



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/023/R1

Judgment No.: UNDT/2023/077

Date: 25 July 2023

Original: English

Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

HOSSAIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Teresa Posse, UNDP

Background

1. On 26 February 2019, the Applicant filed an application challenging the rating of his 2016 Performance Management and Development (“PMD”) assessment.
2. The Respondent filed a reply on 1 April 2019 in which it was argued that the Applicant’s claim was not receivable.
3. On 27 July 2020, the Tribunal issued Judgment No. UNDT/2020/127 in which it dismissed the application as irreceivable.
4. The Applicant appealed the said Judgment to the United Nations Appeals Tribunal (“UNAT”). On 25 June 2021, UNAT issued Judgment No. 2021-UNAT-1135 in which it set aside Judgment No. UNDT/2020/127 and remanded the case as receivable, to the UNDT for hearing.
5. The case was assigned to the present Judge on 4 April 2022.
6. The Tribunal held oral hearings on 6, 9, 13, 21 and 22 June 2022; 7 July 2022; 26 August 2022; and 1 September 2022. At the hearings, oral evidence was received from:
 - a. the Applicant;
 - b. Ms. Debab Asrat Ynessu, then Deputy Resident Representative (“DRR”) of Operations in Zimbabwe for UNDP;
 - c. Ms. Renata Rubian, Policy Advisor on Social Economic Analysis at the Regional Bureau for Asian Pacific;
 - d. Ms. Natalia Perez Andersen, then Head of the Programme Management Unit of the Zimbabwe Resilience Building Fund (“ZRBF”); and
 - e. Mr. Rugare Mukanganise, then Human Resource Analyst with the UNDP in Zimbabwe.

Facts and Procedure (Reproduced from Judgment No. UNDT/2020/127)

7. At the time of the impugned decision, the Applicant held a fixed-term appointment as Finance Specialist for the ZRBF programme, which is managed and supported by the UNDP Zimbabwe Country Office (“UNDP Zimbabwe”) at the P-3 level. The Applicant received the impugned decision on 29 May 2018.¹

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

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

10. On 6 February 2017, his supervisor assessed his overall performance for the 2016 performance evaluation cycle as “partially satisfactory”.

11. That same day, the Applicant expressed his disagreement with his supervisor about the rating of his 2016 PMD.

12. On 13 February 2017, the Applicant had a third discussion regarding his performance with his supervisor. At this meeting, the Applicant disputed his performance rating, presented arguments in support of his position, and asked his supervisor to provide him with evidence in support of her rating.

13. On 9 March 2017, the Applicant held a meeting with the Resident Representative and Country Director, UNDP Zimbabwe, regarding his disagreement with his 2016 PMD rating.

14. On 30 March 2017, the Resident Representative convened the Talent Management Review Group (“TMRG”) to hear the Applicant’s case.

¹ Application, annex 12.

15. On 24 April 2017, the Country Director convened a meeting to inform the Applicant about the outcome of the TMRG process. At this meeting, the Applicant was informed that the TMRG: (1) noted areas where he performed well; (2) recognized that there were some areas which required improvement in his performance; (3) decided to maintain his supervisor's rating of partially satisfactory; and (4) changed the Applicant's contract extension from six months to one year.

16. By e-mail dated 6 June 2017, the Deputy Country Director, Operations, UNDP Zimbabwe, notified the Applicant in writing that the TMRG had endorsed the partially satisfactory rating of his 2016 PMD.

17. On 1 August 2017, the Applicant filed a rebuttal of his 2016 PMD rating. On 8 August 2017, he was informed about the composition of the Rebuttal Panel that was assigned to conduct the review of his case.

18. On 8 September 2017, the Applicant had an individual session with the Rebuttal Panel via Skype conference.

19. On 29 May 2018, the Report of the Rebuttal Panel was shared with the Applicant reflecting the findings and recommendations of the Panel, including the decision to maintain the Applicant's 2016 PMD rating of "partially satisfactory".

20. By e-mail dated 30 May 2018, the Applicant expressed concern that the Rebuttal Panel had not followed due process, and on 7 June 2018, he sent the Panel an extensive submission disputing its decision to maintain his 2016 rating.

21. On 26 February 2019, the Applicant filed this application challenging the impugned decision.

22. The Respondent filed his reply on 1 April 2019.

Submissions

The Applicant

23. The Applicant argues that his supervisor, Ms. Perez, did not assess his performance based on evidence and actual performance, but rather based on her biased personal perception. The assessment was made to “oust” him from his job. His PMD assessment was completed on 6 February 2017 and his contract extension was made on 9 February 2017 only for six months. Therefore, there is a clear link between his performance and contract extension. To extend his contract for six months, his supervisor assessed his performance as partially satisfactory intentionally.

24. A few of his functions were taken away from him and attached to the newly created “Grants Management Unit”. Eventually, his position was abolished with effect from 31 December 2018. The abolition of his post was not implemented after he challenged the decision.

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

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

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

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

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

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

31. The TMRG process was not conducted in accordance with the proper procedures. For example, the TMRG agreed with his supervisor's rating without further details or opportunity provided to him to present his case, there was no formal TMRG meeting, and no notification was received from the TMRG Focal Point, and no meeting minutes were shared except the TMRG decision.

32. The Rebuttal Panel upheld his supervisor's and the TMRG's decision without considering the evidence that he submitted. The rebuttal report mostly included wrong and incorrect information which he had challenged.

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

34. The Applicant seeks the following reliefs:

- a. his performance ratings to be changed to "Very Good";
- b. UNDP to find a job for him with retrospective effect;

- c. compensation for the loss of his job since the date of his separation from UNDP; and
- d. compensation for his emotional injuries.

The Respondent

35. The Respondent submits that the Applicant's supervisor conducted a fair appraisal of the Applicant's performance.

a. The testimony and witness statement of the Applicant's supervisor, Ms. Andersen, refer to multiple instances where the Applicant showed performance shortcomings in 2016, including lack of attention to detail and deficiencies in the quality of deliverables, lack of timeliness or delays in the submission of work products, lack of understanding of key issues within his area of responsibility and lack of initiative to follow-up on areas relevant to his area of expertise.

b. During her testimony, Ms. Andersen illustrated shortcomings in the Applicant's financial reporting and financial analysis and management, including deficiencies in relation to grantee contracts and value for money tracking.

c. Ms. Andersen indicated that: the Applicant submitted work which was partially completed, not at the necessary standard of quality and which lacked accurate information. Ms. Andersen referred to specific examples of lack of attention to detail in financial reporting. Financial reports needed to be corrected and reworked, and finalization of work required extensive support.

In this regard, Ms. Andersen stated that the Applicant's work required close supervision, deliverables were submitted to her for review very close to the deadline with many outstanding issues and inconsistencies and she had to

invest a considerable amount of time revising the Applicant's financial reports.

d. Ms. Andersen affirmed that the Applicant's work required significant follow-up, it lacked sufficient analytical work or financial analysis and the Applicant failed to meet deliverables. Ms. Andersen provided various examples where the Applicant showed lack of proactiveness in his role as Finance Specialist.

e. The Applicant also failed to admit that he had made the same claim - that his supervisor had assessed his performance as partially satisfactory with the intention to "oust [him] from his job" - in a prior performance process in relation to a former supervisor. Ms. Andersen explained that her intention was to conduct the evaluation according to the instructions and to give the Applicant the necessary support to be able to perform to his maximum capacity.

f. The Applicant did not meet his burden of proof that the performance rating was tainted by any bias or improper motives. The evidence shows that the Applicant's supervisor - who in 2017 and 2018 assessed the Applicant's performance as "successful" - properly discharged her functions by accurately and objectively evaluating the Applicant's performance in 2016 against defined performance indicators and in accordance with the applicable criteria set out in the PMD Policy guiding the performance rating. The supervisor conducted a fair appraisal of the Applicant's performance, which was adequately supported by the evidence.

36. The TMRG properly assessed that the performance rating was justified.

a. The testimonies of Ms. Ynessu and of Mr. Mukanganise confirmed that the TMRG took into account the Applicant's inputs when reviewing his case in compliance with paragraph 48 of the PMD Policy. The TMRG - composed by Ms. Ynessu, Mr. Bishow Parajuli, Resident Representative

(“RR”) and Ms. Verity Nyagah, Country Director (“CD”) - considered the information provided by the Applicant during his meeting of 9 March 2017 with the RR and the CD. The witnesses confirmed that the minutes of the meeting where the Applicant explained the basis for his disagreement with the performance rating were shared with the TMRG that reviewed his case. In addition, the TMRG reviewed supporting documentation provided by the Applicant to the RR and CD and other relevant documents, such as the Applicant’s 2016 PMD.

b. Ms. Ynessu and Mr. Mukanganise affirmed that the TMRG also considered inputs from the Applicant’s supervisor, particularly numerous e-mails which showed the Applicant’s performance shortcomings, including delays in the delivery of work products and deficiencies in the quality of deliverables. Ms. Ynessu explained that she observed deficiencies regarding the Applicant’s financial reports which required follow-up, re-work and correction. The performance shortcomings resulted in the need to involve other colleagues to provide support to the Applicant, including a more junior national officer who provided technical advice to the Applicant to assist him with the finalization of a financial report.

c. Ms. Ynessu explained that donors – the European Union and the Department for International Development (“DFID”) – had complained and shown dissatisfaction with UNDP’s financial reports, and lack of donor confidence in UNDP could result in the ceasing of contributions to the ZRBF. Corroboration of the donor’s dissatisfaction with the financial reporting was DFID’s assertion that UNDP may be placed on a financial improvement plan if the reporting did not improve quickly.

d. Ms. Ynessu confirmed that the issues highlighted by the Applicant’s supervisor as performance shortcomings related to financial matters and to the Applicant’s functions as a Finance Specialist. Ms. Ynessu and Mr. Mukanganise stated that the TMRG considered that the Applicant’s

supervisor conducted an objective evaluation of the Applicant's performance in accordance with the factors that were set out in the policy to assign a partially satisfactory rating.

