



Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

LE BAILLY DE LA FALAISE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Nicole Wynn, AS/ALD/OHR, UN Secretariat

Maureen Munyolo, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a Senior Programme Management Officer at the P-5 level with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”), based in Goma, is contesting the undue delay of his Electronic Performance Appraisal System (“e-PAS”) evaluation for 2020-2021, and the negative comments made therein when it was finalized in March 2022, as they contradicted the overall satisfactory rate.

Factual and procedural background

2. Since 20 March 2013, the Applicant has served as a Senior Programme Management Officer at the P-5 level in Goma.¹

3. In June 2019, the Deputy Special Representative of the Secretary-General (“DSRSG”) joined MONUSCO.²

4. During the performance cycle 2020-2021 beginning on 1 April 2020³, the DSRSG was the Applicant’s First Reporting Officer (“FRO”). The Applicant was also the team leader of the Stabilization Support Unit (“SSU”).⁴

5. The performance cycle ended on 31 March 2021.⁵

6. The Applicant’s FRO reviewed the Applicant’s work plan for the 2020-2021 performance cycle and wrote to the Applicant on 21 May 2021, informing him to revise his work plan to focus “on contribution to the achievement of the corporate work output” rather than the Applicant’s personal achievements.⁶

¹ Reply, annex R/1.

² Application, section VII, page 4, para 1. Reply, page 3, para. 7.

³ Reply, page 3, para 7.

⁴ *Ibid.*

⁵ *Ibid.*, para. 8.

⁶ Application, section VII, page 4, para.5. See Application, annex 7. Reply, annexe R/2.

7. On 23 May 2021, the Applicant replied to his FRO⁷ and requested clarification on the suggested changes.⁸

8. By Interoffice Memorandum (“IOM”) dated 15 July 2021, the Applicant wrote to his FRO indicating that he was “obliged to report a number of inaccuracies and place on the record [his] lack of concern for duty of care towards [his] staff, not enabling a positive work environment, and finally [his] noncompliance with ST/AI/2010/5, especially Section 2.2”⁹.

9. By email dated 6 August 2021, the DSRSG wrote to the Applicant informing him that: “[i]n connection with [his] e-PAS, [they] will work together to resolve anomalies in [his] performance appraisals which go back a number of years.”¹⁰

10. By email dated 18 August 2021, the DSRSG wrote to the Applicant requesting his presence in Kinshasa for a face-to-face meeting instead of having a mediation with the support of the Ombudsman services.¹¹

11. On 9 November 2021, the Applicant wrote to the Management Evaluation Unit (“MEU”) and complained about the lack of ePASes for the last two performance cycles.¹² The same day, on 9 November 2021, the FRO wrote to the Applicant for a meeting to discuss his workplan as the Applicant had submitted his 2020-2021 workplan after the deadline and given the confusion, whether the Special Representative of the Secretary-General (“SRSG”) would act as his Second Reporting Officer (“SRO”).¹³

12. On 11 November 2021, the Applicant and his FRO met to talk about the Applicant’s 2020-2021 work plan and end of cycle evaluation.¹⁴ The same day, on 11

⁷ Application, section VII, page 4, para. 5.

⁸ *Ibid.*, annex 7 - DSRSG email MEU Nov. 2021.

⁹ *Ibid.*, annex 1 - IOM 15 July IOM to DSRSG RC HC.

¹⁰ *Ibid.*, annex 3 - 6 August 2021 email DSRSG epas Anomalies.

¹¹ *Ibid.*, annex 4 b - 18 August 2021 unpleasant emails.

¹² *Ibid.*, annex 5 a MEU 11 November 2021.

¹³ *Ibid.*, annex 6- 10 November 2021 DSRSG email.

¹⁴ *Ibid.*, section VII, page 5, para.13.

November 2021, the Applicant informed the MEU that he wished to withdraw his request for a management evaluation, as the matter had been resolved after discussions.¹⁵

13. On 19 November 2021, the Applicant's FRO finalized his ePAS cycle for 2019-2020.¹⁶

14. The Applicant claims that on 20 February 2022, his ePAS cycle for 2020-2021 was still not completed as agreed during their meeting on 11 November 2021.¹⁷

15. On 20 February 2022, the Applicant requested for a management evaluation of the lack of ePASes for the 2019-2020 and 2020-2021 cycles.¹⁸

16. On 24 February 2022, his FRO informed the Applicant that his evaluation was pending in Inspira because the Applicant had not selected an SRO.¹⁹

17. On 4 March 2022, the Applicant wrote to the MEU, reminding them of his previous requests, and requesting for the revision of his 2020-2021 ePAS by a neutral third party.²⁰

18. On 14 March 2022, the FRO informed the Applicant that he would request the Human Resources' ("HR") approval to act as his FRO and SRO since the SRSG did not supervise the Applicant and could not therefore be his SRO.²¹

19. On 16 March 2022, the Applicant was informed that his ePAS was completed in Inspira and that he had 14 days to introduce his comments in the "Acknowledge Review" section.²²

¹⁵ *Ibid.*, annex 5(a) - MEU letter dated 11 November 2021.

¹⁶ *Ibid.*, annex 9 - EP_EVAL 2019-2020.

¹⁷ *Ibid.*, section VII, page 5, para. 17.

¹⁸ *Ibid.*, annex 10, MEU letter dated 22 FEB 2022.

¹⁹ Reply, page 4, para. 12; Reply, annex R/4.

²⁰ Application, annex 11, mail to MEU 4 March 2022.

²¹ Reply, page 4, para 14. Reply, annex R/4.

²² Application, section VII, page 5, para.20.

20. On 24 March 2022, the Applicant wrote to the MEU to share his comments before including them in his 2020-2021 ePAS cycle.²³

21. On 28 July 2022, the Applicant filed the application mentioned in para. 1, contesting decisions which he describes as follows:

I am filing the following complaint to the UNDT in reference to the undue delay and therefore absence of my e-Pas cycles 2020-2021, violation of rules and regulations outlined in ST/AI/2010/5 by my supervisor, Mr. David Mclachlan-Karr. In addition, I also contest the negative comments made in my 2020-2021 Epas when it was finalized in March 2022, as they contradict the overall satisfactory rate.

22. On 29 August 2022, the Respondent filed his reply contesting the receivability of the application.

23. By Order No. 102 (NBI/2023) dated 9 June 2023, the Tribunal directed the parties to file closing submission on or before Friday, 30 June 2023.

24. Both parties complied with the directions in Order No. 102 (NBI/2023) on 30 June 2023.

The Applicant's submissions

25. The Applicant claims that his ePAS cycles 2019-2020 and 2020-2021 have been completed outside the regular timeline, in violation of his FRO's managerial obligations under ST/AI/2010/5 (Performance management and development system). As of 1 February 2022, the responsibilities outlined under section 5.1 from (a) to (f) have not been fulfilled.

26. The Applicant's FRO made his final comments without discussing with him his workplan and end-of-cycle evaluation. A midpoint performance review is essential in the ePAS mechanism and should have been created six months after the creation of the workplan.

²³ *Ibid.*, annex 12 - email to MEU dated 24 March 2022.

27. No workplan was established two years after his FRO took his post.

28. The Applicant's FRO was "still [...] waiting for the results of the management review [OIOS Auditors] of SSU which must also be weighed in the assessment of [the] performance." For this reason, the Applicant's ePas was "blocked since November 2020."

29. The Applicant claims that his FRO added questions to assess his performance that come about one year after the due time for the 2019-2020 ePAS cycle and two years after the due time for the 2020-2021 ePas cycle. According to the Applicant, questions as "how long have you been in your current post as P5"; "how long you have been associated with MONUC/MONUSCO" demonstrated his lack of knowledge and understanding of the Applicant's role.

30. The Applicant seeks a reversal of the 2020-2021 e-PAS cycles, and requests that a third and neutral party complete this performance evaluation cycle.

31. The Applicant further requests recognition of the loss of opportunities, including for his past and future D-1 level applications and compensation for moral and material damages.

The Respondent's submissions

32. The Respondent claims that the FRO's comments are not reviewable administrative decision within the meaning of art. 2.1(a) of the UNDT Statute. Furthermore, the Applicant was granted a performance appraisal in his favor, with the overall rating of "successfully meets expectations."

33. The Applicant waited for two months after the end of the 2020-2021 performance cycle to send his work plan to his FRO and refused to revise it in May 2021 as directed by his FRO. The FRO discussed with the Applicant his workplan by two emails dated 21 and 23 May 2021, to which the Applicant never replied.

34. There is no evidence that the Applicant's 2020-2021 performance appraisal constitutes an abuse of authority, and that the Applicant is entitled to any remedy. Furthermore, the Applicant has produced no evidence to rebut the FRO's comments.

Consideration

35. The Tribunal preliminarily notes that on 16 March 2022, the Applicant received his finalized 2020-2021 performance evaluation with the overall rating of "successfully meets expectations". The Applicant challenges the FRO's comments in his appraisal.

36. The Tribunal is aware that, in general, these are not reviewable administrative decisions within the meaning of art. 2.1(a) of the UNDT Statute, which provides that the Dispute Tribunal is competent to hear and pass judgment where a staff member appeals a decision that is alleged to be in non-compliance with the terms of appointment or contract of employment.

37. Pursuant to section 15.7 of ST/AI/2010/5, the Applicant may only challenge an administrative decision that stems from a final performance appraisal and that affects his conditions of service. Instead, a staff member may not challenge the intermediate or preparatory steps of an administrative decision, as only the "final decision," which carries direct legal consequences for the staff member's legal rights and obligations is receivable before the Dispute Tribunal.

38. In *Beaudry* 2010-UNAT-085, the United Nations Appeals Tribunal ("UNAT") vacated UNDT's Judgment and allowed the Secretary-General's appeal, holding that the rebuttal of the performance evaluation requested by the staff member was not permissible under the applicable Administrative Instruction, as she did not seek to challenge her overall performance rating.

39. In particular, UNAT stressed at para. 27 that:

The UNDT ordered the Administration to consider if there should be an exception granted to allow Beaudry to submit a rebuttal of her e-PAS record for 2007-2008 after the applicable time limit. Beaudry did

not seek to challenge her performance rating of “fully successful performance”; instead, she sought to challenge the critical comments made by her second reporting officer and the evaluation of some of the core values and competencies in her e-PAS record. Under Section 15 of the Administrative Instruction on the performance appraisal system (ST/AI/2002/3), a staff member can only challenge his or her performance rating. A staff member is not entitled to challenge the core values, core competencies, managerial competencies or comments which support that rating without challenging the rating itself. Beaudry’s proposed rebuttal of her e-PAS record for 2007-2008 is not permissible under the Administrative Instruction and, accordingly, there is no basis for the orders of the UNDT with respect to her request for a waiver of the time limit to allow her to submit a rebuttal of her e-PAS record.

40. In *Ngokeng* 2014-UNAT-460, UNAT allowed the Secretary-General’s appeal that had stressed that:

challenges of actions taken in a process, which do not constitute the final decision taken by the Administration, are not receivable as ‘premature’. A negative observation, in an otherwise satisfactory performance appraisal, merely constitutes an action taken in a performance management and development process, not a final administrative decision. Mr. Ngokeng has not established any adverse administrative decision resulting from his performance appraisal.

41. In *Staedtler* Judgment No. 2015-UNAT-546, UNAT endorsed the same conclusion:

In the present matter, there was no evidence of any adverse administrative decision that stemmed from the Appellant’s performance appraisal. As in *Ngokeng*, the SRO’s comment did not detract from the overall satisfactory performance appraisal, which indeed he confirmed, and had no direct legal consequences for the Appellant’s terms of appointment. As such, the SRO’s comment ... does not of itself constitute an independent administrative decision able to be challenged through appeal.

42. Having so said in general, the Tribunal is aware that in some cases comments in the e-PAS can be autonomously relevant owing to their specific content, which contrasts with the rate of the performance assessment and undermines the latter, so having an impact in the conditions of service of the staff member in question.

43. Pursuant to section 15.7 of ST/AI/2010/5, indeed,

[t]he 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.

44. In such cases, where comments essentially prevail on the performance assessment, they could be challenged as such by the staff member, who has the interest to have those comments removed.

45. In such an evaluation of the relevance of comments, the Tribunal is guided by *Simon Handy*, 2020-UNAT-1044/Corr.1, a case where, while Mr. Handy received in his e-PAS for the performance period an overall end-of-cycle rating of “successfully meets performance expectations”, this rating was accompanied by comments of the FROs and the SRO set forth therein, which in their majority were profoundly negative (approximately 56 lines of disparaging comments versus nine lines of positive remarks).

46. In that case, at para. 45, the UNAT stressed that there is no prohibition for the Administration from critically and fairly evaluating staff members, and

making comments in an ePAS about the need for a staff member to improve performance in certain core values and competencies is an important tool for the managers to carry out their functions in the interest of the Organization and, hence, their willingness to do so need to be supported and boosted.

47. Thus, a supervisor may include comments regarding shortcomings.

48. However, according to the same judgment, such comments must be consistent with the overall rating. This implies an assessment of the extent to which FROs and SROs are permitted to provide negative, factual comments on, or constructive criticism of, a staff member’s performance, even if the overall appraisal is favourable, determining, on a case-by-case basis, which comments are permissible and which comments are *per se* unlawful.

49. The same judgment, at paras. 33-34, indeed, stated as follows:

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.

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.

50. In other terms, comments must be consistent with the conclusions of the performance evaluation; therefore, while comments on shortcomings are in general allowed, they cannot have a negative content to the extent that they absorb (and substantially annul) the positive rating, having so an impact on the conditions of service of the staff member.

51. In the same case, UNAT, at paras. 42-43, assessed that:

In essence, these unfavorable disparaging narrative comments in the 2016-2017 ePAS, which are final and unappealable under Sections 15.1 and 15.7 of ST/AI/2010/5, negated Mr. Handy’s positive overall performance appraisal and effectively turned it into an unfavorable one, since they directly have had an adverse impact on his moral and ethical stature and professionalism and might be taken into consideration by the Administration at any time as a basis for his performance rating in the course of his career development, without Mr. Handy being able,

due to the individual character of the 2016-2017 ePAS, to incidentally challenge their validity in the context of an application for rescission of a pertinent adverse administrative decision. The harmful effect of the 2016-2017 ePAS negative comments, which detract from the overall satisfactory rating, on Mr. Handy's employment status is not purely hypothetical, as the Secretary-General erroneously contends, but direct and tangible.

Consequently, as such, the FROs' and the SRO's narrative comments reflected more than a legitimate exercise of administrative hierarchy evaluating employees and constituted of themselves along with the 2016-2017 ePAS a final administrative decision able to be challenged through appeal, as the UNDT correctly found.

52. In *Ngokeng*, already above mentioned, UNAT applied the same principles, but got to an opposite conclusion in assessing the specific case, stressing, at para. 31, that:

In the instant case, there was no evidence of any adverse administrative decision stemming from Mr. Ngokeng's performance appraisal. The FRO's comment on Mr. Ngokeng's output – a comment made in a satisfactory appraisal - was not a final administrative decision. It did not detract from the overall satisfactory performance appraisal and had no direct legal consequences for Mr. Ngokeng's terms of appointment.

53. In *Staedtler*, at para. 40, UNAT got to the same conclusion:

As in *Ngokeng*, the SRO's comment did not detract from the overall satisfactory performance appraisal, which indeed he confirmed ... As such, the SRO's comment reflects no more than a legitimate exercise of administrative hierarchy evaluating employees.

54. Applying these principles to the case at hand, the Tribunal notes that the Applicant's finalized performance appraisal recognized his successful performance and addressed some performance shortcomings. The FRO considered that the Applicant largely met the goals and key results in the workplan and added some comments that only encouraged the staff member to reduce reliance on *gratis* personnel and to ensure better gender and geographic balance of representation within the team.

55. In the Tribunal's view, the comments in this case were expressed in a fair and equitable manner, were not harsh and they were consistent with the overall rating of "successfully meets expectations".

56. The Tribunal also notes that the Applicant had the chance to contrast his FRO's comments in the same e-PAS, with observations that counterbalanced the relevance of the FRO's comments.

57. In sum, the comments at stake did not detract anything from the overall rating and the whole picture of the staff member's performance, as resulting from the e-PAS (including the observations by the staff member), are consistent and positive. The claim on this point therefore fails.

58. As to the Applicant's second claim, concerning the delay in finalization of his 2020-2021 performance evaluation, the Tribunal notes that in general failure to comply with the formal timelines is not *per se* unlawful. To award compensation for harm, there must be evidence to support the existence of harm, illegality, and a nexus between the two.

59. In the case, the Applicant has produced no evidence that the late performance evaluation adversely affected his career progression or his chances of obtaining other employment within the Organization.

60. On the contrary, the Respondent alleged that in August 2022 the Applicant was selected for a position with the United Nations Development Programme in Kinshasa, despite the late performance evaluation.

61. The Applicant recalled that he was rostered at the D-1 level and that in the 2021-2022 Mission budget, the DSRSG functions as the United Nations Resident Coordinator and Humanitarian Coordinator for MONUSCO ("DSRSG-RC-HC") requested, and obtained, a D-1 level post in charge of the stabilization mandate. He added that he had written to the DSRSG-RC-HC twice to offer his services, with no answer and that an external candidate was subsequently appointed and given a three-month appointment.

62. The Applicant gave no evidence that it was owing to the FRO's comments and not to other considerations that the DSRSG-RC-HC chose another person.

63. As to the Applicant's allegations of abuse of authority (essentially connected with the e-PAS evaluation and therefore estimated having the same evaluation by the Tribunal), they are also not receivable because the Applicant has not exhausted the internal remedies provided under ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority).

Conclusion

64. In light of the foregoing, the application fails in its entirety.

(Signed)

Judge Francesco Buffa

Dated this 28th day of July 2023

Entered in the Register on this 28th day of July 2023

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi