. The Tribunal granted the motion and the Applicant completed her application on 14 September 2018.

3. The Respondent filed a reply on 26 December 2018, claiming that the application is not receivable.

## **PROCEDURAL HISTORY**

4. The Tribunal, by Order No. 048 (NBI/2019), directed the Applicant to provide a response on the issue of the receivability of her application on or before 25 April 2019. The Applicant did not comply with Order No. 048.

5. After a review of the pleadings, the Tribunal found the application receivable.<sup>1</sup>

6. The Tribunal held a case management discussion (“CMD”) on 23 October 2019 during which it informed the parties that its review would be limited solely to administrative decisions that stemmed directly from the negative comments in the Applicant’s performance appraisal document (“e-PAS”).<sup>2</sup> By Order No. 167

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<sup>1</sup> Order No. 140 (NBI/2019).

<sup>2</sup> Order No. 167 (NBI/2019).

(NBI/2019), the Tribunal directed the parties to make submissions on the impact of the negative comments and ratings in the Applicant's e-PAS on her overall score in the comparative review process and for the Respondent to provide clarification on the discrepancy between the ratings for core values in the Comparative Review Panel's terms of reference and the ratings contained in the comprehensive evaluation matrix. The Respondent and the Applicant filed their submissions on 13 and 16 December 2019, respectively.

7. In response to Order No. 011 (NBI/2020), the Applicant informed the Tribunal on 4 February 2020 of her intention to call four witnesses to give evidence on her behalf during an oral hearing. Two of the witnesses were to speak to the mission's failure to amend her 2016-2017 e-PAS and provide it for the comparative review process and the other two were to speak to the existence of two P-4 posts at the time of the comparative review process, wherefore, if not for the impugned e-PAS, she would have been retained in service. She also alleged that although she was eligible for a continuing appointment, the Respondent had deliberately delayed the process until she was separated from service.

8. On 14 February 2020, the Applicant informed the Tribunal that her witnesses had all declined to testify and requested that her matter be referred for mediation. On 25 February 2020, the Applicant filed a submission reiterating that there were two, not one, vacant P-4 posts at the time of the comparative review process because there was an unencumbered post that was not taken into consideration. The Respondent objected to hearing the Applicant's witnesses, as the circumstances for which witnesses were proposed were either undisputed or irrelevant.<sup>3</sup>

9. On 2 March 2020, the Respondent shared the hearing bundle with the Applicant for comment. The Applicant objected to the exclusion of her 25 February 2020 submission and the inclusion of several emails accusing her of non-performance.<sup>4</sup> The

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<sup>3</sup> Respondent's response to Order No. 40 (NBI/2020)

<sup>4</sup> Applicant's submission of 4 March 2020.

Respondent filed the hearing bundle on 5 March 2020, which was accepted by the Tribunal in its entirety.

10. Pursuant to the Tribunal's order, on 11 March 2020, the Respondent filed a copy of the Applicant's request for management evaluation submitted on 6 January 2018 to the Management Evaluation Unit ("MEU").

11. On 11 March 2020, the following UNAMID officials gave oral evidence on behalf of the Respondent: Mr. Ebow Idun, then Deputy Chief Human Resources Officer ("Dep./CHRO"); Mr. Seidina O.I.I. Joof, Member of the Comparative Review Panel; and Ms. Rose Dennis, Chair of the Comparative Review Panel. On 12 March 2020, the Tribunal heard oral evidence from the Applicant and Mr. Aggrey Kedogo, then UNAMID CHRO. The hearing was adjourned to allow the Applicant to retain legal counsel, the Respondent to locate witnesses that the Tribunal considered material and for the parties to submit additional documentary evidence.<sup>5</sup> The Tribunal directed service of Order No. 061 (NBI/2020) on the Office of Staff Legal Assistance ("OSLA") in an effort to assist the Applicant retain legal counsel but OSLA declined representation.<sup>6</sup>

12. In response to the Tribunal's orders stemming from the hearing, the Applicant, on 19 March 2020, submitted her request for management evaluation, the response from MEU, her statement to the UNAMID Special Investigation Unit ("UNAMID SIU") regarding an allegation that she had risked the security of other UNAMID staff by using an armed escort that had been provided for them ("the 9 August 2017 incident") and other documentary evidence. On 31 March 2020, the Respondent submitted a UNAMID SIU report on the 9 August 2017 incident which had concluded that the incident had been caused by a lack of managerial coordination. The Respondent also informed the Tribunal that: a) contrary to the Applicant's allegations, there was no audit report on the Darfur Internal Dialogue and Consultations ("DIDC") program and b) the complaint made by the National Professional Officer ("NPO"), Mr. Osman Issa

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<sup>5</sup> Order No. 061 (NBI/2020).

<sup>6</sup> Ibid.

Hassan, against the Applicant had been dealt with as a performance issue and not as a disciplinary matter.

13. On 30 April 2020<sup>7</sup>, the Applicant filed a submission entitled “motion contesting the fake reports” in which she alleged that the documents submitted by the Respondent on 31 March 2020 were “all fake documents, based on forgery and fraud”. She also alleged that her e-PAS and the complaint by the NPO were fake documents. In a submission dated 5 August 2020, the Applicant alleged that she “continue[d] to observe changes and alterations of facts in the documents provided by the Respondent to the court”.

14. In light of the Respondent’s confirmation of the availability of Mr. Hassan and the Applicant’s First Reporting Officer (“FRO”), Mr. Berhanemeskel Nega, and the Applicant having retained counsel, the Tribunal informed the parties on 26 August 2020 that it would resume hearing oral evidence on 8 September 2020.<sup>8</sup>

15. On 31 August 2020, counsel for the Applicant informed the Tribunal that the witnesses material to the Applicant’s case had declined to testify. The counsel did not name the witnesses, neither did he demonstrate how their testimony would be relevant. He requested that the matter be referred to the Ombudsman for informal resolution.

16. The Tribunal resumed the hearing on 8 September 2020 and heard evidence from Messrs. Nega and Hassan. In light of the Applicant’s interest in mediating her claim, at the conclusion of the hearing on 8 September 2020, the Tribunal suspended proceedings and gave Respondent’s Counsel until 21 September 2020 to decide whether mediation would be possible.

17. With the consent of the parties, the Tribunal suspended proceedings and referred the matter to the United Nations Ombudsman and Mediation Services (“UNOMS”) for mediation on 22 September 2020.<sup>9</sup> UNOMS informed the Tribunal on

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<sup>7</sup> The Applicant filed the same submission again on 16 July 2020.

<sup>8</sup> Order No. 160 (NBI/2020).

<sup>9</sup> Order No. 184 (NBI/2020).

30 November 2020 that mediation had not been successful. Consequently, the Tribunal resumed proceedings and invited the parties to file their closing submissions.<sup>10</sup> They were received on 10 June 2021.

## **BACKGROUND FACTS**

18. The Applicant entered the service of UNAMID on 3 June 2010 as a Political Affairs Officer. Between 7 June 2015 and 8 May 2016, she was on special leave without pay.<sup>11</sup>

19. On 2 August 2016, the then Chief of the Political Affairs Section requested reassignment of the Applicant from El Fasher to the Khartoum Liaison Office. The Deputy Joint Special Representative refused this request and directed that the Applicant be reassigned to Sector South instead.<sup>12</sup> Between 1 September 2016 and 29 September 2017, the Applicant was reassigned from El Fasher, North Darfur, to Nyala, South Darfur<sup>13</sup>.

20. During her reassignment to Nyala, Mr. Nega, Head of Office, was her FRO while Mr. Momodu Koroma, Acting Chief, Political Affairs Section, was her Second Reporting Officer (“SRO”).

21. There is ample evidence that a workplace conflict developed once the Applicant took up her duties in Nyala.

22. In August 2017, the Applicant received her e-PAS, in which her FRO had recorded that she required development in several competencies. It nevertheless rated her overall performance positively. The contradictions in the e-PAS attracted intervention of Mr. Kedogo, which however did not bring about a correction.

23. The Applicant was reassigned from Nyala back to El Fasher on 30 September

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<sup>10</sup> Order Nos. 102 (NBI/2021) and 109 (NBI/2021).

<sup>11</sup> Respondent’s reply, annex R/1.

<sup>12</sup> Respondent’s reply, annex R/2, p. 3.

<sup>13</sup> Respondent’s reply, annex R/1.

2017.<sup>14</sup>

24. In October 2017 a comparative review took place in which the Applicant, in part based on her e-PAS, was identified for retrenchment.<sup>15</sup>

25. On 29 November 2017, the UNAMID Human Resources Section (“HRS”) notified the Applicant of the non-renewal of her appointment beyond 31 December 2017 due to the abolition of her post.<sup>16</sup>

## **RECEIVABILITY**

### **Relevant facts**

26. On 31 March 2017, the Applicant submitted her workplan for the performance period September 2016 – March 2017 (“2016-2017 e-PAS”).<sup>17</sup> She explains that the late submission was due to the fact that, since she was not involved in the main project of the Section, she actually needed to develop her portfolio herself.

27. On 10 August 2017, the Applicant received her 2016-2017 e-PAS, which included her FRO’s evaluation and rating together with her SRO’s comments, for review and signature. The overall rating was “successfully meets expectations” but she received several “C” ratings (requires development) in the core values and core competencies.<sup>18</sup> The Applicant did not sign the e-PAS but she added comments to the evaluation in *Inspira*.<sup>19</sup>

28. On the core value of “respect for diversity”, the Applicant’s FRO rated her as “C - requires development” and included the following comment: “The [Applicant’s] experience and skills in political affairs is acknowledged. However, improvement is required in terms of working with people with diverse backgrounds and treating people, in particular team members, with dignity”. On the core competencies of teamwork and

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<sup>14</sup> Respondent’s reply, annex R/1.

<sup>15</sup> Respondent’s reply, annex R/14.

<sup>16</sup> Application, annex entitled “Abolition du post”.

<sup>17</sup> Application, annex entitled “e-Pass 2016-2017”.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

accountability, the Applicant's FRO rated her as "C - requires development" with the following comment: "The [Applicant] has good writing and analytical skills required of a Political Affairs Officer. However, improvements are required in working collaboratively with colleagues in her team and others. Further improvement is also required in supporting team members and taking responsibilities for own shortcomings and for those under her supervision."<sup>20</sup>

29. On the managerial competencies of managing performance, leadership, empowering others and building trust, the Applicant's FRO rated her as "C -requires development" and added the comment that the Applicant "had faced challenges in terms of managing staff under her supervision that impacted on her working relationships with the team and the overall performance of the team. In order to effectively implement the unit's work plan and deliver the mission's mandate, these shortcomings need to be addressed". The FRO's comment on her overall performance urged her to address the challenges she had faced in managing her team and to improve on how she works with others.<sup>21</sup>

30. The Applicant's SRO concluded the performance appraisal with the following comments:

Although the FRO's overall assessment is that [the Applicant] meets expectations, some of the grades awarded on some key indicators require comment; in respect of core values of the UN, [the Applicant] has a C grade in Respect for diversity; in core competencies [the Applicant] has a C in both Teamwork and Accountability and in Managerial competencies, [the Applicant] has a C in four of those competencies; Managerial performance, Leadership, Empowering others and Building trust. [The Applicant] has virtually failed in a core value of the UN – Respect for Diversity and key core and managerial competencies that underpin leadership and teamwork in the UN. I am therefore of the view that [the Applicant] is incapable of being a team leader, as at now, because the assessment calls her leadership qualities into question. I therefore recommend that [the Applicant's] status as Team leader be reviewed. [The Applicant] also needs to improve on other key values and competencies that may impinge on her overall performance in the future. I therefore recommend that [the Applicant]

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid.



undergo serious mentoring that will assist her cope in making the necessary improvements.”<sup>22</sup>

31. On 19 October 2017 (i.e. two days after a civilian staffing review (“CSR”)<sup>23</sup> was announced), the Applicant attended a meeting with Messrs. Koroma and Kedogo to discuss concerns relating to her e-PAS and the e-PAS of Mr. AMK, one of the NPOs whom the Applicant was supposed to supervise. As explained by Mr. Kedogo before the Tribunal, he had noted discrepancies between the comments and the overall end-of-cycle rating in the Applicant’s e-PAS and insisted that the SRO and FRO bring it in line. He, however, explained that he had neither intended nor felt competent to issue a decision with regard to the Applicant’s evaluation.<sup>24</sup>

32. On the same day, the SRO informed the Applicant’s FRO by email, which was copied to the Applicant, that: (i) the CHRO had concluded that there were inconsistencies in his assessment because he had given “C” ratings on seven core values and competencies but concluded with a final overall assessment of “successfully meets expectations”; (ii) the CHRO was of the opinion that the assessment was done in bad faith and could be challenged by the Applicant; and (iii) the CHRO had recommended that the e-PAS be amended. The email stated further that “In this meeting I informed the CHRO of your reaction, that there was no way you were going to alter the e-pas and that [the Applicant] is at liberty to seek a rebuttal on the e-pas.”

33. The Applicant’s 2016-2017 e-PAS was not amended by her FRO or SRO.<sup>25</sup>

### **Submissions**

34. The Respondent’s case is that the application is not receivable *ratione materiae* because neither the performance rating of “successfully meets expectations” nor the comments in the performance appraisal are a reviewable administrative decision within the meaning of art. 2.1(a) of the UNDT Statute. The Respondent, moreover, submits

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<sup>22</sup> Ibid.

<sup>23</sup> Reply, annex 11.

<sup>24</sup> Mr. Kedogo’s oral evidence (12 March 2020).

<sup>25</sup> Application, para. 13.

that the management evaluation request in relation to the refusal to re-write the e-PAS was belated, as it should have been filed on 18 December 2017.<sup>26</sup>

### **Considerations**

35. It is trite law that the Applicant must identify and define the administrative decision that s/he wishes to contest.<sup>27</sup> The United Nations Appeals Tribunal (“UNAT/Appeals Tribunal”) has, however, held that “the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by an applicant and to identify the subject(s) of judicial review”.<sup>28</sup>

36. A cursory reading of the Applicant’s statement of the contested decision on page 3 of the application may lead to the conclusion that she is only contesting her FRO’s decision not to amend her 2016-2017 e-PAS. However, a reading of pages 5–10 of the application in conjunction with her management evaluation request shows that she is also contesting the “consequences” of her FRO’s decision. These “consequences”, which are detailed at paragraphs 15–17 of her management evaluation request, are the non-renewal of her fixed-term appointment and the alleged failure by Administration to make good faith efforts to identify a suitable alternative position for her pursuant to staff rule 9.6(e) after her post was abolished.

37. Considering the foregoing, the Tribunal concludes that the Applicant’s challenge is not limited solely to the issue of the “FRO’s decision not to amend her 2016-2017 e-PAS” but extends to the decision not to renew her fixed-term appointment, with the attendant claim that the Administration failed to make good faith efforts to identify a suitable alternative position for her.

38. Regarding the claim to have the e-PAS re-written, the Tribunal recalls art. 2.1(a) of the UNDT Statute, which provides that:

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<sup>26</sup> Respondent’s submission in response to Order No. 40 (NBI/2020), para. 3.

<sup>27</sup> See *Planas* 2010-UNAT-049 and *Farzin* 2019-UNAT-917.

<sup>28</sup> *Fasanella* 2017-UNAT-765, para. 20.

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 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 non-compliance.

39. Section 15.1 of ST/AI/2010/5 (Performance management and development system) states that:

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.

40. Section 15.7 of ST/AI/2010/5 provides:

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.

41. The above-cited provisions, originating in the administrative instruction, are not binding on the Tribunals, whose jurisdiction is determined by the Statute alone which might be modified only by acts of the General Assembly. This said, it is squarely in line with the established position of the Appeals Tribunal that only decisions having direct consequences for the staff member’s conditions of service are reviewable before the Tribunals. Decisions which do not produce, *per se*, direct legal consequences, are

not reviewable. They may not be contested in themselves but only in the context of a challenge against a resulting decision.<sup>29</sup>

42. As concerns decisions related to the performance evaluation, however, the test has not been applied consistently. In the majority of cases the Tribunals indeed examined the e-PAS strictly as a predicate to subsequent decisions.<sup>30</sup> In *Ngokeng*<sup>31</sup>, the Appeals Tribunal held that the FRO's critical comment, which was made in a satisfactory appraisal, was not a final administrative decision because "it did not detract from the overall satisfactory performance appraisal *and* had no direct legal consequences for Mr. Ngokeng's terms of appointment" (emphasis added). The same was reiterated in *Staedtler*.<sup>32</sup> The *Ngokeng/Staedtler* approach might suggest that determination of receivability is done with a dual focus: whether the e-PAS was internally consistent in an overall positive evaluation and whether it had direct negative consequences for the terms of service. Both Judgments, however, are clear that negative consequences are understood as "evidence of any adverse *administrative decision* stemming from [the] performance appraisal [emphasis added]", and not the degree by which the negative comments detracted from the overall satisfactory appraisal. Accordingly, this jurisprudence does not confirm receivability of applications directed against e-PAS as such, but only incidentally in connection with a decision based upon it.

43. This position was eroded where the Appeals Tribunal accepted receivability of applications directed against the placement of rebuttal panel reports, whether a positive<sup>33</sup> or negative one<sup>34</sup>, on staff members' official status files ("OSF"). In this respect, it is noted that, normally, every final e-PAS report should be placed on the OSF. As such, placement on file is not an autonomous decision from the e-PAS, and

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<sup>29</sup> *Elasoud* 2011-UNAT-173; *Gehr* 2013-UNAT-313; *Lee* 2014-UNAT-481; *Avramoski* 2020-UNAT-987; *Nouinou* 2019-UNAT-902.

<sup>30</sup> *Ishak* 2011-UNAT-152; *Charot* 2017-UNAT-715; *Ncube* 2017-UNAT-721; *Sarwar* 2017-UNAT-757; *Al-Ashi* 2018-UNAT-838.

<sup>31</sup> Judgment No. 2014-UNAT-460.

<sup>32</sup> Judgment No. 2015-UNAT-546.

<sup>33</sup> *Oummih* 2014-UNAT-420.

<sup>34</sup> *Gnassou* 2018-UNAT-865.

not any less “prefatory” than the e-PAS itself. Further, in *Beidas* 2016-UNAT-685 the Appeals Tribunal found non-receivability because the evaluation on a specific point “did not detract from the overall rating of ‘Completely meets expectations’ and [...] therefore the performance evaluation did not affect the terms and conditions of her contract and was thus not an appealable administrative decision”.<sup>35</sup> This line of jurisprudence suggests that performance evaluation could be accepted for review *per se*, notwithstanding that it has not occasioned any negative administrative decision flowing from it.

44. The issue was taken to a different level in *Handy*<sup>36</sup>, where receivability was accepted where the applicant’s overall end-of-cycle rating of “successfully meets performance expectations” was accompanied by comments of the FRO and the SRO, which in their majority were profoundly negative. The Appeals Tribunal found the circumstances of the case to be exceptional in that the narrative comments underpinning the impugned e-PAS contradicted the ratings given to such an extent that they negated the applicant’s positive overall performance appraisal and effectively turned it into an unfavourable one, which were final and unappealable.<sup>37</sup> The Appeals Tribunal confirmed the rescission of the e-PAS and remanded the case to administration for the issuance of a coherent one. The Appeals Tribunal indicated that receivability of similar claims is to be determined on a case-by-case basis.

45. Unlike the *Ngokeng* case, and quite similar to *Handy*, the present case is a remarkable mélange of low ratings and disparaging comments from the FRO that culminate in an overall end-of-cycle rating of “successfully meets expectation”. Then there is a scathing rebuttal of the FRO’s overall rating by the SRO. Considering the nature and gravity of the comments, the Tribunal can only conclude that the FRO’s and SRO’s comments diverged so substantially from the overall satisfactory performance appraisal as to essentially undermine the overall rating of “successfully meets expectation”. Once the FRO stated that the Applicant had to address her

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<sup>35</sup> 2016-UNAT-685 para. 25.

<sup>36</sup> UNDT-2020-030.

<sup>37</sup> *Handy* 2020-UNAT-1044, para. 42

“shortcomings” to “effectively implement the Unit’s work plan and deliver on the mission’s mandate” and the SRO declared that the Applicant was “incapable of being a team leader”, the Applicant’s overall rating was, effectually, downgraded to an unsatisfactory rating, which, if it had been recorded properly, would have allowed the Applicant to use the rebuttal process to protect her rights. However, since the FRO choose to give her a satisfactory overall rating, section 15.1 of ST/AI/2010/5 estopped her from seeking a rebuttal.

46. The Tribunal finds that the contradictions in the Applicant’s e-PAS are of such gravity that would merit rescission under the *Handy* jurisprudence. On this score, receivability *ratione materiae* would thus be met. The claim with respect to amending the e-PAS, however, fails for the lack of a timely management evaluation request.

47. It is obvious that the e-PAS received by the Applicant on 10 August 2017 has never been challenged. Rather, the application is directed against a refusal to amend it, which the Applicant characterises as a fresh administrative decision. In relation to this issue, it is undisputed that the communication refusing to amend the e-PAS was received by the Applicant on 19 October 2017 and, therefore, the deadline to file the management evaluation request elapsed on 18 December 2017.<sup>38</sup> The record shows that a pro-forma (i.e., incomplete) management evaluation request was sent by OSLA by email to the Management Evaluation Unit on 19 December 2017<sup>39</sup>, that is, past the deadline foreseen by staff rule 11.2(c).

48. Consequently, the Tribunal finds that the Applicant’s challenge, insofar as it relates to her FRO’s refusal to amend her e-PAS, is not receivable. The Tribunal, nevertheless, regrets that appropriate corrective action has never been undertaken by the Administration, either as part of settlement talks or *ex-officio*. It is all the more disappointing given that the Administration had been aware of the irregularity from the

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<sup>38</sup> Applicant’s submission of 19 March 2020, p. 1.

<sup>39</sup> Ibid., page 3; Respondent’s submission Respondent’s submission in response to Order No. 40 (NBI 2020), para. 3.

very beginning yet did not act, and maintained this stance in the face of the pronouncement in *Handy*, which came out during the pendency of this case.

49. The decision not to renew the Applicant's fixed-term appointment is, however, properly before the Tribunal and will be considered below.

## **MERITS**

### ***Submissions***

50. The Applicant contests the non-renewal of her fixed-term appointment. Decisions on non-renewal of appointment as a rule are appealable *ratione materiae* on the grounds that the Administration has not acted fairly, justly, or transparently with the staff member or was motivated by bias, prejudice or improper motive.<sup>40</sup> The Applicant invokes as the basis that she was not granted a fair chance to compete in the comparative review process, which designated her post for abolishment. This was because the comparative review process was based on staff members' PHPs and their two most recent performance documents.

51. The Respondent, despite an initial denial of the impact of the Applicant's e-PAS on the retrenchment, having examined the circumstances, has, however, admitted a direct causal link between the rating that the Applicant had received for "respect for diversity" and the outcome of the comparative review.<sup>41</sup> The Respondent maintains, nevertheless, that this specific rating was correct.<sup>42</sup>

### ***Considerations***

*Whether the non-renewal decision stemmed from the final performance appraisal for 2016-2017.*

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<sup>40</sup> *Agha* 2019-UNAT-916 at paras. 16-17.

<sup>41</sup> Respondent's closing submission, paras. 11 to 13.

<sup>42</sup> *Ibid.*

52. Between 30 July and 6 August 2017, UNAMID undertook a comprehensive civilian staffing review to ensure UNAMID's staffing levels were adjusted to implement the revised mission mandate recommended by a special report of the Chairperson of the African Union and the Secretary-General to the United Nations Security Council and the UNAMID Peace and Security Council.<sup>43</sup> The final report of the civilian staffing review, dated 19 October 2017, recommended the abolition of three of the six P-4 Political Affairs Officer posts in the Political Affairs Section.<sup>44</sup> On 17 October 2017, UNAMID issued a mission-wide broadcast to announce the establishment of a comparative review panel to implement the civilian staffing review recommendations and the staff reductions proposed in the UNAMID budget for 2017-2018.<sup>45</sup>

53. The panel operated under the Terms of Reference ("TOR") drawn up by the Mission in accordance with guidelines from the Field Personnel Division.<sup>46</sup> It assigned points pursuant to publicised criteria.<sup>47</sup> The review was based on documents only, the candidates were required to submit their PHPs for assessment of their seniority and experience, and the last two e-PAS documents for assessment of competencies.<sup>48</sup>

54. By email dated 17 October 2017, Mr. Koroma informed the Applicant and two other staff members that the comparative review process would start on 23 October 2017 and that three P-4 posts would be abolished. He requested that they submit their 2015-2016 and 2016-2017 e-PASes to the Comparative Review Panel Focal Point by 18 October 2017.<sup>49</sup>

55. The Applicant did not submit her e-PAS documents. She had no e-PAS for

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<sup>43</sup> S/2017/437, *Special Report of the Chairperson of the African Union Commission and the Secretary-General of the United Nations on the strategic review of the African Union-United Nations Hybrid Operation in Darfur*; and S/RES/2363 (2017).

<sup>44</sup> Reply, annex R/10.

<sup>45</sup> Reply, annex R/11.

<sup>46</sup> Trial bundle, pp. 191 to 197; oral evidence of Aggrey Kedogo; Respondent's response to Order No. 167 (NBI/2019), para. 7 and annex R/18, in relation to an amendment to the scoring for the core values rating and clarification on the tie breaker criteria to be used by the CRP.

<sup>47</sup> Oral evidence of Ebow Idun; trial bundle pp. 193, 196.

<sup>48</sup> Oral evidence of Seidina Joof and Rose Dennis.

<sup>49</sup> Trial bundle, p. 46.



2015-2016 because of her absence from duty during the relevant period. The panel applied a rule that where an e-PAS was not drawn up, the competencies were rated as fully satisfactory.<sup>50</sup> She did not supply an e-PAS for 2016-2017 because she was expecting that it would be re-written.<sup>51</sup> The panel, however, used the e-PAS supplied by the Human Resources Section who submitted the 2016-2017 e-PAS such as it stood, i.e., uncorrected. Thus, the matrix includes ratings for this e-PAS that correspond to the ratings given by the Applicant's FRO. The Respondent pointed out at paragraph 12 of his reply that 14 days after the e-PAS had been sent to the Applicant i.e. on 24 August 2017, it was considered as having been signed by her in accordance with section 8.5 of ST/AI/2010/5.

56. Annex R/13 of the Respondent's reply is the Comparative Review Panel's comprehensive evaluation matrix for the Political Affairs Officers in the Political Affairs Section. The Applicant's e-PAS ratings for the core values, along with her scores for experience and seniority, determined the totality of her score during the comparative review process, which in turn decided which posts were to be abolished.

57. The matrix shows that the Applicant was awarded fifteen points for the overall rating of "successfully meets expectation", three points for being "fully competent" in the core value of integrity; three points for being "fully competent" in the core value of professionalism and one point for being rated as "developing" in the core value of respect for diversity. The matrix discloses that the Applicant's rating for the core value of respect for diversity as "developing" had been decisive for her placement at the last position. Had she been rated fully competent on this score, she would have come even with the candidate B who scored 82.<sup>52</sup>

58. There were six positions in the Political Affairs Section. Two of them were encumbered by staff members on continuing appointments who, therefore, were not subject to the comparative review process. Four other staff members were comparatively reviewed competing for the one remaining post. Of those, Mr A scored

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<sup>50</sup> Oral evidence of Ebow Idun and Rose Dennis.

<sup>51</sup> Oral evidence of the Applicant; see also trial bundle, pp 44 & 45.

<sup>52</sup> Comprehensive evaluation matrix, trial bundle p. 321.

significantly higher than the others (98 points) and was immediately recommended for retention. The other three staff members scored in a close range with one another, receiving 82, 81 and 80 points, with the Applicant scoring the lowest.<sup>53</sup>

59. Although the matrix shows that three positions were designated for retrenchment, this was not entirely correct as it turned out that another post became available since: One of the staff members on continuing appointment at the time of the review was seconded to serve on a P-5 level but retained a lien to his P-4 Political Affairs post. In December 2017, he was promoted thus vacating the P-4 Political Affairs post.<sup>54</sup> In the face of this development, the Mission decided to retain the staff member who scored second, Mr. B.<sup>55</sup> The staff member who came in third had since some time been on a temporary assignment in Syria but, similarly, retained a lien to his P-4 post with the UNAMID Political Affairs Section. After abolition of his post, he was absorbed by the entity in Syria where he had been effectively working.<sup>56</sup> It follows that, if not for the C-rating in respect for diversity, the Applicant could have competed with Mr. B on an equal footing in terms of the score (82 points) and, according to the Terms of Reference, had an advantage due to her gender.<sup>57</sup> This is presently uncontested.<sup>58</sup>

60. In conclusion, the Applicant's performance evaluation for 2016-2017 had an adverse effect on the Applicant's conditions of employment; i.e., it effectively eliminated her from the competition for an additional available post. The rating given to her for respect for diversity, specifically, is responsible for the non-renewal of her appointment.

#### *Appropriateness of the rating*

61. In several decisions where e-PAS was the reason for a decision on non-

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<sup>53</sup> Ibid.

<sup>54</sup> Trial bundle, p. 342 and pp. 20-26 (management evaluation response, p.2, para 2)

<sup>55</sup> Oral evidence of Ebow Idun.

<sup>56</sup> Ibid.

<sup>57</sup> See ToR for the comparative review, trial bundle p.196.

<sup>58</sup> Respondent's closing submission.

extension of appointment, the e-PAS was incidentally examined for procedural regularity and on the merits.

62. Regarding the process, UNAT found in *Ncube* that it would not be in accord with the regulatory framework if the Secretary-General was forced to renew the appointment of an unqualified staff member merely because there are procedural errors in the evaluation process, provided that the procedural errors are not so serious and substantial as to render the evaluation process unlawful or unreasonable or as to violate the due process rights of the staff member in question.<sup>59</sup>

63. Regarding the merits, UNAT stated in *Sarwar* that the Tribunals are not limited to examining the process by which it was determined that performance was unsatisfactory; nor is it quite correct to contend that the UNDT may not reach its own conclusions concerning the performance of a staff member and to suggest that such would be “usurping the role” of the rebuttal panel.<sup>60</sup> This review, however, as UNAT stated in *Said*, must accord deference to the Administration’s appraisal of the performance of staff members, and cannot review *de novo* a staff member’s appraisal, or place itself in the role of the decision-maker and determine whether it would have renewed the contract, based on the performance appraisal. The primary task is to decide whether the preferred and imposed performance standard was not manifestly unfair or irrational, whether it was known to the staff member, whether the standard was not met and whether an adequate evaluation was followed to determine if the staff member failed to meet the required standard. There must be a rational and objective connection between the information available and the finding of unsatisfactory work performance.<sup>61</sup>

64. In the present case, the Tribunal finds that Applicant was not prejudiced at the comparative review by either the comments or their contradiction with the overall rating. Had the evaluation been accorded with the comments, the overall rating could have been “requires development” and the Applicant would have had an opportunity

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<sup>59</sup> 2017-UNAT-721.

<sup>60</sup> *Sarwar* 2017-UNAT-757 para. 71.

<sup>61</sup> *Said* 2015-UNAT-500.

to seek a rebuttal; yet, according to the TOR, the Comparative Review Panel would have taken into account the overall negative evaluation and the Applicant's chances to be retained in service would have been foregone. The point in issue is solely the rating given for "respect for diversity", where there is no disparity between the rating and the comments.

65. The Tribunal recalls that Section 2 of the performance appraisal describes the requirements for meeting the core value of "respect for diversity" as follows:

Works effectively with people from all backgrounds. Treats all people with dignity and respect. Shows respect for and understanding of diverse points of view in daily work and decision making. Examines own biases and behaviors to avoid stereotypical responses. Does not discriminate against any individual or group.

66. The standard as such and the performance indicators are established at the level of the Office of Human Resources and are applicable throughout the Secretariat. There is no question of their rationality and fairness, and there is no question of the Applicant's knowledge of the standard. Rather, the question is whether the standard was not fully met.

67. In her submissions<sup>62</sup> and during her oral evidence, the Applicant gave an animated account about being marginalized and side-lined by Messrs. Nega and Koroma from the beginning of her Nyala assignment in September 2016; a situation that she complained about to the UNAMID leadership immediately and severally. She testified that she was not welcomed/given a briefing by Mr. Nega upon her arrival in Nyala and never developed a working relationship with him. As a Political Affairs Officer assigned to work with the Head of Office, she was supposed to attend meetings between Mr. Nega and the South Darfur authorities but Mr. Nega never invited her to the meetings. Further, although she had volunteered to be the Political Affairs Section representative for the DIDC, she was not invited to attend meetings. She was also not assigned any tasks. Nonetheless, on her own, she managed to attend weekly

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<sup>62</sup> Application; Applicant's submissions of 30 April 2020 (Applicant's motion contesting fake reports and her letter re fake reports).

teleconferences and a few sector-level senior management meetings.

68. The Applicant also stated that as the Team Leader of the Political Affairs Section in Nyala, she was supposed to supervise and serve as the FRO for the NPOs, Messrs. Hassan and AMK, but her supervisors worked directly with them and made her “irrelevant” in the section. Since the NPOs were given tasks directly by Messrs. Nega and Koroma, she rarely knew what they were doing and had no input in the reports they submitted. Consequently, she was unable to provide performance evaluations for them and this was subsequently held against her. She claimed that her supervisors encouraged the NPOs to file false complaints against her, including one submitted by Mr. Hassan on 3 May 2017<sup>63</sup>, in which he alleged that she disrespected them, failed to provide supervision, was frequently absent from work, had constant disagreements with them and used offensive language when communicating with them. According to Respondent’s counsel, these complaints were handled as performance management issues instead of as a disciplinary matter.<sup>64</sup> The Applicant vehemently denied all the allegations.<sup>65</sup> The Applicant also alleged that her supervisors had also encouraged her subordinates to make the false complaint against her regarding the 9 August 2017 incident, which was subsequently found to be due to a lack of coordination.

69. Mr. Hassan countered the Applicant’s accounts by stating that their workplace conflict stemmed from: the Applicant’s failure to consult with him and the other two national staff in the office on work issues; her failure to prepare work plans for them and to clearly define the reporting lines; her frequent absences; and her bad interpersonal skills, which included her shouting at and insulting them frequently. Specifically, he recalled her calling him a liar during a meeting with Mr. Nega. He viewed her behaviour as a cultural insult. Mr. Hassan denied: making multiple complaints about the Applicant’s behaviour at the instigation of her supervisors; not copying her on emails circulating section’s reports that he had drafted; side-lining her

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<sup>63</sup> Reply, annex R/4.

<sup>64</sup> Respondent’s submission in accordance with Order No. 61 (NBI/2020).

<sup>65</sup> Applicant’ oral evidence (12 March 2021); and Applicant’s submissions of 30 April 2020 (Applicant’s motion contesting fake reports and her letter re fake reports).

by reporting to Mr. Nega; and having a cordial working relationship with the Applicant that he hid from her supervisors for fear of reprisal. He claimed that AMK also complained about feeling disrespected by the Applicant because she had used abusive language against him too.<sup>66</sup>

70. Mr. Nega denied marginalizing and/or side-lining the Applicant. His evidence was that he had welcomed the Applicant upon her arrival in Nyala and had a cordial working relationship with her. He denied that he had given a directive for her to not attend or be invited to DIDC meetings or any other meeting. He claimed that he always invited her for his weekly head of section meetings and for bilateral meetings with external stakeholders, but she chose to not attend most of these meetings. He did not doubt her professional competence but stated that there were interpersonal challenges that created problems between her and the national officers she supervised.<sup>67</sup> They complained to him multiple times about her lack of respect for them, her dismissiveness of their views, her inability to coordinate the work of the section, and her frequent absences that resulted in their being left with no guidance or instructions. He gave an account of one incident where the Applicant called one of the NPOs a liar in his presence. He claimed that he discussed these complaints with the Applicant separately, but these meetings were futile because of the Applicant's attitude. He subsequently held a meeting with the whole team during which he told them that they had to respect each other and work together as a team. He claimed that he also had problems finding the Applicant when he needed her and, on one occasion, had to involve the Chief of UNAMID Security for assistance. The Applicant denied being absent except on two occasions when she had been on authorized leave. Mr. Nega denied that the NPOs reported to him directly and stated that he interacted with them because he had to ensure that the work of the unit continued in the face of the Applicant's lack of coordination and dereliction of her supervisory role.

71. Given the degree of contradiction between the overall rating and the comments supplied, the Tribunal's deference to the performance evaluation is limited. It is,

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<sup>66</sup> Oral evidence of Mr. Osman Hassan.

<sup>67</sup> See also trial bundle, p. 327.

however, obvious to the Tribunal that on the prong “works effectively with people from all backgrounds”, the Applicant did not succeed. The oral and documentary evidence from the Applicant, Mr. Nega, Mr. Hassan and Mr. Kedogo indicate that her team was dysfunctional and that she was unable to work with the members of her team, nor with her supervisors. It transpires from the contemporaneous emails submitted by the Applicant that, indeed, there was an issue of not involving the Applicant in a part of the Section’s work (i.e. the DIDC)<sup>68</sup>; her resultant reluctance to evaluate a team member<sup>69</sup> and refusal to perform certain tasks.<sup>70</sup> It further transpires that there was an issue about reporting lines.<sup>71</sup> On the latter point, the Applicant admitted to having sought to deal with the conflict by bypassing her supervisors and complaining to the Head of the Mission, Chief of Staff and Mr. Kedogo (the CHRO).

72. Mr. Nega’s evidence before the Tribunal was that he downgraded the Applicant on the core value of “respect for diversity” because of her lack of respect for the NPOs, her dismissiveness of their views and the insulting language she used towards them. Although Mr. Nega and Mr. Hassan are not neutral, their evidence is credible in light of an email where the Applicant accuses Mr. Hassan of lying. Mr Nega was copied on that email.<sup>72</sup>

73. Altogether, the oral testimony and documents on the case file reveal cogently that in the face of work disagreements the Applicant had taken an intolerant and militant stance. Even though the Applicant denies the factual basis for the written complaint filed against her, including inappropriate tone and language<sup>73</sup>, the tone of her writing lends credence to these allegations. Specifically: a) the Applicant’s response to a request from Mr. Nega for information on the legislative council was “I will advise that you contact the office of the governor of SD for accurate information

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<sup>68</sup> Trial bundle, pp. 370 to 374.

<sup>69</sup> Trial bundle pp 348-349, application, para 15

<sup>70</sup> Reply, annex R/15, pp. 2-3.

<sup>71</sup> Applicant’s submission in response to Order No. 167 (NBI/2019), annex entitled “Report on 26 April meeting with HoO SS with PAS on administrative issues. See also Respondent’s reply, annex R/5.

<sup>72</sup> See the following paragraph and fn 85.

<sup>73</sup> Applicant’s oral evidence.

on the subject matter” and when he asked if it wasn’t the responsibility of her section to follow up, her response was “are you not running a parallel office?”<sup>74</sup>; b) in a request for a review of her 2016-2017 e-PAS, she wrote “the Head of Office (HoO) wanted to manipulate the staff in order to control the reports produced by PAS in Nyala and also take personal credit [for] their work,”<sup>75</sup> and “distortion of facts, misrepresentations and many lies to cover the truth became the norm. Inappropriate interferences of the HoO in PAS work place continued to cause discord among the staffs, breached the communication and fostered disrespect from my colleagues. I am still wondering how the HoO could reconcile the issues obviously created by his unprofessional conduct and the core values of respect of diversity that he is faulting me. I am not aware of any colleague’ complaints of not being treated with dignity.”<sup>76</sup>; c) in an email to Mr. Hassan, copied to Mr. Nega, she wrote: “It is quite unfortunate that after several discussions with you about appropriate reporting lines, team work and integrity, which are core competencies and values required from all UN staffs, you continue to recourse to lies to exonerate yourself from your mistakes [...] As a reminder, our last discussion on 13 December was ignited by the fallacious explanation you made up [...]. These dishonesties will amount to disciplinary action on integrity next time.”<sup>77</sup> The Tribunal finds the tone of these communications undignified and unbecoming of a team leader at the P-4 level.

74. Documents authored by the Applicant and submitted to the Tribunal employ the same inflammatory language and include attribution of falsification, fabrications and ulterior motives on the part of the FRO and the team members. Namely: the closing brief states that the FRO “falsified attendant documents and used false information”, “[used] forgery and falsifications”, “[was] committing felonies, hacking Inspira password of the HoM”; her interlocutory motion is titled “Motion to contest the fake reports” and uses, among other, the expression “they are all fake reports, based on forgery and fraud”, “fake minutes”, “fake complaints”, “fake correspondence”,

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<sup>74</sup> Trial bundle, pp. 325-326.

<sup>75</sup> Trial bundle, pp. 49-67, para. 10.

<sup>76</sup> Trial bundle, p. 58, para. 36.

<sup>77</sup> Trial bundle, p. 372.



“unauthenticated fake report on the investigation” and “fabrication”, including in relation to the “escort incident” report that had exonerated her; in her response to Order No. 167, the Applicant again refers to “fake ePAS”; she moreover alleges that case documents, that is the ToR for the CRP and the complaint against her, have been tampered with after the filings.<sup>78</sup> These insinuations, which are not supported by objective facts, as well as expressions used, show disrespect for persons and fundamental disregard for differing points of view. The Tribunal is, therefore, inclined to believe the witnesses that during the period in question the Applicant had acted in a dismissive and disrespectful fashion toward her colleagues.

75. The Tribunal notes that a staff member is expected to put effort into creating a productive and harmonious environment, and this includes resolving conflicts and dealing with its aftermath. This is particularly expected from experienced staff who are placed in leadership positions. Differences in opinion as to the substance of work must not lead to insults and light accusations of ill-faith. The rating for respect for diversity, that the Applicant partially met performance expectations, therefore, rightly indicates the existence of performance shortcomings. In scoring the “C - requires development”, the FRO accepted that the situation was not hopeless, and that the Applicant demonstrated potential to develop the required skills. The timing of the rating and the CRP exercise, on the other hand, is a coincidence, including that the Applicant submitted her e-PAS late.

76. In conclusion, notwithstanding reservations about the inconsistencies within other areas of the e-PAS, the Tribunal has no basis to argue with the rating for “respect for diversity”, which ultimately tipped the balance in the Applicant’s disfavour in the downsizing exercise.

*The question of provision of an alternative position*

77. The Respondent submits that since the Applicant was on a fixed-term

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<sup>78</sup> Trial bundle, p. 345. The Presiding Judge confirmed with the Registrar that the Applicant’s case file/record in the Court Case Management System had not been tampered with and that submissions had not been subsequently altered.

appointment, there was no expectation of renewal. While the Organization was not required to reassign her to another position, it made efforts to assist the Applicant in identifying other opportunities within other missions. On two occasions, UNAMID requested that the Applicant provide copies of her updated PHP, 2016-2017 performance appraisal and a screenshot of her Inspira roster membership(s) for uploading into the Cosmos platform for possible placement but the Applicant did not respond.

78. In light of the Tribunal's findings on the e-PAS and taking into account the reasons stated by the Respondent, the Tribunal finds that the Applicant failed to substantiate the claim that the Respondent is responsible for not providing an alternative position for her.

#### **JUDGMENT**

79. The application is dismissed.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 1<sup>st</sup> day of July 2021

Entered in the Register on this 1<sup>st</sup> day of July 2021

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi