



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/049

Judgment No.: UNDT/2023/022

Date: 30 March 2023

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

HAYDAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Edwin Nhliziyo

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Maureen Munyolo, AAS/ALD/OHR, UN Secretariat

Introduction and procedural history

1. On 8 June 2022, the Applicant, a P-3 Supply Officer with the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (“MINUSCA”), filed an application before the United Nations Dispute Tribunal (“UNDT” or “Tribunal”) contesting a decision of 29 November 2021 that she described as:

The FRO [First Reporting Officer] prepared a EPAS [electronic performance appraisal] offline instead of doing it in *INSPIRA* as is normally the case and did it in a manner that reflected negatively on the s/m [staff member] despite the fact she was not the cause of the delay. He rated her “successfully meets performance expectations”, the comments and the majority of the individual elements rated make that rating a 'sham', only used to evade a rebuttal.

2. The Respondent filed a reply to the application on 8 July 2022 urging the Tribunal to dismiss the application as not receivable.

3. The Tribunal heard the case from 21-23, 28 February 2023 and on 1 March 2023, during which oral evidence was adduced from: the Applicant; Mr. Okay Mabhena (then Chief, Life Support Section (“LSS”) and the Applicant’s first reporting officer (“FRO”); and from Mr. Braima Jamanca (the Chief, Service Delivery, the Applicant’s second reporting officer (“SRO”)).

4. The Applicant and Respondent filed their closing submissions on 7 and 8 March 2023 respectively.

Facts

5. The performance cycle for 2020/2021 commenced on 26 August 2020, when the Applicant’s FRO sent a draft section workplan to the Unit Chiefs, including the Applicant, to develop their respective Unit plans pending the Chief Supply Chain Management’s (“SCM”) approval of the workplan for the entire section. The

Applicant's FRO also advised the Unit Chiefs including the Applicant to develop their individual workplans.¹

6. On 7 October 2020, the Applicant's FRO reminded the Unit Chiefs including the Applicant to submit their individual and Unit draft workplans for approval by 14 October 2020. The Applicant submitted the Supply Unit's draft workplan for review on 8 October 2020.²

7. On 13 October 2020, the Applicant's FRO informed her that he had reviewed her Unit's draft workplan and that whilst he agreed with the goals, the Key Related Activities and Success Criteria needed some revision. The FRO also attached samples of the previous year's Applicant's draft individual workplan and the one for LSS for her use in case she had no access to them as she was on leave.³

8. On 16 December 2020, the Applicant informed her FRO that the Unit workplan he queried was based on the previous year's workplan which meant that it could not have been that far off the mark for approval.⁴ She did not make any changes.

9. On 14 May 2021, the Applicant's FRO requested the Applicant to fill in and submit her workplan in *Inspira*. The FRO informed her that he had returned the workplan she had submitted because she had deleted all the goals and it had no core competencies or managerial competencies selected.⁵

10. On 24 May 2021, the Applicant's FRO requested her to complete her workplan in *Inspira* and submit it for approval by 31 May 2021.⁶ The Applicant did not respond.

11. On 16 June 2021, the Applicant's FRO sent the Applicant an email containing an attachment titled: Ms Hawa HAYDAR PM Offline Evaluation Form.⁷

¹ Reply, annex R/2; Trial bundle, page 51.

² Reply, annexes R/2 and R/4; Trial bundle at pages 64 and 67.

³ Reply, annex R/5; Trial bundle at page 75.

⁴ Reply, annex R/6; Trial bundle at page 78.

⁵ Reply, annex R/8; Trial bundle at page 96.

⁶ *Ibid.*, at pages 95 and 96.

⁷ Reply, annex R/9; Trial bundle at page 100.

12. In her response of the same day, 16 June 2021, the Applicant informed her FRO that she was unwell and on sick leave.⁸

13. Between 24 and 27 August 2021, the Applicant who was still away from the Mission on sick leave, and her FRO exchanged emails concerning her electronic performance appraisal (“ePAS”) for 2020-2021 (specifically, on who was responsible for the late approval of her workplan and on the way forward); the e-PASes for staff in the Supply Unit; and leave plans for the LSS Section.⁹

14. In the email of 24 August 2021, forwarding the offline performance appraisal to the Applicant, the FRO advised her to fill in her comments by 27 August 2021.¹⁰

15. On 8 September 2021, the Applicant and her FRO met via Microsoft Teams to discuss her offline workplan. The Applicant submitted her offline workplan on 8 October 2021.

16. The Applicant’s FRO and SRO finalized and signed off the Applicant’s 2020-2021 offline performance appraisal on 29 November 2021.¹¹ The Applicant was rated as having successfully met expectations. However, the majority of the FRO’s narrative comments, endorsed by the SRO, were negative.

17. On 30 November 2021, an email with the attached offline performance appraisal from the FRO was sent to the Applicant, copied to the SRO and three other individuals.¹² The email advised the Applicant to complete her part and return the performance report by 14 December 2021. There was no offer of a discussion.

18. The Applicant did not complete the section in the performance appraisal that required her comments by the time the matter was declared a dispute.

19. On 28 January 2022, the Applicant requested management evaluation of the

⁸ Reply, annex R/10; Trial bundle at page 105.

⁹ Reply, annex R/11; Trial bundle at pages 107-110.

¹⁰ *Ibid.*, Trial bundle at pages 109-110.

¹¹ Application, annex A/5; Trial bundle at pages 20-27.

¹² Reply, annex 21; Trial bundle, page 240.

“deliberate delays in conducting the performance on timely manner starting each year from [M]arch 31 to April 30 and Use of e-performance to penalize staff member who speaks out against accountability and integrity”.¹³

20. On 10 March 2022, the Management Evaluation Unit (“MEU”) informed the Applicant that her request was not receivable on the ground that the issuance of an offline performance document did not produce any legal consequences that affected the terms and conditions of her appointment; consequently there was no administrative decision within the meaning of staff rule 11.2(a) that could be subject to review before the MEU.¹⁴

Applicant’s submissions

21. The Applicant’s case is set out below.

a. Over the years, some managers have figured out a way of avoiding the ePAS rebuttal process by making “derogatory statements” in the appraisal document while giving the same staff member a suitable enough rating to avoid the rebuttal process.

b. Another “escape hatch” for such managers is creating circumstances to take the process offline, which is what happened in this case. The dispute in this case is about whether the manager was justified in taking the ePAS process offline and whether the rating of “successfully meets expectations” is consistent with the underlying comments in the ePAS. Also at issue is whether the ePAS should go through the rebuttal process.

c. In the present case, management failed to get a workplan prepared on time, failed to agree on a workplan, failed to conduct any mid-point discussions, failed to give guidance or at best substituted criticism for guidance.

d. The workplan for the Applicant’s Section was delayed by more than four months. That meant that no Unit and individual workplans could be

¹³ Application, annex A/3; Trial bundle, pages 11-15.

¹⁴ *Ibid.*, at annex A/4; Trial bundle, pages 16-19.

prepared. When the Section workplan was finally ready, the Applicant was given an October deadline to submit her Unit workplan, which she did shortly before she went on leave. However, immediately she departed the Mission an email was sent to her stating in general terms that she needed to revisit the draft workplan.

e. She responded to that message two months later when she returned from sick leave in December 2020, but did not hear back from her FRO until May 2021 when she again was on leave. That means that in the 14 months since the performance cycle began, management was responsible for delaying the process by a total of 10 months. The Applicant was responsible only for four months of the delay and that was only because she was out sick.

f. Her FRO, however, blamed her for the delays. He did not discuss and agree on the workplan with her, there was no mid-term review, there was no proactive assistance given to her with respect to any performance shortcomings, yet her ePAS states that development is needed in six of the 11 attributes evaluated. The FRO evades the rebuttal procedure by rating her as “successfully meets expectations”.

g. Section 9 of ST/AI/2010/5 (Performance Management and Development Systems) stipulates that a rating of “successfully meets performance expectations” should be considered in cases where the staff member has fully achieved the defined success criteria and/or performance expectations for most of the goals/key outputs during the performance cycle.

h. The ePAS issue was only a “red herring” because the real reason the Applicant and her FRO were not cooperating from December 2020 to June 2021 was about the arrival in the mission of Ms. S, a new United Nations Volunteer (“UNV”) recruit about whom the two disagreed. The Applicant learned about Ms. S’s arrival on 4 November 2020 while she was still away. The Applicant addressed an email to AR (one of her assistants) on 5 November 2020 to inform her that she had not recruited or participated in any interview

for an UNV Supply Officer and that none should be imposed on her. The FRO took umbrage with that.

i. Management's response to the email was to strip the Applicant of her role, as Chief, General Supply Unit. Her SRO, Mr. Jamanca, testified that the Applicant and her FRO disagreed over the recruitment and assignment of two female staff members into the Applicant's Unit. While the decision to strip the Applicant of her supervisory responsibilities was announced on 5 December 2020, this change was already underway as early as the beginning of November 2020. Once the Applicant was informed of these changes, she challenged the decision through the normal dispute resolution channels set up by the United Nations causing her FRO to take offence.

j. To her FRO and SRO, the dispute that ensued was the non-cooperation that led to the offline ePAS but her and her FRO were not in dispute about that issue at all during the performance cycle under review. They were in dispute because the Applicant wanted her supervisory responsibilities restored. This dispute escalated and was filed with the UNDT. In the meantime, her FRO never raised the issue of the ePAS until 14 May 2020, six weeks after the end of the performance cycle, and his emails were simply "self-saving".

k. On the issue that the Applicant refused to complete the evaluation of a subordinate, the SRO testified that the Applicant had refused to assign work to a staff member reporting to her during the Covid-19 pandemic. The real story was that the staff member concerned was in New York during the Covid-19 pandemic and the request was that that staff member be assigned work she could perform remotely. The Applicant advised that the function of coordinating supplies to the Sectors had been suspended and therefore there was no work that she could assign to the staff member. The staff member involved was subsequently assigned other duties that she could perform remotely. The staff member, although assigned to the Applicant's Unit, was being tasked directly by her FRO and other FROs without consulting the

Applicant and in violation of the Rules. Despite the Applicant's request for comments from her FRO and from those other FROs, they all refused to comply. Human Resources ("HR") were apprised of that situation but failed to act to enforce the rules.

1. In response to the allegation that she refused to cooperate with her FRO, HR, and the Director of Mission Support's office in the recruitment of a UNV, the Applicant submits:

- i. The Job Description for the post required at least five years Supply experience. None of the candidates submitted through the UNV programme had the required experience for the post so they were eliminated at the pre-screening stage;
- ii. Her FRO took over the recruitment process of the UNV from the Applicant and proceeded to recruit a candidate of his choice;
- iii. The Applicant stated that this candidate, who did not meet the job requirements, would not be welcome in her Unit and her FRO responded by stripping her of her supervisory functions;
- iv. Again, HR was alerted to this situation but defended the process without addressing whether the UNV was qualified;
- v. The Applicant brought it to the Tribunal's attention that an investigation is underway concerning the UNV Coordinator involved in that case including allegations that the Coordinator was procuring women for senior United Nations officials through the UNV programme; and
- vi. The Applicant was aware of the rumours in the Mission and that was why she insisted on strictly following the rules to the letter in the recruitment process because she did not want to be associated with some of the alleged shady practices.

m. The allegation that she took leave without the approval of her FRO is untrue. The Applicant submitted evidence that all her leave was approved. The problem for her FRO was that for the Applicant's leave approval purposes, the process was mapped to someone else. Instead of her FRO going to HR to get this changed, he held this against her.

n. The Applicant recused herself from the recruitment process for Ms. KA because of her FRO's interference and upon realizing that the post had been "tailored" to fit Ms. KA.

Respondent's submissions

22. The Respondent submits that the application is not receivable on the following grounds:

a. The Applicant did not timely request management evaluation of the decision to conduct her 2020-2021 offline performance evaluation within 60 days of notification, as required by staff rule 11.2(a) and art. 8.1(c) of the Dispute Tribunal's Statute. The 60-day deadline for requesting management evaluation began to run from 16 June 2021 when the FRO first notified the Applicant of the decision to raise an offline performance evaluation. During cross examination, the Applicant admitted that she first became aware of the decision to raise an offline performance evaluation on 16 June 2021. On the same day, she acknowledged receipt of the FRO's notification of that decision.

b. The implementation of the contested decision on 29 November 2021 did not reset the deadline. From 16 June 2021, the Applicant knew that her 2020-2021 performance evaluation would be conducted offline. The management evaluation deadline was, therefore, 15 August 2021, making the Applicant's 28 January 2022 request for management evaluation 166 days late.

c. The offline performance evaluation was not an appealable administrative decision. It did not carry any direct legal consequences on the Applicant's terms and conditions of service or employment. The offline

evaluation had no impact on the substance and validity of the Applicant's performance evaluation. To be considered an appealable administrative decision, a decision must have a direct impact and not the potential of a future harm. The Applicant's claim to the contrary is unsubstantiated. Although the Applicant testified that the offline performance evaluation negatively impacted her chances of career advancement, she did not identify any position that she applied for but did not get because of the offline evaluation. The FRO and SRO testified that they have never been contacted by any potential employer for reference verification regarding any jobs to which the Applicant applied.

d. The Applicant's challenge to the alleged disparaging comments is beyond the scope of the Dispute Tribunal's review and should be denied. The Applicant requested management evaluation of the alleged delay in completing her performance document for the 2020-2021 performance cycle and the decision to complete the document offline; she did not request management evaluation of the comments or substance of the performance document. MEU confirmed that the decision under review as the alleged delay in completing her performance document for the 2020-2021 performance cycle and the decision to complete the document offline. There is no basis for construing the Applicant's management evaluation request to include the alleged disparaging comments.

23. On the merits, the Respondent makes the following arguments:

a. The decision to conduct an offline performance evaluation was lawful, in accordance with section 4.2 of ST/AI/2010/5. The Applicant did not take the required action to advance or complete the ePAS document within the set deadline. The FRO testified that the 2020-2021 performance evaluation for LSS, including the Applicant's, began four months late because, due to Covid-19 travel restrictions, he did not have access to the work files he needed to start the process. However, as soon as he returned to the Mission in July 2020, he prepared a draft section workplan and sent it, on 26 August 2020, to the Unit

Chiefs, including the Applicant, to develop their respective unit plans and individual workplans pending the Chief/SCM's approval of the section workplan.

b. The Applicant submitted the Supply Unit's draft workplan for review on 8 October 2020 but did not submit her individual workplan. On 13 October 2020, upon review of the Supply Unit's draft workplan, the FRO advised the Applicant to revise it to include a success criterion for each key related activity. The FRO also attached a sample of the correct workplan that had been used the previous year for the Applicant to follow the format adopted. However, the Applicant declined to make the suggested changes. On 18 November 2020, the office of the Chief/SCM sent the approved section workplan to the LSS Unit Chiefs, including the Applicant. With the approved section workplan, the Applicant should have finalized her individual workplan, but did not.

c. The delay in completing the Applicant's performance appraisal was of her own making. In December 2020, while the Applicant's workplan was pending, the FRO, in consultation with the SRO, determined that it was in the best interest of the Organization to relieve the Applicant of supervisory responsibilities because she refused to perform supervisory responsibilities assigned to her. On 22 December 2020, the SRO called for a meeting to resolve the LSS work environment and discuss the Applicant's outstanding performance evaluation. However, the Applicant refused to participate in the meeting and to discuss her pending evaluation with the SRO. Instead, she elected to file a complaint against the FRO to the Conduct and Discipline Team ("CDT"), the Office of Internal Oversight Services ("OIOS") and the MEU. Given the ongoing formal complaints procedures, on 31 January 2021, the FRO informed the Applicant that he would not discuss matters that were actively under investigation.

d. The Applicant did not meet her obligation under ST/AI/2010/5. The preparation of a workplan is a joint process between a staff member and their

FRO. In this case, although the FRO met his obligation when he revised the draft unit workplan submitted by the Applicant on 13 October 2020 and when he sent her a sample workplan to adopt, the Applicant did not meet her obligation of finalizing her individual workplan. On cross examination, the Applicant admitted that she did not submit her individual workplan on *Inspira* as directed by the FRO.

e. The Applicant frustrated the performance evaluation process by removing her goals, core competencies and managerial competencies from her 2020-2021 performance evaluation document on *Inspira*. When the FRO checked *Inspira* in January 2021, he noticed that the Applicant had removed her goals, core competencies and managerial competencies from her 2020-2021 performance evaluation document. He thrice requested that she complete her individual workplan on *Inspira* and submit it for approval. The Applicant failed to do so. Given that the Applicant thwarted the process by removing the goals, core competencies and managerial competencies from her individual workplan on *Inspira*, and refused to re-enter them, the FRO, SRO, and HR decided, in June 2021, to evaluate her outside *Inspira* in accordance with section 4.2 of ST/AI/2010/5. This was reasonable in the circumstances.

f. The FRO and the SRO met their obligations under ST/AI/2010/5 despite the Applicant's lack of cooperation. After initiating the offline evaluation in June 2021, following the Applicant's removal of her evaluation from *Inspira*, the FRO scheduled a meeting on 8 September 2021 via Microsoft Teams to discuss the pending evaluation. This was the earliest possible time he could meet the Applicant to discuss, given that the Applicant was out of the Mission between June and August 2021 on sick leave. However, the Applicant remained uncooperative and insisted on using a Unit workplan that had not been approved by her FRO. Under those circumstances, and in consultation with HR, the FRO and the SRO fulfilled their obligation to evaluate her in compliance with section 5 of ST/AI/2010/5.

g. The offline evaluation did not violate the Applicant's due process rights or deny her a proper performance assessment. While the performance evaluation should have been completed on *Inspira* between 1 April 2020 and 31 March 2021, there is nothing in ST/AI/2010/5 which renders the offline evaluation or any failure to finalize the evaluation within the prescribed deadlines a procedural flaw invalidating the process.

h. The FRO testified that although the Applicant met the majority of her goals and key outputs in the workplan, the performance evaluation correctly reflected shortcomings in the core values of professionalism, teamwork, accountability, and the managerial competencies of managing performance, leadership and empowering others. The Applicant's performance evaluation includes several examples of where she created a hostile work environment in the LSS Unit, refused to perform key managerial functions such as the completion of performance evaluations, and refused to supervise a newly recruited UNV assigned to the Unit. The Applicant did not rebut the supporting evidence. The FRO also provided the Applicant opportunity to comment on the offline evaluation, including the allegedly disparaging comments, but the Applicant failed to do so. Whilst the Applicant achieved the majority of goals and key outputs, the FRO had an obligation under section 8.3 of ST/AI/2010/5 to evaluate and comment on the manner in which the Applicant had demonstrated the core values and competencies, and to comment on areas where the Applicant required improvement.

i. The Applicant produced no evidence of harm resulting from the offline performance evaluation or the comments on the evaluation. Her own testimony about alleged emotional distress, embarrassment and career regression was not corroborated in any way.

Considerations

24. The Respondent urged the Tribunal to find that the application is not receivable on three grounds. Firstly, that the Applicant did not timely request management evaluation of the decision to conduct her performance evaluation offline and secondly, that the offline performance appraisal did not have any legal consequences on the Applicant's terms of appointment.

25. The third ground of the Respondent's defence of receivability was that the Applicant did not request management evaluation of the comments or substance of the performance appraisal document. He argued that the Tribunal does not have a basis to construe the Applicant's management evaluation request to include the alleged disparaging comments.

26. The Tribunal, after reviewing the application and the reply, and after conducting a case management discussion with the parties, concluded that some part of the application was receivable. The parties were advised that reasons for such finding would be advanced in the judgment on the merits.

27. The parties agreed to have an oral hearing at which three witnesses testified. The Applicant testified as did her FRO and SRO.

28. There was little controversy regarding the main issue before the Tribunal which was the failure by the Respondent to afford the Applicant a good faith opportunity to defend her position against the negative comments that appeared in her 2020/2021 performance appraisal; which comments detracted from and was inconsistent with the overall successfully meets expectations rating which in turn prevented her from filing a rebuttal in terms of the legal framework governing rebuttals. In its current state, the performance appraisal is damaging to the Applicant's career. The material evidence is discussed in the section on the merits which appears after the findings on receivability below.

Receivability

The Impugned Decision

29. Before this Tribunal is a situation where the Tribunal must exercise its discretion to define the administrative decision based on the material before it because the impugned decision and the decision before the MEU seem different.

30. The text of the impugned decision that was subject for management evaluation is as follows:

... deliberate delays in conducting the performance on timely manner starting each year from [M]arch 31 to April 30 and Use of e-performance to penalize staff member who speaks out against accountability and integrity.

31. The alleged contested decision presented by the Applicant for this Tribunal's review reads as follows:

The FRO prepared a EPAS offline instead of doing it in INSPIRA as is normally the case and did it in a manner that reflected negatively on the s/m [staff member] despite the fact she was not the cause of the delay. He rated her "successfully meets performance expectations", the comments and the majority of the individual elements rated make that rating a 'sham', only used to evade a rebuttal.

32. During the case management discussion, it was understood that the claim before the Tribunal, although not couched as such in the documentation both for management evaluation and before this Tribunal, is that the Applicant is aggrieved by the decision of the Respondent dated 29 November 2021 in which her performance appraisal report for the period 2020-2021 was by its nature and contents used to penalize her. As a result of the negative comments in her performance appraisal without recourse to rebuttal, her terms and conditions of employment were violated.

33. The reliefs sought were described as:

a. That the offline e-performance be cancelled and that a new one that conforms to the applicable rules be done in *Inspira*;

- b. That the workplan be discussed and agreed upon according to the rules governing ePASes;
- c. That inaccurate statements by the FRO that portray her in a bad light be retracted; and
- d. That she be awarded commensurate damages for repeated violations of her due process rights.

34. It is settled jurisprudence that the Tribunal has discretion to interpret the application broadly in light of numerous factors including the relief or remedies sought by the Applicant.¹⁵ To this effect the United Nations Appeals Tribunal (“UNAT”) has held that;

[i]t is the role of the Dispute Tribunal to adequately interpret and comprehend the application submitted by the moving party, whatever name the party attaches to the document, as the judgment must necessarily refer to the scope of the parties’ contentions. Thus, the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review”.¹⁶

35. Consistent with the above requirement, the Tribunal finds that the impugned decision relates to the use of the performance appraisal to penalize the Applicant. The negative comments without recourse to rebuttal were in essence the penalization. The following issues are discerned from the application: (a) completion of performance appraisal offline (instead of in *Inspira* (online)); (b) negative comments in the performance appraisal; and (c) due process rights in performance appraisal.

Whether the impugned decision constitutes a reviewable administrative decision

36. The Tribunal has jurisdiction to review an impugned decision which meets the requirements under art. 2.1(a) of the UNDT Statute, providing that:

¹⁵ *Fasanella* 2017-UNAT-765, para. 20, referring to *Chaaban* 2016-UNAT-611, para. 18.

¹⁶ *Cardwell* 2018-UNAT-876, para 23 citing *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 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.

37. In interpreting this provision as to what elements constitute an administrative decision, UNAT advises the Tribunal to refer to the definition set in *Andronov*¹⁷ holding thus:

... There is no dispute as to what an “administrative decision” is. It is acceptable by all administrative law systems that an ‘administrative decision’ is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules and regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.¹⁸

38. Based on this definition¹⁹, 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.²⁰ Additionally, the Dispute Tribunal may consider the nature of the decision and the legal framework under which the decision was made.²¹

39. This calls for the Tribunal to consider if the above factors are met in the present application.

¹⁷ Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para. V.

¹⁸ *Fasanella* 2017-UNAT-765, para. 15.

¹⁹ Which is reiterated in several UNAT jurisprudence including *Smith* 2017-UNAT-768, para.17; *Zachariah* UNAT-2017-764, para. 18.

²⁰ *Fasanella*, para. 16, citing *Lee* 2014-UNAT-481, para. 49, citing *Andati-Amwayi* 2010-UNAT-058, para. 17.

²¹ *Lee, op cit.*, para. 50, citing *Bauzá Mercére* 2014-UNAT-404, para. 18.

40. The application relates to the procedure that was utilized to conduct a performance appraisal which is governed by ST/AI/2010/5. The performance appraisal was conducted and completed with a successfully meets expectations rating by the Applicant's FRO and endorsed by her SRO. This was a unilateral decision made in a precise individual case. This decision was final and binding in accordance with sections 15.1 and 15.7 of ST/AI/2010/5 which precluded the Applicant from challenging the performance appraisal otherwise than by either informal or formal justice mechanism.

Direct legal consequences

41. The Respondent argued that because the overall rating was successful, the Applicant was not adversely affected by the performance appraisal. The Applicant disagreed, and averred that although rated successful, when read holistically, the performance appraisal was poor having direct negative legal consequences on her terms and conditions of employment. The comments are reproduced below:

First Reporting Officer's Comments on Values and Competencies

Ms Haydar is fully competent in some UN core values and core competencies but requires development in others.

In April 2020 she refused to assign tasks to one of her subordinates with whom she had developed strained relations. Despite several requests to Ms Haydar to assign tasks to her subordinate, she refused as confirmed by her refusal email of 05 April 2020. As a result, the subordinate had to be temporarily removed from her unit to cool down tempers. Moreover, despite repeated instructions to her, she refused, as confirmed by her email of 13 July 2020, to complete the performance report of that same subordinate for about six months (from June to December 2020).

Furthermore, she did not cooperate with her FRO in her own performance report process. Rather than change the unit workplan as suggested by the FRO in his email of 13 October 2020, on 16 December 2020 she replied refusing to do so. Following that, sometime during the first quarter of 2021, she deleted her performance report from *Inspira* which resulted in this offline report being created, a process in which

she has also refused to cooperate as stated in her email of 27 August 2021, and during a Teams meeting with the FRO on 08 September 2021.

In addition, from February to July 2020, without completing the prescribed candidate assessment form to indicate how each UNV candidate failed to meet the requirement, she outrightly rejected 19 qualified candidates for a vacant UNV position that she had been given to assess. Her FRO had to intervene to move the process forward and when the DMS selected the recommended candidate, she wrote to him on 01 September 2020 advising him to freeze the UNV recruitment. When that failed to stop the recruitment, she contacted UNV HQ in Bonn and informed them that the selected candidate was not welcome in her unit. After the selected UNV arrived in Bangui, on 10 November 2020 Ms Haydar wrote an email to her unit staff informing them that she had not recruited anyone for the unit and instructed them to leave staffing matters to her, thus effectively telling them not to accept the UNV.

First Reporting Officer's Overall Comments

Ms Haydar has good technical knowledge of general supply work and achieved 4 of the 5 goals. She and her team responded very well to the Covid-19 emergency requirements and supplied MINUSCA with required Covid-19 prevention materials.

However, Ms Haydar must learn to accept decisions of her supervisors and support them, instead of devoting so much of her energy resisting them. She must also accept working with anyone that the Organisation places in the same unit with her. In addition, she must not refuse to assign her subordinate tasks or refuse to write a subordinate's performance report and must cooperate in the process of developing and completing her own performance report.

Given her technical knowledge, if she were to address these shortcomings, she might improve her career prospects in the Organisation.

42. In considering an appeal touching on similar grounds, UNAT affirmed that the Dispute Tribunal has jurisdiction in exceptional cases to consider the merits of an application where negative overall comments in an otherwise “successfully meets

expectations” performance appraisal, detract from and are inconsistent with the favourable overall rating, holding that;²²

33. It is true that a good final rating, which *in abstracto* is a favourable decision, does not constitute an “administrative decision” able, by itself, to have a direct and negative impact on a staff member’s rights and, accordingly, there is no legal basis pursuant to Article 2(1)(a) of its Statute for a staff member to file an application before the Dispute Tribunal.

34. Nevertheless, as already noted, the determination on whether a specific decision of the Administration constitutes an appealable administrative decision is done *in concreto* on a case-by-case basis by the UNDT Judge, who takes into consideration, *inter alia*, the particular circumstances, the nature of that decision as well as its relevant decision context and consequences on the staff member’s terms and conditions of employment. The judicial determination about the probable adverse impact of the decision of the Administration on the staff member’s employment status is mainly pivoted around, and based on, the relevant final conclusion of such a decision. In exceptional circumstances, however, the adverse impact on the affected staff member’s career, and therefore the actual character of an administrative decision as a reviewable one (*force exécutoire*), may even turn out from an overall judicial assessment of its final conclusion along with the factual basis of that decision, indicating its reasoning. This is especially true when the reasoning detracts from the overall favourable conclusion, such as to affect the terms and conditions of the staff member’s contract.

43. The Tribunal finds that the content, nature and frequency of the negative comments outweigh, detract from and are inconsistent with the positive rating. Just like in *Handy*, the narrative comments do not confirm, but quite conversely detract from, the overall satisfactory performance appraisal of the Applicant as “successfully meets expectations”, having present and direct legal consequences for the Applicant’s terms of appointment.²³

44. The application is receivable in this respect.

45. The first and second grounds of the Respondent’s challenge on receivability

²² *Handy* 2020-UNAT-1044.

²³ 2020-UNAT-1044, para. 41.

that the Applicant did not timely request management evaluation of the decision to conduct her performance appraisal offline within 60 days of notification, as required by staff rule 11.2(a) and art. 8.1(c) of the Dispute Tribunal's Statute and that the decision carried no direct legal consequences on the Applicant's terms of appointment are valid.

46. The Applicant did not adduce evidence that she filed management evaluation within the 60-day deadline which began to run from 16 June 2021 when the FRO first notified her of the decision to raise an offline performance evaluation. Further, under the circumstances, the Tribunal may not attempt to determine whether the offline performance appraisal carried no direct legal consequences on the Applicant's terms of appointment.

47. The application relating to the decision to conduct an offline performance appraisal is not receivable.

Merits

Presumption of regularity

48. The general principle is that when dealing with a staff member, management is presumed to have acted regularly.²⁴

49. This principle applies to all official acts including acts relating to performance appraisals. If the Administration can show that it acted regularly in dealing with the staff member the presumption of law is satisfied. Thereafter the burden of proof shifts to the staff member to show through clear and convincing evidence that the Administration did not act fairly, justly or transparently or that the decision was motivated by bias, prejudice or improper motive against the staff member.²⁵

50. The set standard of proof to rebut the presumption of regularity is that of clear

²⁴ See generally, *Rolland* 2011- UNAT-122, para. 26.

²⁵ See for example *Barud* 2022-UNAT-1204, para. 32 and *Icha* 2021-UNAT-1077, para. 2 concurring opinion of Colgan J.

and convincing evidence, which is higher than proof on a balance of probabilities²⁶. The Applicant must show clearly and convincingly that her performance appraisal was not regularly completed and that as a result her terms and conditions of employment were violated entitling her to a remedy.

51. The Tribunal shall now discuss the parties' evidence and the legal framework on the issues.

52. At the hearing, the parties gave evidence pertaining to the negative comments and their consequences. The comments make serious allegations concerning professionalism, teamwork, accountability, and the managerial competencies of managing performance, leadership and empowering others.²⁷ Presently the Applicant feels disappointed and discouraged,²⁸ ambushed,²⁹ unfairly and illtreated, abused,³⁰ and humiliated³¹, her character and career were assassinated and damaged respectively³² by the performance appraisal report. She cannot attach this performance appraisal report as reference to job applications or promotions.³³

53. The Tribunal noted that of the 47 lines of narrative comments in the performance appraisal, 41 were negative.

54. The adverse comments related to poor performance in core values and competencies which form the bedrock of standards required of an international civil servant as per art. 101 of the Charter of the United Nations which states that:

(3) the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity.

55. Section 5 of ST/AI/292 (Filing of adverse material in personnel records)

²⁶ *Lemonnier* 2017-UNAT-762, UNAT, para. 36.

²⁷ Respondent's closing submissions para. 19(i).

²⁸ Hearing transcript, 21 February 2023, page 52.

²⁹ *Ibid.*, 22 February 2023, page 48.

³⁰ *Ibid.*, pages 48 and 55.

³¹ *Ibid.*, page 50.

³² *Ibid.*, pages 49 and 56.

³³ *Ibid.*, pages 50 and 53.

recognizes that all performance reports, special reports and other communication pertaining to the staff member's performance are matters of record. The final appraisal by the head of office is placed in the official status file. This file constitutes the sole repository of documents relating to the contractual status and career of the staff member. Therefore, it is imperative that negative comments in a performance appraisal report should be handled justly, fairly and transparently in accordance with ST/AI/2010/5.

56. The Respondent, through the Applicant's FRO and SRO took time to move the Tribunal that the negative comments were a true reflection of the Applicant's conduct during the period under the performance review. The Respondent produced evidence in the form of emails to prove that the negative comments were justified. In the words of the SRO:³⁴

12. The comments discussed the Applicant's performance shortcomings during the performance cycle. The comments were fair and supported by evidence from the FRO. There are emails showing that she refused to assign work to a subordinate, refused to complete subordinate's evaluation, and refused to cooperate with the process of recruitment of an UNV among others.

13. I know about these incidents because they came under me as the SRO and I tried unsuccessfully to mediate them.

14. It was important that the comments be reflected on the performance evaluation. ePAS should reflect comments on goals achievement, success and required improvements.

57. In his evidence, the FRO said that the comments were a fair assessment of the Applicant. They did not detract from the overall assessment. He further said:³⁵

It was important that the comments be reflected in Ms. Haydar's 2020-2021 performance evaluation because the ... four incidents by Ms. Haydar were not acceptable behaviour by a UN staff member. The comments were reflected in her e-performance report to draw her attention to them so that she could correct her behaviour and treat her subordinates with respect and dignity.

³⁴ Hearing, 1 March 2023, written witness statement adopted during trial.

³⁵ Hearing, 23 February 2023, written witness statement adopted during trial, page 224 of the Revised Trial bundle.

58. The purpose of these proceedings is not for the Respondent to give justifications for the negative comments. The justification for the negative comments is what would have happened had the Applicant been given an opportunity to rebut the performance appraisal or to discuss and explain the comments with her supervisors before the report was signed off. Therefore, the evidence of the SRO and FRO attempting to justify their negative comments was irrelevant for purposes of these proceedings.

59. The Applicant's evidence that she could not avail herself to the rebuttal system³⁶ was supported by section 15.1 of ST/AI/2010/5. The issue is whether this in itself was irregular.

The Applicant complained that she had no access to rebuttal because her rating was successful.

60. The relevant section of ST/AI/2010/5 provides that:

15.1 ...Staff members having received the rating of "consistently exceed performance expectations" or "successfully meets performance expectations" cannot initiate a rebuttal.

61. This provision does not allow the Applicant to file a rebuttal because her rating was successful. The fact that the Applicant had no access to the rebuttal procedure did not preclude her from seeking resolution elsewhere concerning her final performance appraisal. Under ST/AI/2010/5, the Applicant had the option to institute informal or formal dispute resolution mechanisms. The provision states:

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.

62. Since the negative comments complained of reflected adversely on the Applicant, as a matter of principle, such material may not be included in her personnel file without her being afforded an opportunity to comment on them.³⁷ Therefore, the

³⁶ Hearing, 22 February 2023, pages 33, 34 and 48.

³⁷ Section 2 of ST/AI/292.

Applicant may have a remedy by way of offering her own comments explaining or challenging the negative comments before the final appraisal by the head of office was filed. Sections 2 and 5 of ST/AI/292 provide that:

2. Adverse material shall mean any correspondence, memorandum, report, note or other paper that reflects adversely on the character, reputation, conduct or performance of a staff member. As a matter of principle, such material may not be included in the personnel file unless it has been shown to the staff member concerned and the staff member is thereby given an opportunity to make comments thereon. It shall be handled and filed in accordance with the procedures set out below, depending upon its source.

3 ...

4 ...

5. A third category of adverse material may relate to an appraisal of the staff member's performance and conduct. Under the existing system, all performance reports, special reports and other communications pertaining to the staff member's performance are a matter of record and are open to rebuttal by the staff member. The reports and the rebuttal, if any, as well as the final appraisal by the head of the department or office are placed in the official status file. This file constitutes the sole repository of documents relating to the contractual status and career of the staff member. It is available for inspection by the staff member once a year before the annual promotion review and in other circumstances specified in the administrative instruction ST/AI/108 on application to the staff member's personnel officer.

63. It is based on the ST/AI/2010/5 as read with ST/AI/292 that this Tribunal finds that in itself, the exclusion from filing a rebuttal is not an irregularity as the Applicant had under the Administrative Instructions protections and avenues for securing a resolution to the dispute, including submitting comments in her defence to counteract the negative comments, seeking informal resolution of the dispute or filing a complaint with the internal justice system.

Due process rights in the Applicant's performance appraisal

64. ST/AI/2010/5 is a mechanism aimed at ensuring that the assessment of a staff member is just, fair and transparent. Section 2.1(d) provides that the purpose of the Performance Management and Development System is to improve the delivery of

programmes by optimizing performance at all levels, which it will achieve by: “recognizing successful performance and addressing underperformance in a fair and equitable manner”.

65. A fair and equitable performance appraisal system entails assessing a staff member transparently, objectively, independently and impartially. This would involve allowing the staff member an opportunity to view and to discuss negative comments and offer feedback to any negative comments before signing off³⁸. The Applicant was not given this opportunity.³⁹

66. The Respondent contended that under section 8.3 of ST/AI/2010/5 he was obliged to evaluate and comment on the manner in which the Applicant had demonstrated the core values and competencies, and to comment on areas where the Applicant required improvement. This is correct. However he did not adduce any evidence to contradict the Applicant’s contention that she was not given an opportunity during the performance cycle to address the under-performance described in the performance appraisal report. Similarly, the negative comments were not discussed with her prior to the report being signed off and shared with at least three other persons other than the SRO.

67. The performance shortcomings as described by her FRO were so fundamental that it was a procedural flaw to complete the final appraisal without any evidence that in the course of the performance cycle the FRO and the Applicant had identified and discussed these shortcomings in order to give the Applicant an opportunity to respond to them or to improve on them. Section 10.1 of ST/AI/2010/5 stipulates that:

During the performance cycle, the first reporting officer should continually evaluate performance. When a performance shortcoming is identified during the performance cycle, the first reporting officer, in consultation with the second reporting officer, should proactively assist the staff member to remedy the shortcoming(s).

³⁸ See generally, *Morsy* UNDT/2012/043, affirmed in *Morsy* 2013-UNAT-298.

³⁹ Hearing, 21 February 2023, pages 52-54.

68. The SRO informed the Tribunal that he had tried to resolve conflict between the Applicant and the FRO during the performance cycle. There is no evidence that the conflict that the SRO attempted to resolve related to the conduct of, or was in pursuance of, fulfilling the objectives of the performance appraisal. In particular section 10.1 above or section 5.3(e) of ST/AI/2010/5 providing that;

The second reporting officer...is responsible for resolving disagreements between the staff member and the first reporting officer in the Performance Management and Development System.

69. The SRO's evidence did not disclose at which point during the performance cycle he tried to resolve disagreements related to the performance management development system concerning the Applicant.⁴⁰ His written testimony⁴¹ does not show that he resolved any of Applicant's performance appraisal related concerns while his oral evidence on this point was vague and not worthy of credit as he did not specify any discussion with the Applicant relating to the Applicant's under-performance.⁴²

70. The SRO's mediation attempts referred to in his evidence occurred in December 2020⁴³ far removed from the impugned decision of 29 November 2021 for which the SRO produced no evidence that he acted fairly and equitably in endorsing the negative comments.

71. It is the Tribunal's understanding from the SRO's written evidence that his involvement in the conflict between the Applicant and her FRO related to internal issues which the Applicant refused to put in writing and the FRO refused to discuss because they were not in writing and because the Applicant had filed complaints against him with the CDT, OIOS and Special Representative of the Secretary-General ("SRSG").⁴⁴

72. The SRO was clear that he endorsed the negative comments because they were

⁴⁰ The record shows there was an issue relating to completion of performance appraisal but not that of the Applicant.

⁴¹ Pages 225-226 of the Revised trial bundle.

⁴² Hearing transcript, 1 March 2023, pages 64-68.

⁴³ Trial bundle page 225, para. 6 and hearing transcripts 1 March 2023 pages 72-74.

⁴⁴ Hearing transcript, 23 February 2023, pages 50-51.

justified. He did not produce evidence to contradict the Applicant that he did not ask or wait for the Applicant's side of the story about the allegations before he came to that conclusion.⁴⁵ He took a one-sided view, therefore the decision was neither transparent nor objective, impartial or independent.

73. The Respondent has failed to show that he acted regularly when he failed to produce evidence that he accorded the Applicant an opportunity to be heard on the negative comments that detracted from the overall successful rating in her performance appraisal. The Performance Management and Development System was not complied with. The offer for the Applicant to make comments on the performance appraisal on the same day that it was circulated to HR and others without waiting for her comments was not made in good faith.

74. The Applicant's evidence that she was ambushed by the completed and signed off performance appraisal on 30 November 2021 was not contradicted. MINUSCA acted without considering the Applicant's due process rights. Her right to be assessed fairly and in an equitable manner which underlies the scope of ST/AI/2010/5 and, also by extension ST/AI/292, was violated.

75. The Tribunal is mandated to interfere with managerial discretion where it is found not to have been exercised in compliance with the established legal framework. In this regard, it is well settled that:

Administrative tribunals worldwide keep evolving legal principles to help them control abuse of discretionary powers. There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion.⁴⁶

76. The presumption of regularity has successfully been rebutted by clear and convincing evidence showing that the Respondent violated ST/AI/2010/5 as read with

⁴⁵ Hearing transcript, 1 March 2023, pages 75-76.

⁴⁶ *Sanwidi* 2010-UNAT-084, para. 38.

ST/AI/292.

77. The application is allowed.

Remedy

78. The Applicant requested the following remedies:

- a. That inaccurate statements by the FRO that portray her in a bad light be retracted; and
- b. That she be awarded commensurate damages for repeated violations of her due process rights.

Retraction of negative comments

79. The Tribunal may not order the retraction of the negative comments because its jurisdiction in the matter does not extend to substituting the managerial performance assessment with its own. However, since the procedure that was utilized to finalize the performance appraisal report is flawed, the Applicant shall be given an opportunity to explain and respond to the negative comments before an independent, impartial and objective panel.

80. The Tribunal observed that the relationship between the Applicant and her SRO is not cordial. The Applicant was vividly distressed as she recounted her work experience. She insinuated elements of collusion between the FRO and the SRO to damage her character and future⁴⁷, while the SRO's attitude toward the Applicant was generally negative⁴⁸. The Applicant's filing of complaints against her supervisors with CDT, OIOS and to the SRSG may have contributed to the poor work relationship between the Applicant and her supervisors.⁴⁹ It is recommended that the MINUSCA

⁴⁷ Hearing transcript, 22 February 2023, pages 32 and 39-51 and 55-56.

⁴⁸ Hearing transcript, 1 March 2023, pages 11, 53 and 68.

⁴⁹ Hearing transcript, 1 March 2023, pages 53-56, 63 and 74.

Administration should look into these issues objectively, as the Applicant feels let down by the HR office⁵⁰, to allow for a harmonious work environment.

Compensation for repeated violation of due process rights

81. In reference to her previous ePASes, the Applicant adduced evidence to show that her FRO was in the habit of commenting negatively on her performance appraisal reports without giving her an opportunity to explain her side.⁵¹ The Applicant conceded that she did not make any formal complaint about these previous acts.⁵² Therefore, they are outside the scope of this judicial review for purposes of determining compensation.⁵³ The claim is disallowed.

Judgment

82. The application is partly granted. The filing of the Applicant's 2020/2021 performance appraisal in the Applicant's personnel or other records is rescinded to allow the MINUSCA Administration to give the Applicant an opportunity to be heard on the negative comments before an independent, impartial and objective panel to ensure that the performance rating of successfully meets expectations is consistent with the comments.

83. No damages are awarded for alleged repeated violations of due process rights.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 30th day of March 2023

⁵⁰ Hearing transcript, 21 February 2023, page 53.

⁵¹ Hearing, 21 February 2023, at pages 54-55.

⁵² *Ibid.*, at page 55.

⁵³ *Simmons* 2012-UNAT-222, paras. 19 -20, **distinguished**.

Entered in the Register on this 30th day of March 2023

(Signed)

Eric Muli, Legal Officer, for
Abena Kwakye-Berko, Registrar, Nairobi