



Case No.: UNDT/NY/2009/137

Judgment No.: UNDT/2010/078

Date: 30 April 2010

Introduction

1. The applicant is a former staff member who was employed on a fixed-term contract. Prior to concluding her service, her performance was appraised by way of a Form P.10-E Report on Short-Term Staff (the Report), which she considered incorrect and adverse to her interests.

2. The applicant filed an application with the UN Dispute Tribunal under article 8 of its Rules of Procedure, contesting the administrative decision that she was not entitled to a rebuttal of the Report. At the same time, she launched an application by way of a motion for temporary relief, for the removal of the Report from her personnel file (the File) pursuant to article 10.2 of the Tribunal's Statute and article 14.1 of its Rules of Procedure.

3. The hearing of the motion for temporary relief was held on 11 November 2009, subsequent to which the applicant was granted the interim relief sought (Judgment UNDT/2009/076). This resulted in the Report being removed from her File pending the outcome of the substantive proceedings.

Facts

4. The applicant entered the service of the Organisation on 25 November 2008. From this date until the end of March 2009 she worked as a Budget Officer with the Mission Support Unit of the Peacebuilding Financing Division (PFD), at the conclusion of which she was evaluated by way of a Form P.10-E Report on Short-Term Staff. This report gave her an overall rating of "good" and noted her as being suitable for reemployment at the same level.

5. From 30 March to 11 June 2009 she served as a Finance and Budget Officer with Section III of the PFD, and thereafter with the Mission Support Unit of the same Division, concluding her service there on 3 July 2009. Prior to concluding her

service, on 22 June 2009, the Section Chief and Director of PFD both signed the Report, evaluating her performance as unsatisfactory. Amongst other things, the Report had a box checked noting the applicant's proficiency in general as "below average", with another checked in relation to whether the staff member would be considered for re-employment, as "[n]o, not at all". The Report was placed on her File on 23 June 2009.

6. The applicant stated that she was unaware that the Report was placed on her File on 23 June 2009 and that she was not shown the Report until 2 July 2009 (the penultimate day of her appointment), and further that she did not receive a copy of the Report at all. The respondent, however, stated that on 23 June 2009 the Assistant to the Section Chief personally delivered a copy of the Report to the applicant, thereafter delivering a copy to be placed on the applicant's File with a third copy being delivered to the Section Chief for placement on the PFD file. In light of the interim relief already granted to the applicant, I do not consider that the outcome of the current proceedings rests on an assessment of this evidence to determine which version of events appears more likely.

7. After concluding her service, on 7 July 2009 the applicant received an Offer of Appointment for another temporary position of three months' duration within the Office of Programme Planning, Budget and Accounts, Department of Management, to commence 9 July 2009. The day prior to commencement, on 8 July 2009, the applicant's former Section Chief, unbeknown to the applicant, wrote to the Assistant Secretary-General (ASG) of the Office of Human Resources Management advising the ASG of the adverse assessment of the applicant's performance and of the Section Chief's opinion that the applicant was unsuitable for re-employment with the Organisation. Upon arriving to report for duty on 9 July 2009 the applicant was advised that there were difficulties with her contract and on the same date received a letter from the Chief of Section, Human Resources Services, Department of Management, advising her that her Offer of Appointment was withdrawn.

8. On 20 August 2009 the applicant, of her own initiative, forwarded her comments in response to the Report to the ASG. She was advised by way of response on the ASG's behalf on 24 August 2009 that there were no formal rebuttal procedures on short-term reports (such as the Report), but that her objections would be placed on her File. On 8 September 2009 the applicant requested management evaluation of the decisions not to allow her a rebuttal of the Report on her File and to withdraw her Offer of Appointment. On 14 October 2009 the applicant received the Secretary-General's endorsement of the findings and recommendations of the Management Evaluation Unit (MEU). These findings and recommendations were that the applicant should be paid an amount equal to three months' net base salary; that the Report should remain on the applicant's File, and that any comments made

[a]dverse material shall mean any correspondence, memorandum, report, note or other paper that reflects adversely on the character, reputation, conduct or performance of a staff member. As a matter of principle, such material may not be included in the personnel file unless it has been shown to the staff member concerned and the staff member is thereby given an opportunity to make comments thereon. It shall be handled and filed in accordance with the procedures set out below, depending upon its source.

11. At para 5, ST/AI/292 states, in relation to the type of material in question in the present case—

[a] third category of adverse material may relate to an appraisal of the staff member's performance and conduct. Under the existing system, all performance reports, special reports and other communications pertaining to the staff member's performance are a matter of record and are *open to rebuttal* by the staff member. The reports and the rebuttal, if any, as well as the final appraisal by the head of the department or office are placed in the official status file. This file constitutes the sole repository of documents relating to the contractual status and career of the staff member. It is available for inspection by the staff member once a year before the annual promotion review and in other circumstances specified in the administrative instruction ST/AI/108 on application to the staff member's personnel officer [emphasis added].

ST/AI/2002/3

12. Administrative instruction ST/AI/2002/3 governs the United Nations Secretariat's performance appraisal system (PAS). It states in sec 1 that it—

shall apply to all staff members who hold appointments of at least one year under the 100 series of the Staff Rules ... staff employed under the 200 or 300 series of the Staff Rules, and temporary staff employed for less than one year under the 100 series of the Staff Rules *may* also be appraised under the provisions of the present instruction where appropriate, taking into consideration the nature and duration of the functions and the supervisory structure in place in the work unit [emphases added].

13. This administrative instruction provides for a full rebuttal process if a staff member disagrees with the given performance rating. It is also applicable to

temporary staff employed for less than a year if such staff member has undergone the appraisal process. To summarise some of the salient features of the PAS process as promulgated in ST/AI/2002/3, performance expectations are agreed in the work planning phase (sec 6) and at the end of the performance period the first reporting officer and staff member meet to discuss the overall performance (sec 9.1). After this has been done, the first and second reporting officers and the staff member sign the PAS via which the staff member's performance is evaluated and rated (sec 10), without prejudice to the staff member's right to initiate a rebuttal process (sec 9.4). The evaluation is placed on the staff member's official status file and appears in the Integrated Management Information System (sec 11.5). Where a staff member disagrees with the performance rating given at the end of a performance period, they may submit a written rebuttal statement in accordance with and pursuant to sec 15. This statement is placed on the staff member's file, as is management's written reply to it. Thereafter, a rebuttal panel considers the matter and provides a written report, with reasons, on whether the original appraisal rating should be maintained or not. The rebuttal panel makes a binding determination of the appropriate performance rating and its notation is made on the final appraisal section of the PAS form, with a notation of any change in the rating as a result of a PAS rebuttal. The rebuttal panel's report is also placed on the staff member's file.

Applicant's submissions

14. The applicant submits that the respondent's offer to place the applicant's comments in response to the Report on her File together with the Report was not an adequate remedy. She contends that the failure to provide rebuttal procedures for short-term staff is discriminatory and violates the rights of all staff to due process. Further that all staff members, temporary or short-term, are entitled to a procedure which accurately reflects their performance, which is not provided for by ST/AI/292. The applicant did not specify the precise procedures under ST/AI/2002/3, or any

other procedures, that she wished to be applied in her situation, but simply sought a more comprehensive process of rebuttal than that offered by the respondent.

15. The applicant noted that ST/AI/2002/3 entitles staff, pursuant to sec 16.1, to institute the rebuttal procedures where there is any “disagreement” as to ratings. She stated that these rights were provided due to the fact that the Secretary-General was aware that it would be an inadequate remedy to allow staff to merely place their comments on top of those of their supervisors, as it might, if the definition of “adverse” is first satisfied, be the only remedy provided for by ST/AI/292. Further, an arbitrary or strict definition of “adverse” in itself may lead to absurd results such as where a staff member considers their performance as outstanding, but is only assessed as average or good, yet may have no right to even place their comments on their file since the words “average” or “good” do not necessarily connote an adverse comment.

16. The applicant also argued that it is problematic that ST/AI/2002/3 “may” be used for temporary staff “where appropriate”, but that no guidance is given as to when this will be the case.

17. The applicant sought to reinforce her arguments in noting that, contrary to her understanding of the respondent’s assertions that short-term staff have lesser rights than long-term staff, they should be accorded at least as great a safeguard in relation to the appraisal of their performance, as a single adverse evaluation could effectively end their chances of obtaining or maintaining a career within the Organisation.

Respondent’s submissions

18. The respondent stated that it had complied with its own rules and procedures, which were not discriminatory or in violation of the applicant’s rights and which formed part of the applicant’s terms of employment. Specifically, the preparation of reports on short-term staff was mandated by the Organisation’s rules, and this was done. As a temporary staff member, the applicant had those rights which apply to

short-term employment and which are commensurate with its non-permanent nature. In the case of adverse performance appraisal, a short-term staff member's rights are limited to the process afforded by ST/AI/292; they are entitled to be made aware of and to contradict or "rebut" the adverse material in writing, which is then placed on their personnel file along with the adverse material. In this regard, the respondent noted that an adverse PAS report prepared in accordance with ST/AI/2002/3 also remains on the staff member's file, regardless of the outcome of the rebuttal process. Specifically, ST/AI/2002/3 does not apply to short-term staff and nor are the rights provided under this instruction afforded to such staff.

19. The respondent contends that the comprehensive rebuttal process provided by ST/AI/2002/3 would be inappropriate to apply to short-term staff, as it does not only require an assessment at the end of a period, but rather an ongoing interactive process of performance management, from the formulation of a work plan, to mid-point consideration, to final assessment. The report on short-term staff is entirely different and is prepared to ensure good management and that the respondent's obligations under staff rule 1.3(a) are thereby fulfilled. Further, there is no strict definitional difference between "rebuttal" in its ordinary sense and the sense that it is used in the ST/AI/2002/3—a right to rebuttal is a right to contradict. The applicant's own comments in response to the Report to the ASG, of 20 August 2009, are titled "Rebuttal".

20. The respondent also contends that temporary staff are necessary to provide an efficient staffing solution for the Organisation's human resources needs and legitimate policy reasons underscore the differentiation in treatment of temporary and permanent staff. This differentiation does not amount to discrimination. The reason that temporary staff are given rights which may be less than those afforded to other staff is that to give them more substantial

due process did not specify what rights of due process had been violated, or where these rights came from.

Considerations

21. The respondent concedes that ST/AI/292 provides the

supervisory duties that may be required to be performed. In this regard I also agree

one year under the 100 series of the Staff Rules may also be appraised” under it. It does not provide sufficient direction as to when the discretion implied by the word “may” is to be exercised, or by whom; assumedly, it would have been a first reporting officer’s discretion in most cases, although this is not clear. Where this discretion was not exercised, it would mean that the only protection short-term staff would have in relation to any appraisal made of them would be pursuant to ST/AI/292—as the respondent contends is appropriate in this case.

28. The discretion inherent in ST/AI/2002/3 means that the rebuttal procedures it provides will be available to some short-term staff (when used, which use is discretionary), but not others, the latter of whom will only have the limited protections of ST/AI/292. Therefore, in the context of staff rule 101.3 which states in mandatory terms that “[s]taff members shall be evaluated for their efficiency, competence and integrity through performance appraisal mechanisms”, some short-term staff members will be treated differently, and adversely, to others. The effective creation of two classes of short-term staff, based on the opaque and whimsical discretion of management, without adequate guidelines, is clearly not fair. Where the provisions of ST/AI/2002/3 are applied to some short-term staff and not others, this violates the doctrine of equal treatment in like circumstances (for application of this doctrine see e.g. UN Administrative Tribunal Judgements No. 268 *Mendez*

staff member's comments in rebuttal are assessed by an impartial panel that follows a prescribed process, including hearing both sides (and potentially, relevant witnesses) before the panel provides a reasoned assessment based on a consideration of both management's and the staff member's views. It is this part of the process that the procedure for short-term staff lacks—there is no final assessment, indeed reassessment, which takes into account the staff member's comments in rebuttal and which may be influenced by the staff member's comments. In other words, no decision is rendered, thus making an effective review impossible. Thus, although the ST/AI/292 procedure goes some way to satisfying the staff member's right to be heard, this right is less than meaningful in the circumstances described. Moreover, there is also a problem in relying on ST/AI/292 solely, in that it does not provide a definition of "adverse", thereby failing to clearly define under what circumstances staff have access to the rebuttal procedures the respondent contends it affords. For example, a staff member who receives a rating of "good" on the report on short-term staff but believes her or his performance to be much better would potentially be unable to challenge or rebut this rating (or indeed, even be informed of it) if the Administration determined that it did not constitute "adverse material".

30. I have discussed the unfairness of having short-term staff subject to potentially different rebuttal rights, as well as the problem with merely relying on ST/AI/292 to provide the rebuttal process for short-term staff. The particular relevance of the failures of the system is found in an examination of its consequences, to which I now look. When a subsequent manager or human resources official looks at a short-term staff member's file and sees an adverse performance report on short-term staff, with the staff member's comments in response placed on top, there is an appreciable risk that the former manager's findings will be given precedence over the staff member's response. Therefore, although ST/AI/292 ostensibly provides, in at least some circumstances, a right to be heard (that is, to raise comments in response), there is a significant risk for short-term staff members that one bad performance appraisal (which does not include a comprehensive right to rebuttal—particularly, to

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above, the Report will be placed back on the file and will be treated as the PAS