



**Before:** Judge Francis Belle

**Registry:** New York

**Registrar:** Morten Michelsen, Officer-in-Charge

DRAGNEA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for Applicant:**

Michael Horn, Archer & Greiner, PC

**Counsel for Respondent:**

Yehuda Goor, AAS/ALD/OHR, UN Secretariat

## **Introduction**

1. By application filed on 17 November 2021, the Applicant, a staff member of the United Nations Department for Safety and Security (“UNDSS”), contests:
  - a. The issuance to her of a notice of reprimand (“Notice”);
  - b. The placement of said notice in her file;
  - c. Her placement under a performance improvement plan (“PIP”); and
  - d. The outcome of the Management Evaluation Unit’s (“MEU”) review of the above decisions.

## **Facts and procedural history**

2. The Applicant is a Security Officer at the S-1 level with the Safety and Security Service (“SSS”) at the UNDSS in New York. She commenced her service with the United Nations on 6 December 2019 on a fixed-term appointment.
3. On 29 March 2021, while on duty at a security post in Headquarters, the Applicant was involved in an altercation with a fellow Security Officer.
4. On the same date, the Applicant was requested by the Officer-in-Charge, Special Investigation Unit (“SIU”), SSS, to complete an incident report.
5. On 31 March 2021, SIU interviewed the Applicant regarding the altercation.
6. On 12 May 2021, the Applicant received the Notice by way of a memorandum titled “Notice of Reprimand Re: Unacceptable Behaviour – Incident of 29 March 2021” from the Chief, SSS, informing her of the result of SIU’s investigation of the altercation. The memorandum indicated that the SIU concluded that the Applicant’s actions had been “found to [be] disruptive to the operations of the Service, unacceptably disrespectful to a fellow officer, unprofessional in the extreme, and not representative of the standard of conduct expected of a security officer”.
7. It further informed the Applicant that she would be placed on a PIP and the Notice would go in her personnel file.

8. On 5 June 2021, the Applicant received a “partially meets expectations” rating for her 2020-2021 performance evaluation, identifying serious performance shortcomings. The Applicant rebutted this evaluation, but the rebuttal panel fully upheld the rating of “partially meets expectations”.
9. On 8 July 2021, the Applicant requested management evaluation of the contested decisions listed in para. 1 a, b, and c above.
10. By letter dated 20 August 2021, the Under-Secretary-General for Management Strategy, Policy and Compliance informed the Applicant of her decision to uphold the decision to issue the Notice and place it in her administrative file, and found not receivable the Applicant’s challenge of the decision to place her on a PIP.
11. On 17 November 2021, the Applicant filed the application mentioned in para. 1 above. In her application, the Applicant requested, *inter alia*, an:
  - a. Order for production of all evidence including a copy of all reports, CCTV recordings and telephone recordings in connection with the 29 March 2021 incident supporting the issuance of the Notice; and
  - b. Oral hearing.
12. On 26 November 2021, the Respondent filed a motion requesting the Tribunal to determine receivability as a preliminary matter and suspend the deadline for the Respondent’s reply.
13. By email dated 29 November 2021, the Tribunal granted the Respondent’s request to suspend the deadline for his reply.
14. On 2 December 2021 and 10 December 2021, the Applicant filed her opposition and supplemental opposition to the Respondent’s motion to have receivability determined as a preliminary matter.
15. On 1 July 2022, the present case was assigned to the undersigned Judge.

16. By Order No. 61 (NY/2022) of 14 July 2022, the Tribunal granted in part the Respondent's motion to have receivability determined as a preliminary matter, on grounds that it does not have jurisdiction to consider appeals against the outcome of a review of the administrative decision by MEU and thus this aspect of the application is manifestly not receivable.

17. The Tribunal further instructed the Respondent to file his reply to the application, which he did on 15 August 2022.

18. By Order No. 76 (NY/2022) of 17 August 2022, the Tribunal instructed the Respondent to file the following materials on an *ex parte* basis:

- a. The investigation report (including its annexes) into the incident of 29 March 2021; and
- b. The CCTV recordings of the incident of 29 March 2021.

19. On 18 August 2022, the Respondent filed the above-mentioned materials on an *ex parte* basis.

20. By Order No. 77 (NY/2022) of 23 August 2022, the Tribunal rejected the Applicant's request for an oral hearing and instructed the Respondent to redact the investigation report and its annexes and refile them on an under-seal basis, excepting the excerpts of CCTV recordings and third parties' statements. The Tribunal further ordered the Applicant to file a rejoinder by 1 September 2022 and invited the Respondent to file his response to the Applicant's rejoinder by 9 September 2022.

21. On 31 August 2022, the Applicant filed her rejoinder.

22. On 9 September 2022, the Respondent filed his response to the Applicant's rejoinder.

23. Having reviewed the parties' submissions, the Tribunal decided to convoke the parties to a case management discussion ("CMD"), which took place, as

scheduled, on 19 September 2022, with a view to explore the possibilities of referral of the case to mediation.

24. During the CMD, the Respondent's Counsel again requested the Tribunal to determine receivability as a preliminary matter.

25. By Order No. 84 (NY/2022) of 20 September 2022, the Tribunal instructed the Respondent to inform the Tribunal about his position on whether he would like to engage in mediation of the case by 26 September 2022.

### **Consideration**

26. Given the Respondent's persistent objection to the receivability of the application, the Tribunal will address this issue as a preliminary matter.

27. The Respondent avers that the application is not receivable *ratione materiae*. To support his claim, he specifically argues that the Notice is not an "administrative measure" but rather a response to unsatisfactory work performance; that it was placed for performance tracking in a working file held locally in SSS rather than the Applicant's Official Status File ("OSF") and as such it is a preparatory, non-reviewable step in performance tracking; and that the placement of the Applicant on a PIP is similarly not appealable under "clear Appeals Tribunal precedent".

28. In this respect, the Tribunal recalls that art. 2 of its Statute provides in its relevant part 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 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 [.]

29. As such, the Appeals Tribunal has consistently held that “the key characteristic of an administrative decision subject to judicial review is that the decision must ‘produce [] direct legal consequences’ affecting a staff member’s terms and conditions of appointment” (see, e.g., *Najjar* 2021-UNAT-1084, para. 29; *Lee* 2014-UNAT-481, para. 49). “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” (see, e.g., *Najjar*, para. 29; *Andati-Amwayi* 2010-UNAT-058, para. 19).

*The Notice and its placement in the Applicant’s personnel file*

30. In relation to the Notice, the Tribunal notes that on 12 May 2021, the Chief, SSS, informed the Applicant of the reprimand by a memorandum titled “Notice of Reprimand Re: Unacceptable Behavior – Incident of 29 March 2021” following the review of an investigation conducted by the SSS concerning the incident of 29 March 2021. The Notice specifically states that (emphasis in the original):

3. Based upon a review of the matter [the Applicant’s] behaviour has been found to [be] disruptive to the operations of the Service, unacceptably disrespectful to a fellow officer, unprofessional in the extreme, and not representative of the standard of conduct expected of a security officer. Specifically, it is in breach [of] Security and Safety Service standard operating procedure 25.02 which states, “*UN security personnel are expected to display the highest level of professionalism, courtesy and tact while in the performance of their duties*” (emphasis in the original).
4. The investigation further noted that immediate action was taken at the time of the incident by the Chief of Service who directed that [the Applicant] be placed on weapons restriction and immediately reassigned to Team D1, thereby lessening the opportunity for any further conflict with the relieving officer.
5. As a result of the circumstances presented in this matter [the Applicant is] hereby served with this reprimand for unacceptable behavior on [her] part. [...]
6. Further, [the Applicant will] be placed on a Performance Improvement Plan which will be developed by, and communicated to [her], by [her] first reporting officer.
7. This reprimand will be placed in [her] personnel file.

31. Noting that the decision at issue is a written reprimand imposed to address a staff member's unsatisfactory conduct following an investigation of an altercation, the Tribunal considers that the decision at issue constitutes an administrative measure under sec. 2.1(d) of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process). In the Tribunal's view, the fact that a reprimand is not a disciplinary measure "does not mean that a reprimand does not have legal consequences, which are to the detriment of its addressee, especially when the reprimand is placed and kept in the staff member's file. The reprimand is, by definition, adverse material" (United Nations Administrative Tribunal Judgment No. 1176, *Parra* (2004), para. IV).

32. In the present case, the reprimand materially and adversely affects the Applicant's rights and is of direct legal effect in that the Notice explicitly states that "[t]his reprimand will be placed in [the Applicant's] personnel file" and as such it may be referred to in the future. Indeed, in this respect, the Appeals Tribunal in *Akyeampong* 2012- UNAT-192 clarified that "[a] reprimand is recorded in the staff member's file to serve as a reminder, should the staff member misconduct herself again. In such an event, the Administration may administer a harsher sanction" (see, para. 31).

33. Moreover, the evidence on record shows that based on the Notice on the Applicant's personnel file, she was placed on a PIP and received a rating of "partially meets performance expectations" for the 2020-2021 performance cycle, and consequently her fixed-term contract was renewed by only four months and twenty-five days as opposed to similarly situated staff members who received extensions of twenty-four months.

34. As such, the Notice and its placement in the Applicant's personnel file did produce direct legal consequences affecting the Applicant's terms and conditions of appointment.

35. Accordingly, the Tribunal finds that the decisions to issue the Applicant the Notice and to place it in her file are subject to legal challenge and, thus, the application is receivable in this respect.

*The decision to place the Applicant on a PIP*

36. In relation to the Applicant's placement on a PIP, the Tribunal is not persuaded by the Applicant's contention that the PIP constitutes a disguised disciplinary measure. In this respect, the Applicant clearly misinterpreted the nature of the PIP, which is a remedial measure relied upon by the Administration to "proactively assist the staff member in remedying [a performance] shortcoming" under sec. 10.1 of ST/AI/2021/4 (Performance Management and Development System).

37. The Tribunal also finds no merit in the Applicant's submission that the PIP is incorporated into the Notice and is premised exclusively on the reprimanded conduct. While it is true that the Administration informed the Applicant of the decision to reprimand her and of the decision to place her on a PIP in the same memorandum, these two decisions are not inseparable from each other. In particular, the evidence on record shows that the PIP sought to address more performance shortcomings than the reprimanded conduct itself.

38. Moreover, the Appeals Tribunal in *Gnassou* 2018-UNAT-865, para. 31, held that:

[T]he order to place [a staff member] on a PIP is not an appealable final administrative decision. Pursuant to ST/AI/2010/5, the PIP is merely a preliminary step instituted to address a staff member's shortcomings during a performance cycle. ST/AI/2010/5 sets out a series of steps which may ultimately lead to a reviewable final administrative decision. The Appeals Tribunal has held that such preliminary steps or actions are not administrative decisions subject to appeal.

39. While the above-mentioned case law refers to the PIP instituted under ST/AI/2010/5 (Performance Management and Development System), the Tribunal is of view that it is equally applicable to the PIP instituted in accordance with ST/AI/2021/4 *mutatis mutandis*. Indeed, both ST/AI/2010/5 and ST/AI/2021/4 contain the same provisions in relation to the institution of a time-bound PIP.

40. The Tribunal therefore finds that the decision to place the Applicant on a PIP is not an appealable administrative decision.



**Conclusion**

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

- a. The challenge against the decisions to issue the Applicant the Notice and to place it in her personnel file is receivable; and
- b. The challenge against the decision to place the Applicant on a PIP is not receivable.

*(Signed)*

Judge Francis Belle

Dated this 23<sup>rd</sup> day of September 2022

Entered in the Register on this 23<sup>rd</sup> day of September 2022

*(Signed)*

Morten Michelsen, Officer-in-Charge, New York