



Before: Duty Judge Margaret Tibulya

Registry: Geneva

Registrar: René M. Vargas M.

RYAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER
ON MOTION TO HAVE
RECEIVABILITY DETERMINED
AS A PRELIMINARY MATTER**

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Halil Göksan, AS/ALD/OHR, UN Secretariat

Introduction

1. On 26 April 2022, the Applicant filed a rebuttal against his 2021-2022 performance evaluation, its overall rating of “partially meets performance expectations” and numerous allegedly false and defamatory comments, pursuant to sec. 15 of ST/AI/2021/4 (Performance Management and Development System).
2. On 28 December 2022, the rebuttal panel issued its report recommending the Applicant’s overall rating should be changed from “partially meets performance expectations” to “meets performance expectations” (new rating). The rebuttal panel further added that: “While outside of its purview, the panel would also like to recommend that the comments should be commensurate with this new rating to ensure consistency between the comments and the overall rating”.
3. By email dated 12 January 2023, a Human Resources Officer with the United Nations Development Coordination Office (“UNDCO”), informed the Applicant that, pursuant to sec. 15.4 of ST/AI/2021/4, the panel is only mandated to designate a new overall rating on the performance evaluation, and neither the rebuttal panel nor Human Resources (“HR”) have the delegation of authority to enforce a change in the comments. As a result, the comments on the Applicant’s 2021-2022 performance evaluation were maintained. This is the “contested decision”.
4. On 25 January 2023, the Applicant requested management evaluation of the contested decision.
5. On 8 March 2023, the Management Evaluation Unit (“MEU”) decided that the Applicant’s request for management evaluation was not receivable under staff rule 11.2(a).
6. On 5 May 2023, the Applicant filed the instant application.
7. On 15 May 2023, the application was served on the Respondent who, on 19 May 2023, filed a motion to have receivability determined as a preliminary matter.

Consideration

Motion to have receivability determined as a preliminary matter

8. In support of his motion, the Respondent claims, *inter alia*, that the contested decision is not a reviewable administrative decision under art. 2.1(a) of the Tribunal's Statute. The Respondent considers that, since the Applicant's final performance appraisal is in favour of him and the negative comments in it have been vacated by the rebuttal panel, the contested decision carries no direct and adverse impact on the Applicant's terms of employment.

9. Furthermore, the Respondent argues that there is no right under the applicable legal framework to have the negative comments removed from the Applicant's performance evaluation, and the recommendation by the rebuttal panel to do so is not binding on the Organization.

10. In his application, the Applicant briefly discussed this issue, arguing that, in accordance with UNAT and UNDT jurisprudence (*Handy* 2020-UNAT-1044, para. 35, *Haydar* UNDT/2023/022, para. 43), if the comments in a satisfactory performance do, in fact, detract from the overall rating, they constitute an appealable decision.

11. The Respondent argues that the context in *Handy* and *Haydar* are different from that in the Applicant's case because the Applicant had the opportunity to rebut his performance evaluation, and was successful in it, whereas in *Handy* and *Haydar* the rebuttal path was never an option.

12. The Tribunal recalls that art. 19 of its Rules of Procedure provides that it can "issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties". In this connection, the Tribunal notes that:

[A]lthough no right to partially respond is granted by the Statute or the Rules of Procedure of the Dispute Tribunal, the Tribunal may decide in certain cases to permit the Respondent to file a reply addressing only the issue of receivability, provided that the Tribunal is satisfied that it would be appropriate for the fair and expeditious disposal of the case and to do justice to the parties (Di Giacomo Order No. 335 (NY/2010), Balakrishnan Order No. 97 (GVA/2011), and Mafessanti Order No. 169 (GVA/2015)).

13. Having reviewed the parties' submissions, the Tribunal is of the view that the answer to the crucial question of whether the application is receivable *ratione materiae* is not a straightforward one in the present case as the debate regarding applicable jurisprudence demonstrates.

14. Motions for leave to have receivability considered as a preliminary matter should be granted only when the receivability of an application is a clear-cut issue (*Dragnea* Order No. 61 (NY/2022), *Balakrishnan* Order No. 97 (GVA/2011)), which is not the case here.

15. The above notwithstanding, the present Order is without prejudice to the Tribunal's later determination on the issue of receivability.

16. Pursuant to art. 10 of the Tribunal's Rules of Procedure, the Respondent has 30 calendar days from the date of receipt of the application to submit his reply. Thus, the Respondent's reply should have been filed by 14 June 2023. However, since the Respondent filed the motion to have receivability determined as a preliminary matter on 19 May 2023, i.e., four calendar days into the deadline to file his reply, the Respondent shall file his reply on the merits within 26 calendar days counted as of the date of issuance of this Order.

Filing of a rejoinder

17. The Tribunal considers it appropriate and in the interest of justice to direct the Applicant to file a rejoinder responding, particularly, to the issues of receivability and law after receipt of the Respondent's reply.

Amicable settlement

18. Having regard to the specific circumstances of the present case and noting that the General Assembly has consistently encouraged alternative dispute resolution, the Tribunal finds it appropriate to encourage the parties to explore the possibility of having the dispute between them resolved without recourse to further litigation.

Conclusion

19. In view of the foregoing, it is ORDERED THAT:

- a. The Respondent shall file his reply fully addressing the merits of the application by **Monday, 26 June 2023**;
- b. By **Wednesday, 26 July 2023**, the Applicant shall file a rejoinder; and
- c. The parties shall explore resolving the dispute amicably and revert to the Tribunal in this respect by **Monday, 31 July 2023**.

(Signed)

Judge Margaret Tibulya (Duty Judge)

Dated this 31st day of May 2023

Entered in the Register on this 31st day of May 2023

(Signed)

René M. Vargas M., Registrar, Geneva