37. The Rebuttal Panel conducted a lawful rebuttal process.

a. The testimony of Ms. Rubian confirmed that the Rebuttal Panel conducted the review of the Applicant's case in full compliance with its Terms of Reference and the procedure prescribed in the PMD Policy.

b. Ms. Rubian explained that the Rebuttal Panel's review of the Applicant's performance included interviews with the Applicant, his two supervisors, the Human Resources Analyst, the Finance Assistant, and an examination of extensive documentation. The Applicant was provided ample opportunity by the Rebuttal Panel to advocate for his case orally and by providing documentation throughout the review process,

c. The Applicant failed to take advantage of the opportunity provided by the Rebuttal Panel to recommend names of persons the Rebuttal Panel could speak to in support of his case. Ms. Rubian confirmed that the performance cycle of the Applicant had followed due process. In this regard, Ms. Rubian indicated that the Applicant had confirmed his agreement with the PMD Key Result Areas ("KRAs") in his PMD, which had been set in conversation with the supervisor, were in line with the functions of the post and his job description and reflected realistic performance expectations.

d. Ms. Rubian stated that the evidence demonstrated that the Applicant received regular feedback from his supervisor, including through bi-weekly meetings where deliverables were discussed, there was follow-up on assignments, constant feedback on the quality of deliverables, and an opportunity for training and for a performance improvement plan.

e. Ms. Rubian's testimony further corroborated that the Rebuttal Panel found that the Applicant's supervisor had fully complied with the mandated requirements of the performance process and that there was "a significant body of evidence to substantiate the rating". Ms. Rubian also attested to the unanimity of the Rebuttal Panel in maintaining the "partially satisfactory" rating, which had concluded that the Applicant had been treated with fairness and had been afforded due process.

f. During her testimony, Ms. Rubian referred to the nature and relevance of the evidence considered by the Rebuttal Panel in reaching its conclusions. The witness also clarified the role of the Rebuttal Panel, its composition and the requirements necessary to become a member, which did not include having expertise in the thematic area, but having managerial experience, a good performance record, and upholding values of integrity and impartiality.

g. Ms. Rubian's testimony confirmed that the Rebuttal Panel conducted an independent review of the Applicant's case, afforded the Applicant due process and performed its functions in accordance with the applicable procedures. It conducted interviews with relevant stakeholders, including the Applicant and the supervisor, and it considered and reviewed all supporting documentation, including the oral and written information provided by the Applicant in support of his case. Based on the evidence on record and witness testimony, the Rebuttal Panel conducted a lawful rebuttal process in compliance with its Terms of Reference and the prescribed procedure.

38. In view of the above, it is the Respondent's submission that the Organization acted fairly in assessing and reviewing the Applicant's performance during all stages of the process. No adverse administrative decision on the grounds of poor performance was taken by the Organization, which acted in good faith and in accordance with the applicable rules and policies. For the foregoing reasons, the Respondent requests that the application be dismissed in its entirety.

Considerations

39. This application presents the following issues.
- a. Whether the assessment of the Applicant's 2016 work performance by his supervisor complied with UNDP's PMD Policy.
 - b. Whether the review of the Applicant's 2016 work performance by the TMRG and the Rebuttal Panel complied with UNDP's PMD Policy.
 - c. Whether the assessment of the Applicant's 2016 work performance by his supervisor was tainted by bias or improper motives.
 - d. Whether the review of the Applicant's 2016 work performance by the TMRG and the Rebuttal Panel was tainted by bias or improper motives.

Whether the assessment of the Applicant's 2016 work performance by his supervisor complied with UNDP's PMD Policy.

40. The Applicant's principal contention relates to his "partially satisfactory" rating and his supervisor's justifications for it. And, except for his complaints that a mid-term review was not conducted, and that his supervisor did not give him any feedback about the alleged unsatisfactory performance before the impugned rating, he does not dispute the fact that the other aspects of the PMD process were complied with during his assessment.

41. The Tribunal will not delve into issues touching on the merits and demerits of the impugned rating, including the justifications for it, since it cannot undertake a "*de novo*" review of the Applicant's ratings or of the performance process.² Deference is given to the decision-maker's assessment of the staff member's performance; the Tribunal's role being limited to determining whether the proper procedures were

² *Sarwar* 2017-UNAT-757, para. 74.

applied.³

42. The PMD process has three mandatory elements: goal setting (which needs to be discussed in a meeting between the supervisor and supervisee); the midterm review between the supervisor and supervisee; and the annual performance review (the end of the PMD cycle for that particular year). Continuous interactive processes between supervisor and supervisee are a best practice.⁴ That the Applicant and his supervisor agreed on four key results and 10 indicators for his PMD from 21 February 2016 to 31 January 2017, and that several discussions were held between them “on how to best formulate these”, is not contested. Ms. Andersen testified that improvements were made in terms of making the indicators more measurable.⁵ Her evidence is corroborated by that of the DRR, that goals and key result areas were agreed between Ms. Andersen and the Applicant.⁶ The Applicant does not dispute these facts.

43. Based on the above the Tribunal finds that the first step in the PMD process (goal setting) was complied with.

44. The Applicant claims that a formal midterm review was not held. The DRR’s evidence that she noticed that dates in the system relating to the midterm review were logged in much later corroborates this complaint.⁷

45. Ms. Andersen explained that she would meet with the Applicant to talk through the missing elements or elements that needed to be corrected or improved. Further, that both during meetings and in written feedback via e-mail, she emphasized and acknowledged good performance, whilst also addressing issues of deficient quality and lack of timeliness to prevent any potential set-back in the achievements of the work. She added that the Applicant participated in all Steering Committee and

³ *Said* 2015-UNAT-500, paras. 40-41. See also *Jennings* 2011-UNAT-184, particularly para. 24, and *Dzintars* 2011-UNAT-176.

⁴ RR’s hearing transcript, page 72, lines 12-24.

⁵ Ms. Andersen’s witness statement, at para. 4.

⁶ RR’s hearing transcript, page 13, lines 7-9.

⁷ *Ibid.*, at page 14, lines 22-25.

donor meetings, as well as in all internal staff meetings. In these meetings, he was an equal partner around the table and participated.⁸

46. Ms. Andersen's evidence is corroborated by that of Ms. Ynessu, who stated that available documents indicated that throughout the midterm review, the Applicant had bi-weekly meetings with his supervisor, through which there were a lot of interactions regarding performance. These bi-weekly interactions, which she states are very much part of a PMD cycle, provided plenty of opportunity for discussions about achievements, deliverables, shortcomings, and actions that had to be taken to correct the course.⁹

47. The Applicant does not contest the evidence that bi-weekly meetings took place. His complaint is that no **formal** mid-term review was conducted.

48. The PMD policy provides in relevant parts as follows.

11. "The performance management and development process includes: annual performance planning; regular performance discussions, including performance monitoring, feedback and coaching during the performance year; **the mid-term review**; and the annual performance review.

...

22. "**The mid-term performance review** and its record in the on-line PMD tool will be mandatory for all UNDP staff members who have worked for UNDP or in the current role for at least three months prior to the time of the mid-term review."

49. The Tribunal's understanding of the above provisions is that the mandatory mid-term performance review is meant to be a formal exercise. The regular performance discussions (like those held by the parties) are specifically referenced in paragraph 11 and were not legislated to be held as an alternative to the mandatory mid-term performance review. The Tribunal therefore agrees with the Applicant that there was no formal mid-term review.

⁸ Ms. Andersen's witness statement, page 2, paras. 8-10.

⁹ Ms. Ynessu's hearing transcript, page 15, lines 1-16.

50. Part of the Applicant's complaint is that his supervisor did not give feedback about the alleged unsatisfactory performance before she gave him the impugned rating.

51. Ms. Andersen's and Ms. Ynessu's evidence (see paragraphs 42-46 above) that throughout the midpoint of the midterm review, the Applicant had bi-weekly meetings with the supervisor, through which there were a lot of interactions regarding performance, further that the bi-weekly interactions provided plenty of opportunity for discussions about achievements, deliverables, shortcomings, and actions that had to be taken to correct the course, contradict the assertion that the Applicant was not given feedback about his unsatisfactory performance.

52. According to Ms. Ynessu, the fact that Ms. Andersen indicated that performance was on track did not mean that everything was achieved.¹⁰ Ms. Andersen supports this position in her evidence that she rated the midyear progress as on track despite having noticed some areas that needed improvement, as the staff member assured her that the outstanding items would be delivered briefly.¹¹

53. Based on the above, the complaint that the Applicant was not given feedback cannot be sustained. The Tribunal finds that the Applicant was given feedback about his unsatisfactory performance.

54. In conclusion of the issue of whether the impugned assessment complied with UNDP's PMD Policy, it has been found that the first step in the PMD process (goal setting) was complied with. And, although a formal mid-term review was not conducted, the Applicant through meetings and written communications was made aware of his unsatisfactory performance before the final review.

55. The Tribunal's jurisprudence establishes the principle that "the determination of whether [a staff member] was denied due process or procedural fairness, in the

¹⁰ Ms. Ynessu's hearing transcript, at page 65, lines 10-25.

¹¹ Ms. Andersen's witness statement, para. 11.

final analysis, must rest upon the nature of any procedural irregularity and its impact”.¹²

56. The Tribunal is not convinced that conducting a formal mid-term review would have been more helpful to the Applicant than the feed-back he received about the need to improve his performance. One of the reasons for conducting a mid-term review is for the supervisor to give such feedback. Since the feedback was given, and the Applicant was aware of his shortcomings and could have taken positive steps to improve, the omission to conduct one did not prejudice him in any way. All factors considered, the Tribunal finds that the assessment of the Applicant’s 2016 work performance complied with UNDP’s PMD Policy.

Whether the review of the Applicant’s 2016 work performance by the TMRG and the Rebuttal Panel complied with UNDP’s PMD Policy.

57. The Applicant claims that the TMRG and Rebuttal processes were conducted in total disregard of his due process rights.

The TMRG process

58. It is common cause that the TMRG meeting (to which the Applicant was not invited yet his supervisor was invited,¹³ only considered submissions the Applicant had prepared for the 9 March 2017 meeting. He only presented on one KRA, “value for money tools/indicators”, in the 30 minutes he was allotted at the 9 March meeting. That the Applicant’s presentation was brief is corroborated by Ms. Ynessu’s evidence that it comprised of two-pages.¹⁴

59. The Respondent maintains that the TMRG meeting reviewed sufficient information. The information they allude to comprises of the Applicant’s two-page

¹² *Ncube* 2017-UNAT-721 and *Sarwar* 2017-UNAT-757, para. 87.

¹³ Mr. Mukanganise’s hearing transcript, page 17, line 17.

¹⁴ Ms. Ynessu’s hearing transcript, page 28, lines 12-25.

presentation, his 30-minute oral presentation on one KRA, his 2016 PMD¹⁵ and documentation provided by his supervisor in support of the impugned rating.

60. Paragraph 48 of the UNDP Policy on Performance Management requires the TMRG to review the case, “taking into account appropriate inputs from the supervisor, the supervisee and other parties, as required ...”

61. Since this provision neither requires the subject of review to physically attend a TMRG meeting nor prescribes the nature or form in which a subject’s input should be, the Tribunal agrees with the Respondent that the TMRG may only request for evidence and not for the physical presence of the subject of the review.¹⁶

62. The need for the appearance of equality however demanded that since that the Applicant’s supervisor was invited and she made oral presentations, the Applicant should have as well been invited to make similar submissions.

63. The TMRG instead only reviewed documents which the Applicant prepared and shared at the 9 March meeting. He was not even notified that the documents were to be relied on at the TMRG meeting. He was not aware that his 30-minute oral presentation which focused on only one key result, “value for money tools/indicators”, would be the one to be reviewed by the TMRG.

64. Since, as far as “inputs” from the Applicant are concerned, the TMRG only considered his two-page presentation and oral presentations covering one KRA, the TMRG cannot be said to have considered appropriate inputs from the supervisee (the Applicant) as required by the UNDP Policy.

65. A specific request to the Applicant for input for the TMRG process might have yielded presentations and documents relevant to other Key Result Areas for example, thereby adding value to the TMRG process.

¹⁵ Application, annex 10.

¹⁶ Ms. Ynessu’s hearing transcript, pages 29-30, lines 10-25, 1-3.

66. It has been established that the Applicant was not given an opportunity to make presentations, oral or otherwise before the TMRG in contravention of paragraph 48 of the UNDP PMD policy. And, unlike his supervisor, the Applicant was not given an opportunity to be physically present at the TMRG. He was therefore not afforded an equal opportunity to make his case. And, the TMRG considered presentations which had not been prepared for the TMRG process, and submissions relating to one KRA. Based on the above, the Tribunal finds that the TMRG review process did not comply with UNDP's PMD Policy.

The Rebuttal Panel

67. The Applicant contends that the Rebuttal Panel upheld the TMRG decision without considering the materials he submitted before them as evidenced by their email of 31 July 2018.¹⁷ Further that the rebuttal report bore incorrect information which he had challenged, yet his concern was not addressed.

68. The above claim omits vital information such as the stated reason for rejecting the documents, which was that the Panel had already closed the case and issued a final report. In the Tribunal's view, this was a valid reason for the Rebuttal Panel's refusal to accept the evidence which the Applicant sent them at that stage. Review processes should not be allowed to go on indefinitely.

69. The final Rebuttal Panel report indicates that the Panel reviewed a wide range of issues in the assessment process and based their decision to uphold the TMRG's decision, on evidence they gathered during the review. Ms. Ynessu was emphatic that the PMD cycle was the primary point of departure and not the TMRG decision. She explained that while the TMRG session is important, the Panel's decision was premised on the fact that the assessment process complied with the PMD policy.

70. One of the issues which the Applicant raises is the absence of a mid-term review. While the Panel agreed with him after finding that the dates of the mid-term

¹⁷ Application, annex 14.

review were logged much later into the system, they were persuaded that the bi-weekly meetings the Applicant and his supervisor had, and the constant feedback he received sufficiently made up for the absence of a mid-term review.¹⁸ The Tribunal has already pronounced itself on this issue (see para. 54 above) and adopts those findings.

71. The complaint that the Rebuttal Panel did not consider evidence submitted by the Applicant is not valid. The Rebuttal Panel report¹⁹ indicates that the Applicant's TOR, 2016 PMD, email exchanges (with the HR, Supervisor, TMRG, DCD, Donors), HR notes to the records, TMRG's 6 June communication to him and a document from the Office of Human Resources Management ("OHRM") were reviewed, and five persons including the Applicant were interviewed.

72. The complaint that the RC/RR and the CD were not interviewed by the Rebuttal Panel is also not valid. The Applicant was invited to suggest interview subjects but did not suggest either of them. He cannot therefore complain that they were not interviewed.

73. The Tribunal notes Ms. Ynessu's statement that the Applicant was invited, and he presented his own case before the TMRG,²⁰ which is a misrepresentation of the true facts. This suggests that in some respects the Rebuttal Panel might have made assumptions. Overall, however, the Tribunal finds that the Rebuttal Panel properly considered all that they should have considered in the review process. The review of the Applicant's 2016 work performance by the Rebuttal panel complied with UNDP's PMD Policy.

Whether the assessment of the Applicant's 2016 work performance by his supervisor was tainted by bias or improper motives.

¹⁸ Ms. Ynessu's hearing transcript, page 14, lines 18-25, page 15 lines, 1-16, page 36, lines 8-15 and page 37, line 12.

¹⁹ Application, annex 12.

²⁰ Ms. Ynessu's hearing transcript, page 17, lines 9-12.

74. The Applicant contends that his supervisor, Ms. Andersen, did not assess his performance based on evidence and actual performance, but rather on her biased personal perception, with a view to ousting him from his job. He cites eight acts/omissions he attributes to his supervisor, to buttress the assertion that she was biased and with improper motive.

75. He claims that his PMD assessment was completed on 6 February 2017 and his contract extension for only six months was made on 9 February 2017. This to him establishes a clear link between his poor assessment and the contract extension. He asserts that his supervisor deliberately assessed his performance as partially satisfactory for her to extend his contract for only six months.

76. The Applicant does not however substantiate this claim beyond what he states above and did not even put the assertion to his supervisor in cross examination to get her response.

77. On the contrary, Ms. Andersen was clear that her intention in assessing the Applicant's performance, was to follow the relevant instructions, and to give him all the support he could receive, so that he would be able to perform to his maximum and support the whole team and implementation of the programme.²¹

78. She further explained that the fact that she gave the Applicant a partial satisfactory as an evaluation in the cycle was not because he did not put in a lot of hours. She always recognised that he worked hard and for long hours. Her intention had always been to support him in the best way she could, so that he could perform his duties without having to invest so much time on the back and forth.²²

79. It is the Applicant who bears the burden to prove his assertions, but he did not adduce evidence to support his claim. The claim is therefore rejected for lack of merit.

²¹ Ms. Andersen's hearing transcript, 1 September 2022, page 14, lines 15-20 and page 18, lines 2-6.

²² *Ibid.*, on 22 June 2022, page 26, lines 4-12.

80. The Applicant claims that a few of his functions were taken away from him and attached to the newly created “Grants Management Unit”, and that his position was eventually abolished with effect from 31 December 2018, though the abolition was not implemented after he challenged the decision.

81. Ms. Ynessu however explained that the decision referred to was taken in 2018 outside of the 2016 PMD period. Further, that the decision was not about abolition of post but of hiring of local staff as opposed to international staff.²³

82. The Applicant questions the fact that the decision was taken by the TMRG who should not have a role in that. Ms. Ynessu, while emphasising the fact that the senior management representative of the country office is represented at the TMRG, explained that any actions by the TMRG which were beyond the cycle of 2016 were not in the purview of the Rebuttal Panel.²⁴ Since there is no evidence contradicting that of Ms. Ynessu, especially about the fact that discussions about phasing out the Applicant’s position took place in 2018, the Tribunal finds that matters concerning the abolition of the Applicant’s post are not relevant to this review process.

83. The Applicant points to the fact that while his mid-term evaluation was assessed as “On-Track” and there was no reminder from his supervisor concerning his performance after the mid-term assessment, he was given a low rating at the end of cycle. This, he claims is evidence that the performance assessment was made intentionally to make him an underperformer to oust him from his position.

84. Ms. Andersen explained that in the mid-term review, she noticed some areas that needed improvement. She however rated the mid-year progress as on track after the Applicant assured her that the outstanding items would be delivered. She also recognized the very high complexity of the ZRBF operation and the fact that the Applicant’s experience had been very focused on traditional UNDP programming.²⁵

²³ Ms. Ynessu’s hearing transcript, 13 June 2022; page 67, lines 7-21.

²⁴ *Ibid.*, at page 68, lines 7-10.

²⁵ Ms. Andersen's witness statement, para. 11.

Regarding Grantee Agreements, she explained that the bulk of actual work (the financial movement, i.e., the amount of money that was flowing through the programme) increased significantly between the mid-year review and the end of year review.²⁶

85. After the mid-year, the contracts were being implemented and during that implementation period (the second half of the year), there were deficiencies such as the lack of analysis of the financial activities under ZRBF, lack of analysis in relation to the performance of the grantees and the lack of understanding of how the financial reports were to be produced which attracted a low end of year rating.²⁷

86. Ms. Ynessu also stated that the fact that Ms. Andersen gave an on-track comment does not mean that everything was achieved and okay.²⁸

87. According to Ms. Rubian, the Rebuttal Panel *inter-alia* considered feedback from donors about submissions from UNDP.²⁹ They also looked at the PMD cycle in 2016 and the course of action, i.e., what happened after the feedback had been given.³⁰

88. Ms. Andersen's explanations, supported by Ms. Ynessu's and Ms. Rubian's evidence sufficiently rebut the assertion that there was a contradiction between the mid-term feed-back and the final assessment. The Tribunal rejects the Applicant's claim.

89. The Applicant claims that one of his key results "Value for Money" was achieved but it was assessed as not achieved and the agreed tools/indicators were being used by ZRBF/UNDP. This, he maintains, demonstrates that his performance was not objectively assessed.

²⁶ *Ibid.*, 21 June 2022 transcript, page 8, lines 19-25; page 9, lines 1-6.

²⁷ *Ibid.*, at page 16, lines 11-16; page 20, lines 12-25.

²⁸ Ms. Ynessu's hearing transcript of 9 July 2022, page 65, lines 23-25,

²⁹ Ms. Rubian's hearing transcript of 13 June 2022; page 74-75.

³⁰ *Ibid.*, at page 76, lines 3-5.

90. Ms. Andersen is however positive that the Value for Money indicators were not finalised, and that there was a large amount of support provided to the team to develop them. Further, that Value for Money experts from DFID were brought in, and they participated in evaluating the products that were submitted. None of the products were acceptable to their standards.³¹ DFID brought their value-for-money expert from the office in South Africa to work with the team and the teams of the grantees to refine the instrument. Significant training on how to develop the instrument and how to develop the indicators was conducted.³²

91. Ms. Rubian explained that a letter which merely indicates that a submission has been done is not evidence that the submission has been accepted and approved by the donor and is to a sufficient standard. The DFID experts' review of the value for money component was open at the end of 2016, because the value for money analysis (even the set up) and the indicator system for value for money had not been finalised. She is positive that whatever had been submitted was not of sufficient quality.³³

92. There is nothing to contradict Ms. Andersen's evidence which represents a credible rebuttal to the Value for Money issue. The Tribunal therefore rejects the Applicant's assertion and accepts Ms. Andersen's explanation.

93. The Applicant claims that his supervisor wrongly blamed him for the delivery of products with wrong specifications, yet he and his colleague were the ones who detected the problem.

94. Ms. Rubian states that in the assessment under KRA No.4 there is no reference to any procurement undertaken in 2015, and that the only reference is the need to action with the Procurement Unit, which language is actually not negative, since it only incentivizes the Applicant to have meetings with the Procurement Unit.³⁴ She points to the fact that the final rebuttal report bears no evidence that the issue of

³¹ Ms. Andersen's hearing transcript of 1 September 2022; page 28, line 4 and page 30, lines 10-15.

³² Ms. Andersen's hearing transcript of 26 August 2022, page 71, lines 15-20,

³³ Ms. Rubian's hearing transcript of 1 September 2022; page 31, lines 12-20.

³⁴ *Ibid.*, at page 63, lines 23-25, page 64, lines 1-7, 13-15, 24-25 and, page 65, lines 1-5.

the 2015 procurement was included in the Rebuttal Panel's deliberations. The Panel's responsibility was for the performance in 2016 and not the Applicant's performance in 2015.³⁵

95. In the absence of contradictory evidence, the Tribunal finds that Ms. Rubian's evidence sufficiently rebuts the Applicant's assertion. The claim is also rejected for lack of merit.

96. The Applicant claims that he was faulted for assignments which were not part of his KRA's and cites the example of the 2017 and 2018 budgets which were not uploaded and were therefore not reflected in the executive snapshot. He had not joined the institution (he joined on 21st February 2016) by that time.

97. There is no evidence contradicting that of Ms. Andersen that she expected the finance specialist to make sure that everything was in order, and that all UNDP systems were up to date with all the available information to ensure that the programme did not run into financial deficits.³⁶ The Tribunal agrees with Ms. Andersen's explanation and rejects the Applicant's complaint.

98. The Applicant further claims that his supervisor assessed his 2016 PMD twice and departed from the first good assessment making his performance appear comparatively bad during her second assessment.³⁷

99. Ms. Andersen was not sure about the document (application, annex 9) on which the Applicant based the above assertion but explained that only final documents uploaded in the PDM should be guiding this judicial review process.³⁸ According to her, the format of the document indicates that it is not the final document. As the Applicant admits, he has never raised concerns on the basis of the

³⁵ *Ibid.*, at page 66, lines 5-9.

³⁶ Ms. Andersen's hearing transcript of 21 June 2022, page 34, lines 14-22; page 35, lines 3-4, 8-12 and page 36, lines 12-14.

³⁷ Application, annex 9.

³⁸ Ms. Andersen's hearing transcript of 26 August 2022, page 6, lines 6, 9, 13 and 16, page 12, lines 16-17, page 18, lines 22-24.

document. The system works in such a way that documents are revised until the final document comes into existence.³⁹ Her position is that she does not recall the document and what could have motivated her to change the rating, but in the PMD process what matters is the final document.⁴⁰

100. Throughout her testimony, Ms. Andersen appeared to be a truthful witness. Her explanation that the document (application, annex 9) which reflects a different assessment from the second assessment could have come about during the evolving evaluation process is plausible. The assertion that the Applicant was assessed twice, and his rating was changed for worse does not make sense since there is no credible reason that could be the case. The Tribunal therefore rejects the Applicant's claim as speculative.

101. The Applicant admits that this is not the first time he was given a partially satisfactory rating. In 2013, his supervisor gave him a poor rating,⁴¹ and while at UNDP Afghanistan where he was working as finance specialist, his supervisor also gave him a partially satisfactory rating.⁴²

102. These admissions contradict his claim that throughout his 14-year United Nations career, his performance has never been rated as partially satisfactory. His assertion that the impugned assessment represents a "sudden" change of performance rating is not entirely correct.

103. The Applicant's claim is that he completed many other complex time-consuming tasks none of which were assessed as part of his performance evaluation. Ms. Rubian however explained that the PMD cycle is assessed against the key results areas recorded in the system. In this case no additional tasks were recorded as part of KRA. Any additional tasks could not be considered since performance is judged against the agreed key result areas. It was the Applicant's responsibility to request

³⁹ *Ibid.*, at page 20, lines 2-9.

⁴⁰ *Ibid.*, at page 22, lines 19-22.

⁴¹ Applicant's hearing transcript, page 63, line 25.

⁴² *Ibid.*, at page 64, lines 16 and 19.

and ensure that any additional and relevant KRA was adequately recorded.

104. Since financial reports are to be done by the financial specialist, Ms. Ynessu did not see anything special or out of the scope of a finance specialist. If the Applicant did the work, he delivered on his key result areas.⁴³

105. Ms. Rubian emphasises the fact that all members of staff do activities and performance deliverables that are beyond their *stricto sensu* area of work, but if there is no conversation and agreement with the supervisor to record them as an official key result area, such tasks don't necessarily contribute to the final performance. She explained that the 2016 PMD recognised the additional tasks, and in their assessment, they recognised the value of the additional tasks, but the Applicant was assessed on agreed KRAs, the ones which were used for the final rating as is done for all staff. The additional tasks were included in the written assessment but not in the rating. They couldn't be rated because they were not KRAs.⁴⁴

106. The above explanations sufficiently rebut the Applicant's complaint, and the Tribunal accepts them, rejecting this complaint as well.

107. While the Tribunal may determine that the assessment of a performance was unfair, illegal, or irrational, provided that the Applicant sufficiently proves that the assessment of his performance was tainted by bias, retaliation, or some other form of ill motivation,⁴⁵ the Applicant has not discharged the burden of proving improper motives or bias against the Respondent.

108. The Tribunal finds that all the eight alleged acts/omissions on which the Applicant bases the complaint that his "partially satisfactory" rating was motivated by bias and ill-motive are speculative and concludes that the impugned assessment was not tainted by bias or improper motives.

⁴³ Ms. Ynessu's hearing transcript of 9 July 2022; page 48, lines 20-25 and page 49 lines 1-15.

⁴⁴ Ms. Rubian;s hearing transcript, page 49 lines 12-16, 19-25 and page 50, lines 1-21.

⁴⁵ *Azzouni* 2010-UNAT-081, para. 35; *Obdeijn* 2012-UNAT-201, para. 38.

Whether the review of the Applicant's 2016 work performance by the TMRG and the Rebuttal Panel was tainted by bias or improper motives.

109. The Applicant's complaint against the TMRG process is that it was not conducted at all, but that they considered evidence he had submitted for another process, thereby failing to afford him an opportunity to present his case.

110. He complained that the Rebuttal Panel upheld the TMRG decision without considering the materials he submitted to them.

111. The Tribunal agreed with the Applicant that the TMRG did not afford him an opportunity to present his case but found that the Rebuttal Panel reviewed all the materials he placed before them, and interviewed all witnesses they ought to have interviewed. There is therefore no evidence upon which the Tribunal can base a finding of bias and improper motive against the Rebuttal Panel.

112. The Tribunal's conclusion that the TMRG did not afford the Applicant an opportunity to present his case cannot, without more, ground a finding of bias and improper motive.

113. Bias is an element of natural justice which examines not only the mind of the decision-maker subjectively but also examines the manifestation of the process of decision-making objectively.⁴⁶

114. Recalling that the TMRG was a multi-member group, there is no evidence that they agreed to deny the Applicant an opportunity to present his case. The teams' failures could have been a result of a mistaken belief that the Applicant had filed sufficient information for review purposes, which is the narrative that came out in Mr. Mukanganise's testimony.

115. All factors considered, the Tribunal finds that the review of the Applicant's 2016 work performance was not tainted by bias or improper motives.

⁴⁶ *Hatim Sobier* 2022-UNAT-1208.

Remedies

116. The Applicant seeks an order that his performance be assessed or reviewed afresh. The Tribunal has however not made any finding of bias and improper motive. And, the impropriety in the TMRG review process was cured by the Rebuttal Panel process which has been found to have been proper albeit the few shortcomings. There is therefore no basis for assailing the impugned assessment which should remain undisturbed. The request for an order for a fresh assessment and or review of the Applicant's performance is therefore rejected.

117. The Applicant prays that exemplary action be taken so that no one can repeat this type of heinous work. There is however no basis for such action especially since the assessment was not tainted with bias and improper motive as had been found.

118. The prayer that UNDT should ensure justice and create an example so that the supervisor cannot use the PMD as a weapon to harass staff would also be without basis since no finding of wrongdoing has been made against the Applicant's supervisor.

119. The prayer that UNDP should consider this issue as harassment and abuse of authority on the part of the supervisor and suggest appropriate action would also be baseless since there is no finding of harassment and abuse of authority against the supervisor.

Conclusion

120. The application fails and is dismissed in its entirety.

(Signed)

Judge Margaret Tibulya

Dated this 25th day July 2023

Entered in the Register on this 25th day July 2023

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi