



JUDGE LUIS MARÍA SIMÓN , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2014/057, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 30 May 2014, in the matter of *Staedtler v. Secretary-General of the United Nations*. Mr. Marc Staedtler filed his appeal on 28 July 2014, which he perfected on

6. In June 2012, Mr. Staedtler's first reporting officer (FRO) prepared Mr. Staedtler's 2011-2012 performance appraisal (ePAS) and gave him a rating of "successfully meets performance expectations". On 16 July 2012, Mr. Staedtler's second reporting officer (SRO) finalized the ePAS. While the SRO did not make any changes to the FRO's evaluation, the SRO commented that Mr. Staedtler gave "an overall good but mixed performance" and noted that Mr. Staedtler needed to be more diplomatic and collaborative. Mr. Staedtler, questioning the basis for this "deviating evaluation", declined to sign off on this evaluation.

7. By letter dated 31 August 2012, the Senior Programme Management Officer for the Regional and Country Office (Senior Programme Manager) reminded Mr. Staedtler that his contract was due to expire on 12 September 2012 but advised that since additional funding had been secured against his project post, his contract would be extended to 31 December 2012.

8. Under this extension and effective 13 September 2012, Mr. Staedtler reported to a new FRO. However, on the same day Mr. Staedtler's previous FRO initiated Mr. Staedtler's performance appraisal for the new 2012-2013 cycle. This prompted Mr. Staedtler to request his previous FRO to reflect the changes in his reporting line pursuant to his reassignment to Jordan in the "system".

9. On 5 November 2012, without Mr. Staedtler having entered any comments on his mid-point review for the 2012-2013 ePAS cycle, Mr. Staedtler's previous FRO signed off on the mid-point review. Mr. Staedtler claims he learned of this on 7 November 2012 and he subsequently disputed the finalization of his mid-point review without him having had an opportunity to comment on the observations of his previous FRO, which Mr. Staedtler alleged misrepresented his performance.

10. In November 2012, Mr. Staedtler was informed that his FRO could "roll back" the ePAS to the point of the mid-point review to allow Mr. Staedtler to insert his comments and self-evaluation. In March 2013, Mr. Staedtler was informed that his ePAS had been "rolled back" to the point requiring "staff member self-evaluation" for him to enter his comments. Mr. Staedtler responded that this did not resolve his concerns.

18. On 18 March 2013, the MEU also rejected Mr. Staedtler's first request of 9 January 2013. With respect to the individual claims therein, the MEU found that his first claim concerning comments in his 2011-2012 ePAS was made out of time and was thus not receivable, his second claim concerning the mid-point review of his 2012-2013 ePAS was moot, and his third claim concerning non-renewal of his appointment was rejected as the decision was valid.

19. On 20 May 2013, Mr. Staedtler filed an application with the UNDT challenging: the MEU decision that found that his challenge to the comments entered by his SRO in his 2011-2012 ePAS was time-barred; the denial of his right to comment on his mid-point review for his 2012-2013 ePAS; the failure by the Ethics Office to find that he had been subjected to retaliation; and UN-Habitat's decision not to renew his appointment.

20. On 30 May 2014, the Dispute Tribunal issued the Judgment currently under appeal. The UNDT dismissed Mr. Staedtler's application in its entirety, finding that:

(a) The challenge to the inclusion of the comments of his SRO in his 2011-2012 ePAS was not receivable as, having received a positive rating therein, he had no right to challenge his 2011-2012 ePAS, and it did not constitute an "administrative decision" that negatively impacted his conditions of service;

(b) The challenge to the failure of his previous FRO to allow him to comment on his mid-point review for the 2012-2013 cycle was moot, given Mr. Staedtler had subsequently been given the opportunity to enter his comments in the system, and had failed to do so;

(c) The challenge to the findings of the Ethics Office, namely that the content of Mr. Staedtler's reports did not constitute a "protected activity" pursuant to ST/SGB/2005/21, was receivable but without merit; and

(d) His challenge in respect of UN-Habitat's decision not to renew his fixed-term contract beyond 31 December 2012 was not receivable as he had first been notified that his contract would not be renewed on 31 August 2012, and not 26 November 2012 as he contended.

Submissions

Mr. Staedtler's Appeal

21. The UNDT erred on a question of law when it found that his challenge to his 2011-2012 ePAS was not against an appealable administrative decision as there was no negative impact to him. The inconsistency in the comments in his ePAS deprived him of his due process right to a "contradiction-free evaluation". Further, he was subjected to a gross abuse insofar as he cannot challenge the SRO's negative comments given that Administrative Instruction ST/AI/2010/5 (Performance Management and Development System) does not allow staff members to seek review of ratings of "successfully meets performance expectations". This has a direct and negative impact on his due process rights insofar as the comments lastingly damage his professional reputation. Further, the UNDT held in *Ngokeng* that comments provided in the performance appraisal documents are administrative decisions within the meaning of Article 2(1)(a) of the UNDT Statute and, consequently, are challengeable¹.

22. The UNDT erred on a question of fact and law when it dismissed Mr. Staedtler's claim concerning his 2012-2013 ePAS cycle. Contrary to the UNDT's finding, the Administration deliberately refused to rectify its initial failure as it did not "roll back the ePAS in March 2013 to the stage of the Mid-term-review but only to the stage of the End-of-year-performance-appraisal". The issue was therefore not moot. The sole means to rectify the violation of his right to provide comments on his mid-term review is to allow him to provide them in the corresponding section of the ePAS document.

23. The UNDT erred on a question of fact and law when it determined that his request for management evaluation of the non-renewal decision was out of time and not receivable. None of the involved parties, including the Administration which issued the letter, interpreted the letter of 31 August 2012 to constitute a non-renewal notice. The UNDT erred when it ignored the Organization's obligation to act in good faith and failed to require that a non-renewal notice contain unequivocal information so that a staff member may exercise his or her right to appeal, as required by the jurisprudence of the Appeals Tribunal.²

challengeable administrative decision, as distinct from a notice about non-expectancy of renewal.³

rights. Furthermore, as properly found by the UNDT, the Appellant did not identify any adverse administrative decision resulting from his performance appraisal. In any event, the SRO made the contested comments in July 2012, whereas Mr. Staedtler did not request management evaluation until January 2013. Accordingly, he had clearly failed to file a request challenging his SRO's comments within the 60-day deadline pursuant to Staff Rule 11.2(c). Lastly, Mr. Staedtler's reliance on the UNDT judgment in *Ngokeng* is legally unsustainable, as the Appeals Tribunal vacated that judgment on appeal, finding that the UNDT had violated the clear jurisdictional limits on its power to review performance appraisals when they are deemed to be satisfactory.⁴

28. The UNDT properly rejected Mr. Staedtler's claims concerning his 2012-2013 ePAS because even if it were accepted that there had been a minor procedural irregularity in the manner in which the mid-point review had been conducted, the UNDT properly found that the irregularity had been rectified, and that Mr. Staedtler did not suffer any harm. Further, the Appeals Tribunal's jurisprudence shows that the Appeals Tribunal has been reluctant to examine the merits of administrative decisions that have been rescinded or superseded by subsequent actions by the Administration and thereby rendered moot.⁵ Mr. Staedtler's challenges merely reflect his disagreement with the conclusions reached by the UNDT and repeat factual allegations that he made before the UNDT. Further, as the MEU noted, the matter was not ripe for review because at the time Mr. Staedtler challenged his evaluation, the 2012-2013 ePAS performance

30. The UNDT's reliance on *Hunt-Matthes*

34. With respect to the Appellant's disclosure request, the UNDT stated:⁹

... On 25 November 2013, the Applicant sought disclosure of documents by the Respondent. The Respondent replied to this request. On 13 December 2013, the Applicant repeated his request for disclosure and asked the Tribunal to order the Respondent to "provide comprehensive and unequivocal responses to the requests ... and deriving follow-up requests".

[On 4 March 2014, the UNDT ordered the Secretary-General to file his submissions and response to Mr. Staedtler's request of 25 November 2013 pursuant to Order No. 038 (NBI/2014).]

[On 8 March 2014, the Appellant filed a further request for production of information and documents.]

... The documents sought by the Applicant were:

- a) documents to show whether or not the Office for Internal Oversight Services (OIOS) had carried out an investigation addressing the reported misconduct and prohibited activities in the Libya programme and, if so, the reports of that investigation; and
- b) if the Tribunal finds that the administration had reassigned the Applicant to a P4 post at the Amman duty station, he seeks answers to a number of questions concerning the reassignment post and its funding.

... In response to these requests, the Respondent referred to a memorandum dated 25 March 2013 from the Director of the Investigation Division of OIOS to the Executive Director of UN-Habitat stating that the matter would be best handled by UN-Habitat. Secondly, the Respondent reaffirmed its previous submissions and elaborated on the questions raised by the Applicant about his assignment to Amman.

... Having reviewed the memorandum referred to by the Respondent, the Tribunal is satisfied that OIOS did not investigate the Applicant's complaint and there is no OIOS report for the Respondent to disclose. Any documentation or evidence relating to the reassignment to Amman is not relevant to the four decisions being challenged by the Applicant in this case.

.... The Tribunal holds that the Respondent has sufficiently responded to the Applicant's requests for disclosure. The relevant evidence which it was able to and did disclose forms part of the considerations of the Tribunal which follow.

35. We find no error of procedure by the Dispute Tribunal with regard to the disclosure of documents requested by the Appellant. The Dispute Tribunal analysed the document and response submitted by the Secretary-General and concluded that, notwithstanding the

⁹ Impugned Judgment, paras. 5-9.

Appellant's repeated disclosure requests, the Secretary-General's response constituted a satisfactory answer to the Tribunal's Order. Our jurisprudence clearly indicates that the Appeals Tribunal will not interfere lightly with the broad discretion of the UNDT in the management of cases¹⁰ and that the UNDT has a broad discretion to determine the admissibility of, and the weight to be attached to, any evidence as the Judge hearing the case has an appreciation of all of the issues for determination and the evidence before him or her.¹¹

36. The Appellant has failed to demonstrate how the UNDT erred in procedure. He has not demonstrated which documents were not produced or how such documents would have led to different findings of fact and changed the outcome of his case. Therefore, the Appellant has not established any procedural errors warranting the reversal of the Judgment.

Did the UNDT err in finding that his challenge to his 2011-2012 ePAS was not receivable?

37. While the Appellant relies on the UNDT Judgment in *Ngokeng*, that judgment was overturned on appeal. As we stated on appeal in *Ngokeng*, pursuant to Section 15.1 of ST/AI/2010/5, a staff member who receives a rating of "consistently exceeds" or "successfully meets" performance expectations on his or her performance appraisal is not able to initiate a rebuttal.¹²

38. Thus, a good final rating 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.

39. Section 15.7 of ST/AI/2010/5 provides:

The 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.

¹⁰ *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-62, para. 23.

¹¹ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123, para. 33.

¹² *Ngokeng v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-460, para. 29.

40. In the present matter, there was no evidence of any adverse administrative decision that stemmed from the Appellant's performance appraisal. As in *Ngokeng*, the SRO's comment did not detract from the overall satisfactory performance appraisal, which indeed he confirmed, and had no direct legal consequences for the Appellant's terms of appointment. As such, the SRO's comment reflects no more than a legitimate exercise of administrative hierarchy evaluating employees, and does not of itself constitute an independent administrative decision able to be challenged through appeal.

41. Hence, the Dispute Tribunal correctly concluded that the Appellant's challenge related to the comments of his SRO in his 2011-2012 ePAS was not receivable.

Did the UNDT err in finding that his challenge to his 2012-2013 ePAS was moot?

42. We equally find that the UNDT did not err when it considered that the Appellant's challenge to the failure of the Administration to allow him to comment on his mid-point review in relation to his 2012-2013 ePAS cycle was moot, since he was given the opportunity previously omitted and did not take advantage of it.

43. Contrary to the Appellant's arguments, it is immaterial that the "rolling back" of the ePAS procedure did not go back to the stage of the mid-point review but rather only to the stage of the end-of-year evaluation, because the rectification nevertheless provided the staff member with the opportunity of which he had previously been deprived, namely to introduce his comments with respect to his performance in the electronic system.

Did the UNDT err in finding that the challenge to the non-renewal of his contract was time-barred?

44. This Tribunal upholds the decision of the Dispute Tribunal, namely that the Appellant failed to challenge the decision not to renew his fixed-term contract beyond 31 December 2012 in a timely manner.

45. The UNDT correctly stated that the Appellant was aware of the decision he now contests as of 31 August 2012. As a result of that finding, time began to run for the Appellant to request management evaluation, in accordance with the procedures prescribed by the Staff Regulations and Rules. Contrary to the Appellant's contention, time cannot be said to have started to run for the purpose of requesting management evaluation as of 26 November 2012 when he

was again notified in the context of separation formalities that his contract would expire on 31 December 2012.

46. The Appeals Tribunal has consistently held that the reiteration of an original administrative decision, if repeatedly questioned by a staff member, does not reset the clock with respect to statutory timelines; rather time starts to run from the date on which the original decision was made.¹³ Further, we can see no action on the part of the Administration that departed from the principle of good faith or that could be said to have created false expectations on the part of the Appellant that the Administration was considering otherwise.

47. The Appellant admits that he sought info

the protection system envisaged in ST/SGB/2005/21 was applicable to his situation or that he followed the correct steps in bringing his complaint. On the contrary, as determined by the Ethics Office, the Appellant did not address his complaint to the right authority and failed to demonstrate a *prima facie* case of retaliation.

50. The appeal on this issue has no merit.

Referral for accountability

51. Finally, the Appellant requested referral of certain persons named in his appeal to the executive head of UN-Habitat for accountability on the basis of the complaints canvassed in his appeal. In view of our foregoing findings rejecting each of the Appellant's grounds of appeal, such request necessarily also fails.

Judgment

52. The appeal is dismissed in its entirety and the UNDT Judgment is affirmed.

Original and Authoritative Version: English

Dated this 2nd day of July 2015 in Geneva, Switzerland.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Adinyira

Entered in the Register on this 20th day of August 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar