
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 qhj ku 2016 Pghqto cpeg Mcpci go gpvcpf Dgxrqr o gpv(öPMDö) assessment.
2. The Respondent filed a reply on 1 April 2019 in which it was argued that the Arr rdecvü erko y cu pqvtgegkcdrg.
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 Ttkdwpcn(öUNATö). Op 25 Jwpg 2021, UNAT kuwgf Jwf i o gpvNq. 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

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 operated by the United Nations Development Programme (UNDP) 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 with UNDP Zimbabwe. His appointment as a 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 period.

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 Committee (TMRC) to discuss 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 offer the Applicant a 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 findings of the 2016 PMD.

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.

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d. Ms. Andersen affirmed that the

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 stated that the Rebuttal Panel conducted an impartial and fair process, 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, the Respondent maintains that the Organization acted fairly in assessing and reviewing the Applicant's case. 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 performance in 2016 by his supervisor is fair and reasonable under the UNDP's PMD Policy.

b. Whether the assessment 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 assessment 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 appeal relates to the fact 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

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, 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

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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

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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 Mr. Ypou'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 Mr. Ypou's 2016 work performance by his supervisor was tainted by bias or improper motives.

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

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

positive that whatever had been submitted was not of sufficient quality.³³

92. There is nothing to contradict Mu. Apf gtuþþu evidence which represents a credible rebuttal to the Value for Money issue. The Tribunal therefore rejects the Applicant'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 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 KRA's 2017 and 2018 executive snapshots. 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

³³ Mu. Apf gtuþþu, 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.

³⁵ *Ibid.*, at page 66, lines 5-9.

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

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 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 recorded KRA. 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 do not 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

⁴¹ Applicant's written statement, page 63, line 25.

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

⁴³ Ms. Ynessu's written statement dated 9 July 2022; page 48, lines 20-25 and page 49 lines 1-15.

112. The 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

