



Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

KELAPILE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for the Applicant:
Daniel Trup, OSLA

Counsel for the Respondent:
Sandra Baffoe-Bonnie, OES/ECA

Notice: This Order has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. On 15 July 2015, the Applicant, a D1 Chief of Staff in the Office of the Executive Secretary (ES) of in the United Nations Economic Commission for Africa (UNECA), filed an Application with the Dispute Tribunal seeking suspension of the implementation of the decision to transfer him from his current post to the African Peer Review Mechanism (APRM) on the basis of alleged performance shortcomings following the cancellation of his Performance appraisal (“e-PAS”) evaluation for 2014/2015.

2. The Application was served on the Respondent who filed his Reply on 17 July 2015.

Background and facts

3. The Applicant has served as the Chief of Staff at the D1 level for UNECA since 1 August 2014.

4. The Applicant designated Mr. Carlos Lopes, ES/UNECA, as his First Reporting Officer (FRO) and Second Reporting Officer (SRO) despite his reservations concerning Mr. Lopes’ dual role.

5. Between August and September 2014, the Applicant was designated Officer-in-Charge of the Division of Administration pending the finalization of the recruitment of the Director. The new Director of Administration assumed the office on 6 April 2015.

6. According to the Respondent, in October 2014, the ES began to note performance shortcomings on the part of the Applicant.

7. On or around the end of March 2015, the Applicant was requested by his FRO/SRO to initiate the work plan covering the reporting period 2014/2015.

8. By the end of April 2015, the Applicant was assessed by his FRO/SRO for the eight month reporting period. The overall rating given to the Applicant was one of partially meeting performance.

9. On 26 April 2015, the Applicant acknowledged receipt of the e-PAS evaluation providing accompanying comments and remarks and, on 8 May 2015, the Applicant filed a rebuttal to challenge the outcome of the 2014/2015 e-PAS. The request for the establishment of Rebuttal Panel was made by the Applicant to Mr. Lopes as ES of UNECA.

10. According to the Applicant, despite his repeated requests to the Human Resources Services Section to provide ongoing updates regarding the timing of the establishment of the Rebuttal Panel, no information was forthcoming.

11. On 28 May 2015, the Applicant was notified through Inspira that his 2014/2015 evaluation had been cancelled. At the same time when reviewing his e-PAS he noticed that it had indeed changed. Whilst the work-plan and FRO's comments on his performance remained in the document, all additional commentary with regard to the Applicant's feedback on performance under the staff member acknowledgment section had been deleted. According to the Applicant, this was despite the fact that the evaluation process had been concluded and that the Applicant had already initiated a rebuttal request.

12. On 28 May 2015, the Applicant contacted the Unite Service Desk to enquire as to how his e-PAS had been cancelled. On 2 June 2015, the Unite Service Desk informed the Applicant that:

According to our records, the document has been cancelled by the FRO, Mr. CARLOS LOPES on 28-MAY-15 at 04.37.23.AM. Please contact your FRO for more information.

13. On 19 June 2015, the Applicant was asked by Deputy Executive Secretary, Mr. Abdalla Hamdok, to meet with him. At that meeting, Mr. Hamdok indicated that he had just concluded a meeting with the ES who had requested that he should convey to the Applicant several messages including the decision to 'laterally' transfer the Applicant to an APRM based in South Africa.

14. On 20 June 2015, the Applicant received an Interoffice Memorandum from Mr. Jit Gurung, Chief Human Resources Services Section. The subject of this memorandum was titled "2014/2015 Performance Cycle/Lateral Transfer".

The Interoffice Memorandum went on to state that because of the Applicant's seven months in post the:

Executive Secretary has decided to cancel the incomplete ePAS evaluation for 2014/2015 performance cycle. However, to address the performance shortcomings discussed with you by the Executive Secretary and in the spirit of section 10.1 of ST/AI/2010/5, the Executive Secretary has decided to take the necessary remedial measures by transferring you to more suitable functions... African Peer Review...effective 5 August 2015.

15. On 30 June 2015, the Applicant filed a management evaluation request challenging the decision of the Administration both with respect to the unlawful cancellation of his e-PAS and the transfer to APRM.

Parties' contentions

16. The Applicant's primary contentions may be summarized as follows:

Prima facie unlawfulness

17. The decision is prima facie unlawful:

a. The Applicant submits that the decision to transfer him was not based on alleged performance shortcomings. The manner in which his e-PAS was conducted and then cancelled highlights numerous discrepancies in the performance/evaluation process. The subsequent last minute notification of transfer to APRM merely serves to highlight and reinforce the dysfunctional way in which the Applicant is being pushed aside without due process and a fair and proper evaluation of his performance.

b. There were numerous procedural flaws in violation of the statutory framework for performance appraisal.

c. The Administration failed to undertake the necessary steps pursuant to ST/AI/2010/5 (Performance Management and Development System) prior to making a determination that the Applicant should be transferred as a result of performance shortcomings.

d. The Applicant's FRO/SRO was the same person. Such a dual function is expressly prohibited under ST/AI/2010/5. The Applicant submits that in *Gehr* UNDT/2015/019, the Tribunal concluded that the first and second reporting officers must be two different individuals and that allowing the blending of both functions in one person would defeat the underlying purpose of having two independent minds reviewing the staff member's performance and, ultimately, would render meaningless the system of checks and balances.

e. The mid-point review, despite taking place in April 2015 at the end of the 2014/2015 reporting cycle, evidences no suggestion that the Applicant was not meeting performance expectations. No formal discussions took place between the Applicant and his FRO/SRO to demonstrate that performance expectations were not being met. The mid-point review undertaken by the Applicant's FRO/SRO simply noted his comments. Effectively, if there were alleged performance shortcomings, the Applicant was robbed of the opportunity to focus on them.

f. Soon after this mid-point review, the Applicant was graded as partially meeting expectations. This being at odds with the average grade the Applicant received in the e-PAS, which suggested that he should have been awarded a grade of meeting expectations.

g. Subsequently and pursuant to section 15 of ST/AI/2010/5, the Applicant filed a request for rebuttal to the ES. The Applicant assumed that through the ES, the matter would be passed to the Director of Administration, who would then establish the Rebuttal Panel. This did not happen. Instead, the Administration took the decision on 19 June 2015 to cancel the evaluation on the basis of only eight months evaluation and thereby ignoring the Applicant's request for rebuttal. Such an action is not foreseen in ST/AI/2010/5. Indeed it should also be noted that the act of the FRO/SRO on 28 May 2015 in being able to delete portions of the Applicant's e-PAS evaluation is not even technically permitted within the electronic system that manages performance.

h. Pursuant to section 3 of ST/AI/2010/5 it is permitted that at the commencement of the Performance Cycle, the period of evaluation may be extended for a longer or shorter period, the minimum being six months and the maximum eighteen months.

i. However, having entered into an agreed work plan, mid-point review and final evaluation in April 2015 suggests that the intention of the Administration had been to provide an eight month e-PAS. The Applicant's request for rebuttal on 8 May 2015 and the subsequent cancellation of the e-PAS on 19 June 2015 can only be interpreted as the Administration changing its mind concerning the evaluation. Indeed, it should be noted that this change of mind by the Administration took place more than one month after the Applicant had submitted his rebuttal. The suggestion being that the Applicant's filing of a challenge led the Administration to pursue a different approach vis-à-vis the Applicant's employment specifically his unlawful transfer.

j. The unlawful cancelation of the e-PAS, therefore, was related directly to the subsequent decision of his transfer to APRM. The decision to transfer him to APRM was not based on any performance shortcomings or on any proven operations considerations. The Applicant submits that the decision for transfer him was not made with operational or performance considerations in mind but rather in haste to remove him from his current post and as a result should be regarded as a *de facto* demotion and therefore unlawful.

k. The Applicant submits that in the case of *Bye* UNDT/2009/083, the Tribunal reviewing issues of lateral transfer concluded that:

The level of the position proposed is not the only relevant consideration in verifying the appropriateness of the offer. In other terms, it is not sufficient that the post offered be at the same grade than that previously held by the staff member. It is equally necessary to examine whether the functions the concerned one will be called upon fulfilling correspond to the latter's skills, qualifications and professional experience.

l. The Applicant submits that there appears to have been no pre-planning or thought regarding his transfer. He was never made aware in advance that such an option existed. This lack of information suggests that no real consideration of the Applicant and his skills were taken into account in determining the need for transfer. The only consideration appears to be one relating to the necessity to remove him from his current post.

m. The Applicant further submits that the decision to undertake remedial measures was made after the unlawful cancellation of his e-PAS. This document being the sole repository within which performance is measured and remedial measures taken.

n. The Applicant submits that the approach adopted by the Administration in this regard led to adverse and misguided conclusions. If issues of performance were recognized by the Administration, then a valid e-PAS needed to exist to document the alleged deficiencies. Moreover, if the Administration were to accept the existence of the e-PAS, it would then be obligated to undertake the rebuttal procedure in order to validate the finding of alleged performance shortcomings and the remedial measure of transfer.

o. The Applicant submits that a confirmation of a finding of performance shortcomings by the rebuttal panel would have been unlikely, in the circumstances in which he averaged 'B' in his evaluation. On the other hand, if the Administration concluded that no e-PAS exists, then it would seem arbitrary to transfer the Applicant on the basis of alleged performance shortcomings, when no evaluation mandated by ST/AI/2010/5 has taken place.

p. The Applicant submits that the reasoning given by the Administration relating to alleged performance shortcomings is misleading. Rather, the Applicant contends the ultimate decision to transfer him was made for reasons not connected with performance but as a result of a workplace divergence between himself and Mr. Lopes. Such a

decision based on performance shortcomings was therefore arbitrary and consequently unlawful.

Irreparable harm

q. In *Calvani* UNDT/2009/092, the Tribunal found that damage to professional reputation and career prospects falls within the definition of irreparable harm.

r. In this case, a well-respected senior member of the United Nations being forced to transfer from his post of Chief of Staff, on the basis of allegations of performance shortcomings, will inevitably have a detrimental impact on the Applicant's career and reputation. Considering the Applicant's previous professional experience as Chairman of the Advisory Committee on Administrative and Budgetary Questions (ACABQ), such a transfer would, it is respectfully submitted, undermine his credibility and possible promotional avenues.

s. Once such a transfer takes place the damage is done. The Applicant would submit that at that stage his reputation would be undermined, at the minimum it would be reflected in his Personal History Profile that he only performed the role of Chief of Staff for less than eight months into a twenty-four month contract.

t. The Applicant submits that the position that he is to be transferred to in no way equates to his current high profile role of Chief of Staff to the UNECA. Therefore in circumstances in which the Applicant is unlawfully transferred, any future job application he may choose to make would not include substantive experience as Chief of Staff but rather relate to the mediocre post of "Senior Technical Advisor". At the same time the Applicant would be forced to disclose to future employers that the initial reasoning for his move to APRM related to performance shortcomings even if he was subsequently able to successfully challenge this decision.

18. The Respondent's primary contentions may be summarized as follows:

Prima facie unlawfulness

- a. The Respondent submits that the decision reassigning the Applicant to APRM is lawful and that in making the decision, the ES acted within the full scope of his authority on reassignment of staff members.
- b. The Applicant's reassignment to APRM is based on the ES' determination and decision that his skill and background would be most useful to APRM. The reassignment decision is based on a request from the then Chair of APRM for UNECA to provide technical assistance in support of the work of APRM and the ES' determination that it will be in the interest of the organization to do so.
- c. The Applicant has failed to demonstrate that the reassignment is *prima facie* unlawful and thus, there is no basis upon which the implementation of the decision can be suspended.

Irreparable harm

- d. The Applicant's fear of reputational harm is unfounded. The Applicant was at the Under-Secretary-General level when he was the Chair of ACABQ and gladly accepted a D1 position as Chief of Staff which is two steps below that of a USG. However, this was not detrimental to his reputation and career.
- e. The Applicant's reassignment will not result in any harm to his career prospects or reputation and the post he is being reassigned to is at the same level as his current position. He will continue to receive all his benefits and statutory entitlements as a staff member on a fixed-term contract.

Urgency

- f. By virtue of the fact that the Respondent has informed the Applicant that the implementation of the reassignment decision has been

deferred pending the outcome of the management evaluation, there is no imminent danger of an impending transfer to warrant a treatment of the matter as urgent.

g. In any case, the Respondent has on his own volition extended the effective date of the reassignment to 28 August 2015 pending the outcome of the management evaluation. This extension would allow the parties to benefit from the guidance of the management evaluation.

h. For this reason, the UNECA management has extended the effective date of the reassignment by 23 days and to the extent that the decision will only be implemented two weeks after the deadline within which a management evaluation decision is expected. The request for suspension of action is therefore moot and no longer urgent.

Considerations

Unlawfulness

19. The Tribunal will start by referring to the pronouncements of the Appeals Tribunal that dealt with reassignment of staff members to the extent that such reassignment was related to alleged performance shortcomings.

20. In *Kamunyi*¹ the Appeals Tribunal held that it is within the Administration's discretion to reassign a staff member to a different post at the same level and such a reassignment is lawful if it is reasonable in the particular circumstances of each case and if it causes no economic prejudice to the staff member. However, this discretion is not unfettered as the Appeals Tribunal held in *Abdulla*².

...managerial discretion is not unfettered and the jurisprudence of the Appeals Tribunal has reiterated on numerous occasions that a decision of the Administration may be impugned if it is found to be arbitrary or capricious, motivated by prejudice or extraneous factors or was flawed by procedural irregularity or error of law.

¹ 2012-UNAT-194, at para. 3. See also *Lauritzen* 2013-UNAT-282

² 2014-UNAT-482 at para. 60.

21. In the present case the decision to reassign the Applicant was based on his alleged performance shortcomings. Once he got a rating of “partially meets expectations”, the Applicant started the rebuttal process in compliance with section 15.1 of ST/AI/2010/5 which reads in relevant part,

Staff members who disagree with a “partially meets performance expectations” or “does not meet performance expectations” rating given at the end of the performance year may, within 14 days of signing the completed e-PAS or e-performance document, submit to their Executive Officer at Headquarters, or to the Chief of Administration/Chief of Mission Support, as applicable, a written rebuttal statement setting forth briefly the specific reasons why a higher overall rating should have been given. Staff members having received the rating of “consistently exceed performance expectations” or “successfully meets performance expectations” cannot initiate a rebuttal.

22. Once the Applicant had filed his request for the establishment of a Rebuttal Panel to Mr. Lopes as ES of UNECA, the latter had the compelling duty to follow up the process as required by section 15.3 of ST/AI/2010/5 which reads in relevant part,

After receiving a copy of the rebuttal statement, the head of department/office/mission, or his or her representative, shall, within 14 days, prepare and submit to the rebuttal panel a brief written statement in reply to the rebuttal statement submitted by the staff member...

23. Instead of complying with this mandatory requirement, Mr. Lopes decided to cancel the rating. On the assumption that Mr. Lopes took that decision because he may have concluded that there was a flaw in the process leading to the rating awarded to the Applicant and wanted to rectify the error, it would have been incumbent to take corrective measures in regard to the e-PAS. In *Cranfield*³ it was held that,

In situations where the Administration finds that it has made an unlawful decision or an illegal commitment, it is entitled to remedy that situation. The interests of justice require that the Secretary-General should retain the discretion to correct erroneous decisions, as to deny such an entitlement would be contrary to both the interests of staff members and the Administration. How the

³ 2013-UNAT-367, at para. 36. See also *Das* 2014-UNAT-421.

Secretary-General's discretion should be exercised will necessarily depend on the circumstances of any given case. When responsibility lies with the Administration for the unlawful decision, it must take upon itself the responsibility therefor and act with due expedition once alerted to the unlawful act.

24. This Mr. Lopes did not do. Instead, he decided to cancel the rating and still maintained his decision to reassign the Applicant to South Africa. To the extent that the decision to reassign was based on alleged performance shortcomings, the transfer was still premised on that reason and nothing had changed in the situation created by Mr. Lopes when he initially decided to transfer the Applicant.

25. Mr. Lopes seems to have underestimated the value and purport of an e-PAS notwithstanding the authoritative pronouncements of the Appeals Tribunal on the matter. In *Simmons*⁴ the Appeals Tribunal held,

Importance of annual e-PAS reports cannot be under-estimated. These reports are important for the staff member because they inform the staff member of how well or poorly she has performed and how her performance has been judged by her reporting officers. This gives the staff member an opportunity to improve her performance. Needless to say this also helps in the staff member's professional career development. The e-PAS reports also aid interview panels when the staff member is being considered for promotion or selection to a higher post or a fresh post. Moreover, these reports inform the management of the strength and weaknesses of the staff member and help the management to assess the staff member while deploying the staff member or assigning duties to the staff member.

The Appeals Tribunal reiterated similar views in *Tadonki*⁵.

26. The objectiveness, transparency and legality of a performance evaluation stems primarily from the procedures indicated in the applicable Administrative Instructions, which were established in a detailed manner to ensure that these objectives are reached, that the staff member acknowledges the faults or reasons for his or her under-performance, and that the managers properly guide, advise and supervise their staff, provide adequate performance improvement goals and communicate goals to be achieved.

⁴ 2012-UNAT-222, at para 16.

⁵ 2014-UNAT-400.

27. The Tribunal underlined the importance of the e-PAS requirements in *Noguiera*⁶.

From a reading of the relevant provisions relating to the PAS, it cannot be disputed that this mechanism exists in the interest of staff members, management and of the Organization. For staff members, e-PAS procedures ensure that the members of the staff are rated fairly, guided in case of shortcomings and have an opportunity of challenging a rating that they do not agree with. For Management, e-PAS procedures enable it to enhance the work of its respective departments or sections by placing on them the onus of devising a work plan and making sure that the highest standard of efficiency is achieved through guidance and dialogue. For the Organization, e-PAS procedures ensure that the aims and purposes of the Organization as set out in art. 101.3⁷ of the Charter are complied with.

28. Mr. Lopes also overlooked the importance of a rebuttal panel. In *Das*⁸ the Appeals Tribunal held that an effective rebuttal mechanism is an integral part of a performance evaluation process and that a staff member cannot be deprived of a meaningful opportunity to file a rebuttal. In *Gehr*⁹ the Appeals emphasized the fundamental importance of a rebuttal process and the duty of the Administration to ensure that the process is adhered to. This is what the Tribunal stated:

...an employee has a fundamental right to put his/her case, in response to an employer's assessment of his/her performance¹⁰.

29. The denial to the Applicant of the right to rebut his performance appraisal, in the view of this Tribunal, offended a basic tenet of justice, namely the principle of *audi alteram partem*.

30. In *Rees*¹¹, one of the issues was whether there had been compliance with the performance appraisal obligations. Shaw J. held:

While in hindsight, the Director of RRDD's meeting with the Applicant on 10 March 2008 to discuss a work plan might be

⁶ UNDT/2009/088.

⁷ The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity.

⁸ 2014-UNAT-421.

⁹ 2012-UNAT-253.

¹⁰ At para. 10.

¹¹ UNDT/2011/156.

construed as the development of an improvement plan as contemplated by the PAS, this was not conveyed to her at the time. **Further, the Applicant was not asked to provide a review of her own performance that could be discussed at the meeting. She had no formal opportunity to comment on or to seek a rebuttal of the opinions that had been reached about her performance** (Emphasis added).

31. The Appeals Tribunal UNAT approved this finding and held that,

The UNDT correctly found that Ms. Rees had been informally criticised and humiliated based on inconsistent and subjectively-held biases. She was never given an opportunity to comment on or rebut the negative opinions that her supervisors purportedly held¹².

32. It is clear that the Administration in the present case did not comply with the rules regulating the performance of a staff member as embodied in ST/AI/2010/5 and as further explained and elaborated by the Dispute and Appeals Tribunals. On the obligation to follow its own rules the Tribunal will refer to the following ruling of the International Labour Organization Administrative Tribunal (ILOAT).

The fundamental considerations which lead to the conclusions that an organization must comply with the rules which it has established also dictate the conclusion that it cannot base an adverse decision on a staff member's unsatisfactory performance if it has not complied with the rules established to evaluate that performance¹³.

33. The same approach was taken by the Appeals Tribunal in *Rees*¹⁴; *Tadonki*¹⁵; and *Hersch*¹⁶.

34. The Tribunal concludes, on a scrutiny of the facts and the applicable regulation on e-PAS and the established jurisprudence, that the decision to reassign the Applicant was unlawful in that the decision was based on an alleged performance shortcoming as this was a "re-assignment based on an element of pre-judgment about a staff member's future performance" as held in *Abdulla*¹⁷

¹² *Rees* 2012-UNAT-266.

¹³ Judgment 2414, ILOAT, 2 February 2005.

¹⁴ 2012-UNAT-65.

¹⁵ 2014-UNAT-400.

¹⁶ 2014-UNAT-433.

¹⁷ 2014-UNAT-482.

and without giving the Applicant a meaningful opportunity to rebut the rating¹⁸ and was therefore a wrong exercise of discretion. This is supported further by the decision in *In Rees*¹⁹ where the Appeals Tribunal held,

The Appeals Tribunal recalls the jurisprudence that it is imperative that the Administration adheres to the rule of law and standards of due process in its decision-making. Given that Ms. Rees' performance was the principal reason for the decision to reassign her, the Administration was required to provide a performance-related justification for its decision. This could have been properly done with the PAS, in accordance with ST/AI/2002/3²⁰.

35. The Tribunal notes that Mr. Lopes was wearing two hats when evaluating the performance of the Applicant. He was acting both as the first and second reporting officer of the Applicant. This was clearly in breach of ST/AI/2010/5. Section 5 makes provision for two reporting officers whose functions and duties are quite distinct. Section 5.1 of ST/AI/2010/5 lists out the functions and duties of first reporting officers:

A first reporting officer shall be designated for each staff member at the beginning of the performance cycle. The first reporting officer is responsible for:

- (a) Developing the workplan with the staff member;
- (b) Conducting the midpoint review and final evaluation;
- (c) Providing ongoing feedback on the overall work of the staff member throughout the performance cycle;
- (d) Advising, supporting and coaching the staff member on professional development and in the development of a personal development plan;
- (e) Developing a performance improvement plan in consultation with the staff member in the case of performance shortcomings or underperformance, if applicable;
- (f) Ensuring that all e-PAS and/or e-performance documents of staff supervised are completed in accordance with the prescribed procedures.

36. The duties and functions of second reporting officers are set out in sections 5.3 and 5.4 of ST/AI/2010/5:

¹⁸ *Das* 2014-UNAT-421.

¹⁹ 2012-UNAT-266.

²⁰ Abolished and Replaced by ST/AI/2010/5.

Section 5.3

The second reporting officer, who shall be the first reporting officer's supervisor or equivalent, is responsible for:

- (a) Ensuring that the first reporting officer understands and applies the Performance Management and Development System principles and procedures;
- (b) Holding the first reporting officer accountable for developing, together with staff, workplans with fair and consistent performance expectations and ensuring linkages between department/office priorities and individual work plans;
- (c) Holding the first reporting officer accountable for the timely appraisal of the staff member's performance;
- (d) Providing ongoing feedback and evaluating the first reporting officer's ability to manage the performance of his/her supervisees;
- (e) Resolving disagreements between the staff member and the first reporting officer in the implementation of the Performance Management and Development System;
- (f) Overseeing the establishment and implementation of a performance improvement plan in case of performance shortcomings or underperformance, as provided for in section 10 of the present instruction.

Section 5.4 of ST/AI/2010/5:

The second reporting officer also has the broader responsibility of ensuring that the Performance Management and Development System is consistently and fairly applied across work units by all first reporting officers who report to him or her. The second reporting officer shall ensure fairness and consistency throughout the cycle, especially when defining performance expectations and communicating performance standards. The second reporting officer ensures consistency between the competency and core values ratings, the comments and the overall rating of individual staff members for a given performance cycle. A staff member normally has one second reporting officer at any given time throughout the reporting cycle.

37. The Tribunal will here endorse the views expressed on the above provisions by Judge Laker in the case of *Gehr*²¹ where the learned Judge stated,

It follows from the above that, in essence, the first reporting officer is to implement, from the management side, the different procedural steps and substantive exchanges throughout the cycle, whereas the second reporting officer overviews, and if necessary

²¹ UNDT/2015/019.

rectifies or counterbalances, the first reporting officer's intervention.

This scheme is clear from the distribution of tasks between the first and second reporting officers as outlined above. Additionally, it is consistent with the requirement that the second reporting officer be the supervisor of the first reporting officer.

The corollary is that the first and the second reporting officers must be two different individuals. Allowing the "blending" of both functions in one person would defeat the underlying purpose of having two independent minds reviewing the staff member's performance and, ultimately, would render meaningless the system of "checks and balances" carefully established in the cited provisions. Indeed, there would be an obvious conflict of interest in having the same official carrying out, first, the substantive steps of the performance appraisal (as first reporting officer) and, then, verifying that his or her own actions and appreciations were proper (as second reporting officer).

38. The Tribunal holds in the light of the above that by acting as both the first and second reporting officers of the Applicant Mr. Lopes openly flouted the clear provisions of ST/AI/2010/5.

39. In addition, it is the Tribunal's view that, the two-tier review by two distinct managers is a fundamental feature of the performance appraisal system set out in ST/AI/2010/5. It is one of the major guarantees of fairness and impartiality for any staff member being appraised. As such, failure to comply with it amounts to a fundamental breach of the instruction.

40. This an added reason why the reassignment is unlawful in that Mr. Lopes based his decision on a flawed procedure.

Irreparable Harm

41. The Applicant occupies a high position in the Organization as Chief of Staff in the Office of the Executive Secretary of UNECA at the D1 level. To be assigned on the ground of alleged performance shortcomings against which he had no opportunity to make a rebuttal is certainly going to damage his reputation. The Tribunal will here endorse the observations of Cousin J. in *Calvani*²²

²² UNDT/2009/092.

it is appropriate to take into account that the Applicant has been in the employ of the United Nations for more than 20 years and that, as Director of UNICRI, he holds a highly responsible and visible position. It can therefore be said that the contested decision causes him an irreparable moral prejudice in terms of the damage to his reputation.

42. In *Tadonki*²³ the Tribunal held:

The well-established principle is that where damages can adequately compensate an applicant, if he is successful on the substantive case, an interim measure should not be granted. But a wrong on the face of it should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process. In order to convince the Tribunal that the award of damages would not be an adequate remedy, the Applicant must show that the Respondent's action or activities will lead to irreparable damage. An employer who is circumventing its own procedures ought not to be able to get away with the argument that the payment of damages would be sufficient to cover his own wrongdoing.

43. The Tribunal finds that this requirement has been met.

Urgency

44. The Applicant has not expressed in precise terms whether the implementation of the decision is imminent. The Respondent submits that,

a. He has informed the Applicant that the implementation of the reassignment decision has been deferred pending the outcome of the management evaluation, there is no imminent danger of an impending transfer to warrant a treatment of the matter as urgent.

b. In any case, the Respondent has on his own volition extended the effective date of the reassignment to 28 August 2015 pending the outcome of the management evaluation. This extension would allow the parties to benefit from the guidance of the management evaluation.

²³ UNDT/2009/016.

c. For this reason, the UNECA management has extended the effective date of the reassignment by 23 days and to the extent that the decision will only be implemented two weeks after the deadline within which a management evaluation decision is expected. The request for suspension of action is therefore moot and no longer urgent.

45. The fact that a matter has been suspended temporarily while the Administration waits for the guidance of the Management Evaluation Unit (MEU) is no reason for the Tribunal to defer its decision. The Respondent himself concedes that he is ready to implement the decision soon after the delay for the response from the MEU expires. The Administration is, in the view of the Tribunal, using this as a subterfuge to put the decision on hold until the MEU responds or until the delay for a response expires. To that extent the Tribunal considers that the Applicant cannot be left in a limbo and concludes that by virtue of what the Tribunal qualifies as a colourable device it is urgent to suspend the administrative decision on the ground of urgency.

Accountability

46. Article 10.8 of the Statute of the Dispute Tribunal reads:

The Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.

In *Abboud*²⁴ the Appeals Tribunal observed that the article means exactly what it says.

47. The issue is whether the Tribunal has the power to refer a manager for accountability on a suspension of action application. In *Ware*²⁵ this Tribunal held,

There is nothing in art. 10.8 that would restrict its application to cases that are heard on the merits. Even applications for suspension of action may reveal a certain form of conduct or attitude on the part of a manager that would warrant a referral for accountability. There is no reason that potentially unlawful conduct should not be

²⁴ 2011-UNAT-094

²⁵ Order No. 231 (NBI/2015).

accounted for at any stage of the proceedings. It is obvious that a remedy at the earliest possible stage would serve the interest of both the Organization and the staff member.

48. The Tribunal endorses the above view and refers Mr. Lopes to the Secretary General for possible action to enforce accountability for:

a. Openly flouting the e-PAS requirement by depriving the Applicant of a meaningful opportunity to rebut the rating he was given;

b. For acting as both the first and second reporting officers in blatant breach of the clear provisions of ST/AI/2010/5.

c. For ignoring the authoritative pronouncements of the Appeals Tribunal in matters of compliance with rules of the Organization and in particular the rules relating to e-PAS.

d. For using the colourable device of cancelling the rating given to the Applicant and at the same time using his alleged performance shortcomings to reassign him to South Africa thus leaving the Applicant in limbo as to his performance.

Conclusion

49. The Application for suspension of action in this case is successful.

50. It is accordingly **ORDERED** that the decision to transfer the Applicant from his current post to the APRM is suspended pending management evaluation.

(Signed)

Judge Vinod Boolell

Dated this 23rd day of July 2015

Entered in the Register on this 23rd day of July 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi