



**Before:** Judge Sean Wallace

**Registry:** Nairobi

**Registrar:** Wanda L. Carter

EL-SIBAI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Robbie Leighton, OSLA

**Counsel for Respondent:**

Lucienne Pierre, AS/ALD/OHR, UN Secretariat

Fabian M. Preger, AS/ALD/OHR, UN Secretariat

## **Introduction**

1. By application filed on 21 November 2024, the Applicant, a Programme Management Officer, Office of the Executive Secretary (“OES”), United Nations Economic and Social Commission for Western Asia, based in Beirut, filed an application challenging what she describes as “comments on 2023-24 ePAS which detract from the overall rating”.
2. By the same application, the Applicant also seemed to challenge two other decisions, namely:
  - a. The closure of her complaint against her Second Reporting Officer (“SRO”) without pursuing a disciplinary process.
  - b. The decision of the Local Property Survey Board (“LPSB”) which found her to have been grossly negligent when her office laptop was stolen from her parked vehicle.
3. However, in her submission filed on 7 February 2025 in response to Order No. 8 (NBI/2025), the Applicant indicated that the only administrative decision she seeks to contest in this application is the decision to introduce comments on her 2023-2024 ePAS which detract from the overall rating.
4. The Applicant further stated that the decision to close her complaint of harassment and abuse of authority without action was contested by management evaluation on 22 July 2024 and separately to the United Nations Dispute Tribunal (“UNDT”) on 17 January 2025. Thus, the legality of this decision is not at issue in this UNDT Application. The Applicant references the closure in this case only to provide relevant context for the decision by the Applicant’s SRO to introduce these comments into the ePAS.
5. Similarly, the Applicant indicated that she is not seeking to contest the outcome of the LPSB regarding the theft of her laptop. She averred that she had determined that she would live with that decision despite disagreeing with it.

6. Therefore, this judgment will focus on the administrative decision which the Applicant terms as “the decision to introduce comments on her 2023-2024 ePAS which detract from the overall rating”.

### **Factual background**

7. The 2023-2024 performance cycle began on 1 April 2023 and ended on 31 March 2024. During the performance cycle, the Executive Secretary, ESCWA, was the Applicant’s SRO and Head of the OES. The Special Assistant to the Executive Secretary was the Applicant’s First Reporting Officer (“FRO”).

8. On 25 September 2023, the Applicant filed a complaint against her SRO with the United Nations Office of Internal Oversight Services (“OIOS”).

9. On 30 November 2023, the Assistant Secretary-General for Human Resources (“ASG/HR”) requested the Applicant to submit further details on the alleged prohibited conduct.

10. On 22 January 2024, the Applicant provided more information where she expanded the complaint to include her FRO.

11. On 29 January 2024 and 5 February 2024, while copying the Ethics Office, the Applicant provided further information, as requested by ASG/HR.

12. On the same day, the Ethics Office wrote to Applicant, seeking clarification as to whether she was seeking protection from retaliation.

13. On 21 March 2024, the Applicant had a meeting with the Ethics Office.

14. By way of an email dated 25 March 2024, the Ethics Office advised the Applicant, that after its assessment, the acts she reported would be described as “continued harassment or abuse of authority”, but not “retaliation”, therefore, the Applicant would not be provided protection.

15. On 24 May 2024, the ASG/HR, informed the Applicant that, upon a preliminary assessment of her complaint, it had been decided not to pursue a disciplinary process against her SRO, but to take managerial action, and that the

situation would be monitored by the designated Conduct and Discipline (“C&D”) Focal Point.

16. Two days later, on 26 May 2024, the Applicant was advised of her 2023-2024 ePAS performance evaluation, which included comments from both her FRO and SRO. According to the record, the ePAS had been awaiting the Executive Secretary’s approval as SRO for 54 days.

17. For the 2023-2024 performance cycle, the Applicant received Final Rating of B “Successfully meets expectations”. The FRO Comments were consistent with this rating and simply said “In the end-of-cycle assessment for Ms. El Sibaii, she achieved her goals under my supervision. With her years of experience, she brings an expertise to the work.”

18. The SRO Comments were much lengthier:

Zainab has consistently performed her tasks and duties effectively, showcasing commendable ambition and dedication in her role. However, her frequent disagreements and contestations with her first reporting officer (FRO) have become a significant source of distraction for office performance. This issue has escalated to the point where intervention from the director of Resource of Management and Service Delivery (RMSD) was required to resolve matters.

It’s essential for Zainab to recognize that while her work and duty accomplishments are noteworthy, maintaining appropriate work relations and communication with her FRO and other staff members is equally important, especially within the OES. Her ambition and proactive nature should be channeled towards constructive dialogue, active listening, and fostering a collaborative work environment.

Additionally, Zainah needs to understand that using the power of the OES to intimidate staff is unacceptable. While ambition and high expectations are valued, they must be balanced with professionalism and respect for colleagues.

Moving forward, Zainab should prioritize improving her relationship with her FRO and other staff members, ensuring that her ambition and dedication contribute positively to the overall productivity and harmony within the office.

19. On 28 May 2024, the Applicant wrote to the Office of Human Resources (“OHR”), copying the designated C&D Focal Point, requesting an immediate intervention, as the SRO’s comments in the performance document, in her view were “retaliatory” and “unfair and false accusations intending to tarnish [her] reputation and harm [her] at both personal and professional levels”.

20. On 30 May 2024, the Applicant had a meeting with the Focal Point. By email on the same day, the Focal Point advised the Applicant that her responsibilities were limited to monitoring the situation, and that the Applicant should report to the Ethics Office should she believe that a retaliation occurred.

21. On 3 June 2024, Applicant sought protection from retaliation before the Ethics Office in relation to the SRO’s comments of her performance document.

22. On 24 July 2024, Applicant requested management evaluation of the comments in her 2023-24 ePAS.

23. On 23 August 2024, the Management Advice and Evaluation Section issued its decision finding the request not receivable.

### **Procedural background**

24. On 21 November 2024, the Applicant filed the present application.

25. The Respondent filed a reply on 26 December 2024, where it argued that the contested decision, in relation to the comments on 2023-24 ePAS is not receivable and, even if it were receivable the application has no merit..

26. By Order No. 8 (NBI/2025), the Applicant was directed to file a rejoinder by 7 February 2025, and *inter alia*, clarify the exact contested decision(s) she is contesting and address the Respondent’s arguments in the reply.

27. The Applicant complied with Order No. 8 (NBI/2025) and filed the requested submissions as directed.

28. Having read all the submission on record in this case, the Tribunal considers itself to be sufficiently informed to be able to determine the case.

## Consideration

### *Receivability*

#### *Respondent's submissions*

29. The Respondent contends that the application is not receivable because the Applicant has failed to identify a final administrative decision that did not comply with the terms of her appointment or contract of employment, as required under art. 2.1(a) of the Statute of the United Nations Dispute Tribunal.

30. The Applicant's final performance rating of "Successfully Meets Expectations" was in favour of, not adverse to, the Applicant. The contested comments do not detract from the rating. As in *Staedtler* (2015-UNAT-546, para. 40), the comments reflect "a legitimate exercise of administrative hierarchy evaluating employees".

31. Relying on the jurisprudence of the Tribunal (*Handy* 2020-UNAT-1044, paras. 32-33; *Staedtler* 2015-UNAT-546; and *Ngokeng* 2014-UNAT-460), the Respondent submits that comments that do not detract from a satisfactory performance appraisal carry no direct legal consequences and are not receivable.

#### *Applicant's submissions*

32. The Applicant's position is that the application is receivable. She asserts that the test for whether the SRO's comments represent an administrative decision lies in whether they detract from the overall performance evaluation, whether they cause adverse career consequences and deprive the staff member of the option of rebuttal.

33. The Applicant invites the Tribunal to follow the United Nations Appeals Tribunal ("UNAT")'s reasoning in *Haydar* (2024-UNAT-1434, para. 46), where it was held that:

Our determination of whether an action is an "administrative decision" does not turn on the label applied by the Organization. Rather, the analysis turns on whether an action has "the capacity to produce direct legal consequences". Accordingly, this Tribunal must examine the underlying circumstances and context of the challenged

action. With particular regard to a facially positive performance evaluation, we look to the “actual character” of the evaluation, including whether the reasoning or narrative comments so detract from the overall favorable conclusion that they can be said to have a direct adverse impact on the terms and conditions of the staff member’s employment.

34. The Applicant submits that like in *Haydar*, the comments created a highly negative employment record for her and thus have a direct adverse impact on her terms and conditions of employment.

35. The Tribunal agrees with the Applicant that *Haydar* is applicable in this case. Unlike the FRO’s comments which are entirely consistent with the ePAS rating of “Successfully Meets Expectations”, the comments of the SRO seriously undercut and detract from the overall appraisal rating.

36. After the initial sentence recognizing that the Applicant “consistently performed her tasks and duties effectively” and commending her “ambition and dedication in her role, the SRO added seven sentences which are completely negative about the Applicant. Even the positive traits initially mentioned are turned against the Applicant. Thus, the SRO claims that her “commendable ambition and dedication” are mischanneled and apparently distract from a collaborative work environment. Similarly, the SRO comments state that the Applicant’s work and duty accomplishments are counterbalanced by inappropriate work relations, including using her role “to intimidate staff”.

37. The Appeals Tribunal’s language in *Haydar* is apt here: “The paucity of positive comments, compared with the pointed and overwhelmingly negative comments in the performance appraisal render this evaluation an “administrative decision” with, in this context, a direct adverse impact on Ms. Haydar’s employment. The application was receivable as a matter of law. “...*Id.*, para. 48.

38. Here too, the SRO comments reflect a dearth of positive statements, compared to overwhelmingly negative comments. Thus, this will have a direct adverse impact on the Applicant’s employment making the appraisal a reviewable administrative decision and the application receivable.

*Merits*

39. On the merits of the case, the *Haydar* case is also instructive as to the next step that the Dispute Tribunal should take in a case such as this:

Whether by design or not, the combination of the overwhelmingly negative comments regarding Ms. Haydar with the final assessment of “successfully meets performance expectations” produced a highly negative employment record which could never be challenged or reviewed through channels outside the internal justice system. This is not to say, and we do not rule, that the substance of the performance evaluation regarding Ms. Haydar was incorrect. Rather, we hold that **this substantively negative performance evaluation cannot be allowed to stand where it is coupled with a final conclusion which operates to deprive the staff member of any opportunity to contest the evaluation through normal channels.** *Id.* paras. 51-52. (emphasis added)

40. The Appeals Tribunal then continued with language that could have been written for the facts in this case:

In light of the nature of the violation, we rescind the performance appraisal of 29 November 2021 in order to provide management an opportunity to revise that evaluation in a manner consistent with the rulings of the UNDT and this Tribunal. Such revision may address the ultimate conclusion as to Ms. Haydar’s performance during the relevant period, or underlying comments regarding that conclusion, or both. In any event, the individuals preparing such a revision are reminded that the ultimate conclusion they reach in their assessment must be supported by the comments and not fundamentally undermined by them .... Upon completion of this revision, Ms. Haydar will have all applicable rights for review, based on the nature of the revised evaluation. *Id.* at para. 55.

41. This Tribunal will diligently follow the guidelines set forth by the Appeals Tribunal in *Haydar*. Thus, the Applicant’s 2023-2024 performance appraisal as set forth in her ePAS is rescinded in order to provide management an opportunity to revise it in an appropriate manner.



42. In that regard, management is reminded of the following:

- a. The comments must be consistent with the final overall assessment;
- b. The comments must be supported by facts and relate only to matters arising during the evaluation period;
- c. The comments must be a genuine exercise of disinterested managerial assessment and not ill-motivated, biased, or designed to penalize the Applicant for filing a complaint against either reporting officer;
- d. The role of the SRO in making comments on the ePAS must be consistent with the parameters set forth in ST/AI/2021/4 (Performance Management and Development System), in particular sec. 5.4.

43. The Applicant's requested remedy includes that "a new ePAS be created reflecting the FRO's assessment and indicating the SRO concurs with such." The Dispute Tribunal's authority is limited by its statute which provides that the "Tribunal may only order one or both of the following: (a) Rescission of the contested administrative decision or specific performance ...; (b) Compensation for harm..." UNDT Statute, Article 10.5. Dictating what the ePAS should say is beyond that authority, so the Applicant's requested remedy is rejected.

44. Similarly, the parties both address at great length the details of the various comments, the factual context in which they were made, and whether the comments were valid or appropriate. Again, that analysis is beyond the purview of the judicial review in this case.

## **Conclusion**

45. In view of the reasons set forth above, the Tribunal:

- a. Determines that the performance evaluation in Applicant's ePAS for the 2023-2024 evaluation cycle is receivable.
- b. Determines that the performance evaluation in Applicant's ePAS for the 2023-2024 evaluation cycle was unlawful; and

c. Rescinds that performance evaluation in order to provide management an opportunity to revise that evaluation in a manner consistent with this judgment.

*(Signed)*

Judge Sean Wallace

Dated this 17<sup>th</sup> day of July 2025

Entered in the Register on this 17<sup>th</sup> day of July 2025

*(Signed)*

Wanda L. Carter, Registrar, Nairobi