



Before: Judge Marilyn J. Kaman

Registry: New York

Registrar: Santiago Villalpando

SIMMONS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

ii. The Applicant's candidature for two posts, respectively with

13. In response to a 25 November 2009 request from the Applicant and following a 28 January 2010 email from the Tribunal on 30 January 2010, the Respondent agreed that the present case “can proceed on the papers” under the reservation that he could possibly submit additional pleadings to take into account “recent developments on receivability and appointment and promotions”.

14. By email of 3 February 2010, Judge Adams directed the parties to file and serve written submissions from both parties regarding the preliminary issue of receivability, which the Respondent did on 16 March 2010 and the Applicant did on 30 March 2010.

15. On 30 June 2010, Judge Adams left the Tribunal, before deciding the preliminary issue of receivability before his departure. On 27 July 2010, the case was re-assigned to the sitting Tribunal.

16. After issuing further case management orders (Orders No. 197 and 242 (NY/2010)) and receiving further written submissions from the parties, on 10 December 2010, the Tribunal issued Order No. 325 (NY/2010) on receivability (see para. 6 above).

17. In Order No. 3 (NY/2011), the Tribunal called for closing statements on the remaining substantive issues of the case defined above in para. 4(a) and (b).

18. By email of 31 January 2011, the Applicant filed and served her closing statement (after submitting an incorrect attachment on 29 January 2011). After being granted a time extension Order No. 28 (NY/2011) of 11 February 2011, by email of 8 February 2011, the Respondent filed and served his closing statement.

19. By email of 9 February 2011, the Applicant filed and served a “Motion to strike out portions of the Respondent’s closing statement” in which she complained

- Takes ownership of all responsibilities and honours commitments.
Takes personal responsibility for his/her own shortcomings and those of the work unit.

Education

Advanced university degree (Master degree or equivalent) in business administration, finance, public administration or a related field. A first level university degree with a relevant combination of academic qualifications and experience may be accepted in lieu of the advanced university degree.

Languages

English and French are the working language of the United Nations Secretariat. For this post, fluency in oral and written English is required. Knowledge of another official UN language is desirable.

Other skills

Advanced computer skills and proficiency in complex computerised financial systems such as IMIS and BIS desirable.

25. On 10 September 2007, the Applicant submitted her application. According to the Respondent's closing statement, two applications were received at the 30-day mark, of which eight candidates, internal, were short-listed, including the Applicant. As one candidate withdrew his candidature, seven candidates were

awaiting further instructions ... ACCOUNTABILITY: The Panel

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- b. On 27 February 2009, the first reporting officer signed off the Applicant's midpoint review and the Applicant counter-signed off 29 minutes later on the same day;
- c. On 27 April 2009, the Applicant ~~in~~ ~~sted~~ her end-of-cycle self-appraisal;
- d. On 31 March 2010 (i.e., almost a ~~year~~ ~~later~~), the first reporting officer signed off the end-of-cycle appraisal, on 7 April 2010, the second reporting officer followed-up, and the Applicant did so on 8 April 2010;
- e. On 9 April 2010, her first and ~~second~~ reporting officers signed the report, while the Applicant did so on 15 April 2010.

Applicant's submissions

The Applicant's e-PAS reports for 2007-2008 and 2008-2009

35. The Applicant's primary contentions regarding her e-PAS reports for 2007-2008 and 2008-2009 may be summarised as follows:
- a. Management failed to ensure ~~that~~ ~~the~~ Applicant's work plan for 2007-2008 and her e-PAS for 2008-2009 were prepared and completed in a timely manner;
 - b. The Applicant's due process rights and the proper implementation of the Staff Rules have not been respected by the Administration. The delay in preparation of the Applicant's work plan and e-PAS are longstanding matters and "[m]anagement has for years been ~~either~~ tardy in preparing and/or completing [her] e-PAS";

C.

The selection processes

37. The Applicant's primary contentions regarding the selection processes for Post 1 and Post 2 may be summarised as follows:

a. The Administration failed to adhere to the staff regulations and rules in the selection processes for Post 1 and Post 2, particularly in that the Applicant's performance was not a factor considered by interview panels;

b. In the absence of the Applicant's completed e-PAS reports, the Administration solely relied on the results of competency-based interviews and a written test that was unfairly graded for the Applicant;

c. The Respondent's alleged failure to undertake and finalize the Applicant's e-PAS, "is itself sufficient to sustain a successful case against the Respondent in the absence of a challenge of the flawed selection process";

d. The Applicant was not "favourably impacted by the absence of [her] e-PAS"2.72eleted /rda(c t2)(of the ff8.e AgApple3-1. th4000Be aw6.495 -2.8c91'5.4(a s

f. The interview panels were “~~biased~~ and prejudicial” against the Applicant, and all its members were ~~former~~ former and current staff members working for OPPBA;

g. While other candidates were deemed to satisfy the required language skills for Post 2, the Applicant was ~~strongly~~ strongly rated as “meets some of the requirements of the post” even though ~~she~~ she fully complied with these, which was “a noticeable trend that suggests ~~an~~ attempt to conspire against [the Applicant’s] career interest by not ~~giving~~ full and fair ~~consideration~~ consideration to [the Applicant’s] candidature”;

Compensation

38. The Applicant’s primary contention ~~regarding~~ regarding compensation may be summarised as follows:

a. The Applicant requests the Tribunal ~~to~~ order “[~~he~~] immediate promotion to the P-4 level” and refers to “the need for real justice in this

Respondent's submissions

39. With reference to the Applicant's motion of 9 February 2011 and Order No. 47 (NY/2011), all references to the Applicant abusing her supervisor in the Respondent's closing statement are omitted in the following (see paras. 19-21 above).

The Applicant's e-PAS reports for 2007-2008 and 2008-2009

40. The Respondent's primary contentions concerning the e-PAS reports for 2007-2008 may be summarised as follows:

- a. The performance management system is designed to enhance performance of staff members in the context of a consultative management process, as expressed in para. 2 of ST/AI/2002/3;
- b. The Applicant did not engage with her supervisor as she was required to do under ST/AI/2002/3, para. 2.2. The e-PAS rating represents a supervisor's expression of the extent to which a staff member has achieved, over the course of a year, mutually agreed performance goals. It is fundamental to this process that the staff member engages with his/her supervisor in order to ensure that

goals of the work plan, has ownership over the process of drafting the work plan. Since it is their work plan, it is important that they express the goals that they will seek to achieve. For this reason, while her supervisor had assisted the Applicant by indicating to her that she may use the earlier work plan as a basis for the draft, he did not draft the work plan for her, which is not the intent of the e-PAS system and the role of the supervisor;

e. It is standard practice for staff members to check with their colleagues to see how they have expressed their goals. It should not have been necessary for her supervisor to make this suggestion. If the Applicant had simply made the revisions that she had agreed to make, her work plan would have been finalised at the end of September 2007, the same time as her colleagues;

f. The Applicant did not accept her supervisor's guidance. Instead of redrafting her plan, she simply re-submitted the same plan. By doing this, she rejected her supervisor's input and failed to participate in the "two-way process" mandated by sec. 2.2 of ST/AI/2002/3;

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about it, and her subsequent withdrawal from the process was the reason she did not have a finalized work plan. All other members of the Service duly completed their work plans following the circulation of the Service work plan in June 2007;

i. Ultimately, the Applicant's failure to submit a work plan obstructed the e-PAS procedures and no e-PAS was completed for the year 2007-2008;

j. However, under sec 6.6 of ST/AI/2006 (Staff selection system), the Applicant did not suffer any harm as a result of her not having completed her work plan. By not completing her work plan she avoided having her performance assessed.

41. The Respondent's primary contentions concerning the e-PAS reports for 2008-2009 may be summarised as follows:

a. The Applicant cooperated in the production of her work plan for the 2008-2009 e-PAS cycle. Accordingly, the required steps were completed;

b. The Respondent admits that he is unable to provide any detailed explanation as to why the end of cycle sign-off was late but notes that the Applicant was absent from the office on sick leave for a period; however, it is unclear whether this had any impact on the late sign off.

The selection processes

42. The Respondent's primary contentions regarding the selection processes for Post 1 and Post 2 may be summarised as follows:

a. The candidates for Post 1 were assessed on the basis of their background and experience stated in their PHP and on their interview performance;

b. In addition to the PHPs, the interview panel would have received the most recent e-PAS of the candidates. Whether or not a candidate was able to submit a completed e-PAS did not impact on the assessment of their candidacy for the following reasons:

- i. In the absence of an e-PAS, satisfactory performance was assumed. This assumption is mandated in sec. 6.6 of ST/AI/2006/3,

exercise was complete and the recommendations had been sent to the CRC. As such, whether or not the Applicant's e-PAS had been completed was irrelevant to the outcome of the selection exercise.

Consideration

The e-PAS report for 2007-2008

The work plan

43. Both parties appear to agree that the Applicant's e-PAS report for 2007-2008 was delayed, due to the fact that the Applicant's work plan was not completed on time. The Tribunal will examine the issue in light of ST/AI/2002/3 (Performance appraisal system), which has since been abolished by ST/AI/2010/5, currently in force.

44. The Tribunal observes that the individual work plans form the basis both for midterm performance review (see section 8 of ST/AI/2002/3, "In the middle of each performance year, the first reporting officer reviews with each staff member the manner in which the individual work plan has been carried out") and the eventual performance appraisal at the end of the performance year (see section 9 of ST/AI/2002/3, "Prior to the appraisal meeting [at the end of the performance year] between the first reporting officer and the staff member, the staff member should review the manner in which he or she has carried out the work plan defined at the beginning of the performance year ...").

45. Basically, without an individual work plan, neither of these obligatory assessments of a staff member's performance can be carried out, which also means that the e-PAS report cannot be completed.

46. The parties seem to disagree, a legal matter, on who is to be responsible for completing the individual work plan under ST/AI/2002/3—the staff member or the first reporting officer.

47. Section 4.1 of ST/AI/2002/3 states (emphasis added):

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

- (a) *Setting the work plan with the staff member;*
- (b) *Conducting the mid-point review and final appraisal;*
- (c) *Providing supervision on the overall work of the staff member throughout the reporting period.*

48. From this provision, it directly follows that in addition to conducting the midterm review and the performance appraisal as well as supervising the staff member, the first reporting officer is also responsible for “[s]etting the work plan with the staff member”.

49. Sec. 7.1 specifically states that “[h]eads of departments and offices are responsible for the implementation of PAS” and sec. 7.3 places the “primary responsibility” for the “timely execution” of the PAS upon the head of department/office, who also is responsible for overall compliance as well as consistent and fair implementation of PAS procedures. Sec. 7.2 further clarifies (emphasis added):

7.2 *The head of the department or office shall hold all managers and staff with supervisory responsibilities accountable for the effective use of the PAS process as a management tool, and provide advice and recommendations where warranted. This shall cover all phases of the system, including the planning stage, establishment of the work plan, required competencies and planning for development, ongoing feedback, the mid-point review and the final appraisal.*

50. Accordingly, under ST/AI/2002/3, it is the duty of the first reporting officer, as well as the head of department and those with supervisory authority to make sure that the staff member's individual work plans are completed on time.

51. Such interpretation is also in line with the notion that the first reporting officer is the staff member's supervisor and that the e-PAS is a "management tool" which not only empowers the supervisor but also holds her/him accountable and responsible for managing and motivating her/his staff, as per sec. 2. Otherwise, it would be left to the individual staff member to define his own role within the given work unit; this is a function that is obviously a management prerogative.

The Applicant's responsibility under ST/AI/2002/3

52. It is clear that a staff member has responsibility and role to play under ST/AI/2002/3 regarding the e-PAS evaluation system. The Applicant herself recognizes that the e-PAS process "is not a unilateral assessment by the Administration" and that, under ST/AI/2002/3, sec. 2.2, the e-PAS is to "promote two-way communication between staff members and supervisor. Certain rights and corresponding obligations are attached to the staff member as a result.

53. Insofar as the individual work plan is concerned, after the head of department/office has developed the general departmental and work unit plans" in consultation with the staff, the staff member is entitled to—and must—prepare a timely draft of this plan for further discussion with the first reporting officer. Before doing so, under secs. 6.1 and 6.2 of ST/AI/2002/3 (as recited below), the first reporting officer shall first meet with the given staff member, either individually or with the entire work unit, to ensure that she has understood the general plan for the given department plan the n functio (Tw [(co)5.9(nce-.00, e)Tissee is

6.1 In the light of the departmental and work unit plans, managers meet with the staff under their direct supervision to ensure that the objectives of the work unit are understood and annual individual work plans are drawn up. Supervisors may meet with the staff in their work unit either as a group or individually.

6.2 The staff member works with the first reporting officer to devise the plan for the performance cycle and to determine the competencies that will be used to carry out the work plan. The work planning stage includes: (a) work plan; (b) competencies; and (c) planning for development, as follows:

(a) Work plan: on the basis of the departmental and work unit plans, each staff member prepares, in a timely manner, a draft work plan for discussion with the first reporting officer. The format of the work plan may vary depending on the functions of the staff member but must include goals and/or a statement of performance expectations for the reporting period. When more than one staff member performs the same function, performance expectations may be collectively developed, while allowing for individual variations where appropriate;

...

54. In the present case, the general work plan for the Applicant's office for 1 April 2007 to 31 March 2008 was "circulated to all staff for comments on 11 June 2007 and finally cleared and distributed on 18 June 2007". Therefore, the Applicant submitted her first draft on 16 July 2007. Under the given circumstances, this submission would appear to be timely, per sec. 6.2(a) of ST/AI/2002/3.

55. However, after discussing this work plan for two months, her first reporting officer suggested that her previous work plan for 2006-2007 should instead be used as the basis for the 2007-2008 work plan and requested the Applicant to revise the work plan accordingly. On 26 September 2007, the Applicant's first reporting officer sent the Applicant the following email (emphasis added):

Further to our e-PAS discussions on 27 July and 24 September 2007, the workplan for the period 2007-2008 was returned to you yesterday,

60.

b)

responsible

for:m

(including the first reporting officer), which remains ultimately responsible for the implementation of the e-PAS system

The e-PAS report for 2008-2009

69. It follows directly from the 2008-2009 e-PAS report that the Applicant's first reporting officer did not complete it until a year after the end of the reporting period (see para. 34 above).

70. In the Respondent's closing statements, Counsel admits that the Applicant undertook all the required steps in a timely manner, and he cannot further explain why the one-year delay in completing the report occurred. In the closing statement, Counsel also requests for additional time to elucidate the matter, but since the dates are clearly established by the actual e-PAS report, any such submission would be unnecessary (see para. 34(a)-(e) above).

71. As already stated in the above, the Administration is responsible for implementing and completing the e-PAS report. A one-year delay in signing-off on an e-PAS report is clearly improper under sec. 9 of ST/AI/2002/2, which explicitly stipulates that the appraisal should be made "[a]t the end of the performance year". As admitted by the Respondent and demonstrated by her immediate counter-signing off the various steps in report (see para. 34(e) above), the Tribunal notes that the Applicant swiftly and diligently undertook her duties in the process.

72. The Tribunal finds that the required procedures for completing the Applicant's e-PAS report for 2008-2009 were not followed, and the Respondent is responsible for the delay.

Was the selection process for Post 1 proper?

73. Although the Applicant raises a number of specific criticisms concerning the selection process, it appears to the Tribunal that she admits that all relevant

procedures were followed, which also ~~is~~ to be the case based on the facts presented to the Tribunal.

74. The Applicant in essence contends th

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80. In addition, the Applicant has failed to demonstrate that she was actually harmed by these missing e-PAS reports—in any event, she made it to the competency-based interview, which indicates that she was deemed to have “fully met performance expectations during the period for which there is no performance record or appraisal” under sec. 6.6 of ST/AI/2002/4. For the same reason, despite the fact that the Respondent has now admitted that Applicant actually complied with the language requirements for Post 1, the initially mistaken assessment of her language skills did not make any difference.

81. The Applicant additionally contends that the interview panel was biased and prejudicial against her, since all its members were former or current OPPBA staff members. It follows from a consistent practice from the Appeals and Dispute Tribunal that when an applicant alleges bias, or any other improper motivation, against her/him, the onus is on her/him to provide “sufficient evidence” to prove the contention (see *Parker* 2010-UNAT-012, and also *Bye* UNDT/2009/083). The Applicant has not been able to explain or substantiate why any potential job affiliation with OPPBA in itself would disqualify any of the panel members from sitting on the interview panel. In addition, there does not appear to be any other legal and/or factual basis that should or se exclude them from assuming this task. The Tribunal therefore rejects this submission of the Applicant.

82. The Tribunal finds that the selection process for Post 1 was proper and, accordingly, the Applicant’s appeal concerning this is dismissed.

Did the Applicant apply for Post 2 too late in time?

83. It follows from the facts enumerated at the outset that the Applicant applied for Post 2 too late in time and after the selection process had actually been completed (see sec. 7.1 of ST/AI/2006/3).

84. Since the Applicant applied for Post 2 too late in time and after the selection process had actually been completed, the Tribunal rejects the Applicant's appeal regarding the selection process for Post 2.

Compensation

85. In her application, the Applicant claims no less than two years' net base salary for all the violations of her "due process rights", including the late completion of her e-PAS reports for 2007-2008 and 2008-2009.

86. The purpose of compensation is to place the staff member in the same position he or she would have been in, had the Organization complied with its contractual obligations (see for example, the Appeals Tribunal's judgment in *Wu* 2010-UNAT-042). Under *Antaki* 2010-UNAT-096, a compensation award may be for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury. Compensation may be awarded where no harm at all has been suffered (see *Sena* 2010-UNAT-094 and *Antaki* 2010-UNAT-096).

87. The Tribunal awards the Applicant the sum of US\$500 for the procedural violations of the delay in her e-PAS report for 2007-2008 and for the resulting stress caused to the Applicant.

88. Based on the case record, the Tribunal finds that the delay in the Applicant e-PAS report for 2008-2009 for over a year caused the Applicant considerable and unreasonable stress for which the Respondent is to compensate her (see paras. 20-21).

89. The Tribunal awards the Applicant the sum of USD3,000 for the procedural violation of the delay in her e-PAS report for 2008-2009 and for the resulting stress caused to the Applicant.

97. The Tribunal rejects the Applicant's request for an award of reasonable compensation as the Tribunal sees fit, but not less than two years net base salary, for the continued violation of her process rights, as the Tribunal finds that sum is not warranted in this case;

98. The Tribunal awards the Applicant the sum of USD500 for the delay in her e-PAS report for 2007-2008, the sum of USD100 for the delay in her e-PAS report for 2008-2009 and for the resulting stress on the Applicant. The Tribunal rejects all other pleas.

99. Under art. 10.5 of the Statute of the Dispute Tribunal, the Respondent shall pay the Applicant the total sum of USD3,500 as compensation. This sum is to be paid within 60 days of the date of judgment becomes executable during which period the US Prime Rate as at that shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall