
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/063

Judgment No.: UNDT/2023/079

Date: 28 July 2023

Original: English

Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

LE BAILLY

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.

Case No. UNDT/NBI/2022/063

Judgment No.: UNDT/2023/079

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

Case No.

Case No. UNDT/NBI/2022/063

Judgment No.: UNDT/2023/079

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

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 stemmin

Case No. UNDT/NBI/2022/063

Judgment No.: UNDT/2023/079

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/AI/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