



Case No.: UNDT/NY/2009/104

Judgment No. UNDT/2011/197

Date: 21 November 2011

CaseNo. UNDT/NY/2009/104

JudgmentNo. UNDT/2011/197

9. At the commencement of the hearing, Counsel for the Applicant indicated that he wished to restrict the scope of the case. Although he wished to address the issue of compliance with the electronic performance appraisal system ("e-PAS") process, he did not want to have the question of the Applicant's performance canvassed.

10. It is not the role of the Tribunal to re-evaluate the performance of any staff member. However, in this case, as agreed by both Counsel at the case management hearing of 30 August 2011, the process used to evaluate the Applicant's performance is a central issue. Once the issue of whether the process was fair was raised, inevitably the Applicant's performance was brought up by the witnesses. It is also discussed in the documents in the context of performance management. For this reason, the case could not be strictly limited in the manner sought by Counsel for the Applicant.

11. At the hearing held on 25–27 October 2011, the Tribunal received testimony from the Applicant and eight other witnesses, including the Applicant's former first and second reporting officers and other staff members of DPA who had worked with her.

Facts

12. The Applicant, Ms. Lara Gabriel-maDongen, joined the United Nations Secretariat in New York on 1 May 2005 as Director, AED, at the D-2 level on a two-year fixed-term contract. In that role, she was the first reporting officer to several D-1 staff members who reported to her.

13. At the time she took up her appointment, the Applicant's first reporting officer was Mr. Danilo Türk, Assistant Secretary-General for Political Affairs, and her second reporting officer was Mr. Kieran Prendergast, Under-Secretary-General for Political Affairs. They prepared a work plan for the Applicant when she took up her position. Although the Appli

CaseNo. UNDT/NY/2009/104

JudgmentNo. UNDT/2011/197

staff members were ready to walk out. Said there were two options: a buyout or

Applicant's request, to allow her to apply for other jobs without being prejudiced by a negative performance evaluation. The Applicant denies this. However, Ms. Kane's evidence is supported by a notation made by her in the e-PAS on 6 June 2006, which stated that "[u]pon [the Applicant's] receipt of the completion of the PAS process was delayed", as well as by Ms. Gutierrez's note of the meeting between Ms. Kane and the Applicant of 3 March 2006.

33. When she received the mid-point review, the Applicant responded the same day that she would not sign it and that she would contest it. On 15 June 2006, Ms. Kane emailed the Applicant, pointing out that the e-PAS procedure had been explained to her and the e-PAS report had not been returned. Ms. Kane said: "[I]ts completion is thus being further delayed. If you will not return the e-PAS to me, I will take this as a refusal and proceed accordingly".

34. The Applicant signed off on her e-PAS mid-point review on 22 June 2006. However, the e-PAS process remained with the Applicant as she had not initiated the end-of-cycle appraisal process. After the mid-review point, the e-PAS report for the period of 1 May 2005 to 30 March 2006 was not completed.

35. On 12 July 2006, the staff members who had met with Mr. Gambari on 5 April 2006 prepared a note about the continuing problems in AED, expressing concerns with the Applicant's leadership, discussing the continuing problems in AED, and asking to be informed what steps were contemplated to remedy the situation.

36. Ms. Kane continued to monitor the Applicant's performance and, on 4 August 2006, sent an email expressing dissatisfaction with how she had handled some AED issues and asking her to "exercise quality control, both in substance and presentation".

37. On 11 September 2006, Mr. Gambari had another meeting with senior staff members of AED at their request. The staff members expressed their dissatisfaction

42. On 4 October 2006, Mr. Gambari met with the Office of Human Resources Management (“OHRM”) to discuss various courses of action to deal with the Applicant’s situation. He also sent a note to the Chef de Cabinet of the Secretary-General, advising that the Applicant had refused to complete her final portion of the e-PAS evaluation for May 2005 to March 2006 that “[they] have not even been able to document her performance for the official record”; that the Applicant would be notified of her non-extension beyond April 2007; and that he had asked the Assistant Secretary-General, DPA, to as

45. The Applicant denies that she received a call on 18 October 2006 or that any efforts were made to meet with her. However, the events of 18 October 2006 were recorded in a note of the same date prepared by Ms. Karam, which reflects the sequence of events, including the calls to the Applicant. In addition, Ms. Kane email, sent at 10:48 a.m. on 18 October 2006, specifically referred to “[their] telephone conversation just now”. Further, the next day the Applicant called her former Secretary and asked for Ms. Kane’s message to be forwarded to her personal email. On the basis of the evidence given, the Tribunal is satisfied that the Applicant knew of the appointments made, that Ms. Kane did speak to her on 18 October 2006, and that she did receive the email and the notes advising her of her change of functions.

46. On 30 November 2006, the post of the Director of AED was advertised on Galaxy, the UN’s job website.

47. The Applicant subsequently applied for disability in connection with her illness. Her fixed-term contract, which was due to expire on 30 April 2007, was extended pending the decision on her application for disability. In May 2007, prior to her separation, she had been given an annual within-grade increment, but it was later determined that this increment was incorrectly applied and it was reversed. In June 2007, the Applicant started receiving disability payments. On 25 June 2007, she was separated on the grounds of disability.

48. The Applicant requested administrative review of the decisions and, subsequently, submitted a statement of appeal to the JAB. On 26 September 2008, the JAB issued its report, rejecting her appeal. By letter of 19 November 2008, the Deputy Secretary-General informed the Applicant that the Secretary-General had agreed with the findings of the JAB and decided to take no further action in her case.

Applicant's submissions

49. Based on the written and oral submissions given in the course of this case, including at the hearing, the Applicant's primary contentions may be summarised as follows:

- a. The Administration failed to comply with the established performance evaluation procedures. Both Mr. Gambari and Ms. Kane failed to provide proper supervision, guidance, and mentoring to the Applicant. The Applicant was never properly familiarised with the e-PAS procedures when she joined the Organization. Mr. Gambari participated only in two performance meetings during her employment. The meetings the Applicant had with Ms. Kane, who was biased against her, were tense and stressful. The Applicant was subjected to hostile environment;
- b. A number of violations of the e-PAS procedures took place, including:
 - (i) Ms. Kane did not consult with her previous first reporting officer, Mr. Türk, and the previous second reporting officer, Mr. Prendergast, which resulted in the exclusion of her achievements in the period of May to December 2005 from the mid-point and end-of-cycle reviews;
 - (ii) There was no formal performance improvement plan;
 - (iii) The Applicant never agreed to combine her mid-point review with the end-of-cycle review. The Applicant was entitled to a six-month period between her mid-point review and the completion of the performance period to allow for improvements in performance;
 - (iv) By failing to conduct a final appraisal at the end of the cycle, Ms. Kane prevented the Applicant from exercising her right to rebut the e-PAS report.

c. The fact that the Applicant, a D-level staff member, was granted a step increment from step 1 to step 2 in May 2007 demonstrates that her performance was satisfactory;

d. The decision to reassign the Applicant was unlawful and procedurally flawed. There was never a fully complete performance evaluation that would justify the Applicant's removal from her post in AED. Further, Mr. Gambari and Ms. Kane did not have the authority to reassign the Applicant.

Respondent's submissions

50. The Respondent's primary written and oral contentions may be summarised as follows:

a. The Administration did not engage in any material procedural irregularities in the Applicant's e-PA

c. The Applicant was fully aware of the performance evaluation procedures as she engaged in the functions of her own e-PAS evaluation and regularly engaged in the e-PAS process with staff members under her supervision. Unlike in

CaseNo.

57. Pursuant to sec. 9.1, at the end of the performance year, the first reporting officer and the staff member shall meet to discuss the overall performance during the reporting period. The first reporting officer appraises the extent to which the staff member has achieved the performance expectations as agreed in the work planning phase. Section 9.2 provides that, prior to the appraisal meeting between the first reporting officer and the staff member, they should review the manner in which he or she has carried out the work planned at the beginning of the performance year.

58. Section 10.5 states that a rating “does not meet performance expectations” may lead to a number of administrative actions such as transfer to a different post or function, the withholding of a within-grade increment as further clarified in section 16.6, the non-renewal of a fixed-term contract or termination for unsatisfactory service.

59. The evaluation is placed on the staff member's official status file (sec. 11.5). Where a staff member disagrees with the performance rating given at the end of a performance period, he or she 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, whether the original appraisal rating should be maintained or not. The rebuttal panel makes a binding determination of the appropriate performance rating and makes a notation on the appraisal section of the e-PAS report, marking any change in rating as a result of the rebuttal. The rebuttal panel's report is also placed on the staff member's file and the rating resulting from the rebuttal process cannot be appealed (sec. 15.4).

60. The Respondent's actions in relation to the Applicant will be assessed against these requirements.

Work plan

61. As the Applicant joined DPA on 1 May 2005, her performance evaluation cycle covered the period of 1 May 2005 to 30 March 2006.

62. The Applicant did not ~~initiate~~ her e-PAS report ~~in~~ January 2006, when she was prompted to do so by Ms. Kane. ~~It is~~ the Applicant's own submission that, prior to that period, she worked based on the work plan she had prepared with Mr. Türk and Mr. Prendergast, although that work plan was not formally recorded in the e-

arrival, met with the Applicant to discuss her performance. There is a question as to whether that meeting was a mid-term review assessment of her performance as prescribed by ST/AI/2002/3. The notes of that meeting reflect that various performance-related matters were discussed and that Mr. Gambari raised a number of concerns with the Applicant's performance. This meeting was not contemporaneously reflected in the Applicant's e-PAS report as that was not formally initiated until Ms. Kane's arrival. However, it was a substantive performance-related meeting during which the Applicant was given specific details of the performance problems and a time within which her performance was to be reviewed.

66. Shortly after she became the Applicant's first reporting officer on 1 December 2005, Ms. Kane also conducted a mid-point review with the Applicant for the performance cycle ending on March 2006. This review commenced on 23 December 2005 and was followed by substantive meetings on 23 January 2006, 15 February 2006, and 3 March 2006. During these meetings, Ms. Kane and the Applicant discussed the Applicant's work plan and the manner in which it was carried out. Ms. Kane brought performance shortcomings to the Applicant's attention and provided performance feedback and guidance.

67. The Tribunal finds that substantively, the requirements of sec. 8 of ST/AI/2002/3 were complied with, although there was a delay in when the results of the mid-point review were noted in the e-PAS. The Tribunal finds that the reason for this delay was that the inclusion of information regarding the mid-point review into the e-PAS report was postponed at the Applicant's own request.

Improvement plan

68. It is required, under sec. 8.3 of ST/2002/3, that, as soon as performance shortcomings are identified, they be brought to the attention of the staff member and appropriate steps taken to rectify the situation.

69. Within the first months of the Applicant's employment, performance shortcomings were identified. The Applicant's supervisors brought them to her attention and discussed them with her in a series of meetings beginning in November 2005.

70. From the numerous contemporaneous notes regarding the discussions she had with Mr. Gambari and Ms. Kane, records on file and emails, it is clear that the purpose of these meetings was to provide the Applicant with feedback concerning her performance and ways to improve it and to give her guidance as to her work objectives. There is no doubt that the Applicant was aware of her supervisors' negative views concerning her performance. Unfortunately, rather than accepting advice and taking the opportunity to make suggested improvements, she characterised the meetings as harassment.

71. The Tribunal finds that her supervisors made genuine and good faith efforts to bring the concerns with the Applicant's performance to her attention and improve the situation.

End-of-cycle review

72. The Applicant did not dispute that following Ms. Kane's signing off on the mid-point review on 6 June 2006, the e-PAS report was with the Applicant and required further action by her to be finalised. Although she counter-signed the mid-point review on 22 June 2006, she did not initiate the end-of-cycle review, and thus the e-PAS report stayed with her from that time.

73. The Tribunal finds that the Applicant was aware of the procedures for finalising the e-PAS report. Ms. Kane gave her the e-PAS guide in early 2006 and informed her of the action she needed to take. The Applicant had completed her work plan in January 2006 and reviewed and signed off on her mid-point review in June 2006. Further, she herself acted as the reporting officer for several staff members reporting to her in the same time period and processed their e-PAS reports.

CaseNo. UNDT/NY/2009/104

JudgmentNo.

Conclusions regarding performance evaluation procedures

78. Although pursuant to ST/AI/2002/3, the heads of departments and offices have the primary responsibility for the timely execution, overall compliance with, and fair implementation of the e-PAS, staff members also bear responsibility for complying with the established procedures.

79. The Tribunal identified the following deviations from the standard evaluation procedures as envisaged in ST/AI/2002/3. Specifically:

a. The Applicant's work plan was not formally initiated in the e-PAS until January 2006, although she was appointed on 1 May 2005. The responsibility for the failure to initiate the work plan until January 2006 rests primarily with the Respondent. The delay in recording the work plan in the e-PAS is explained, at least in part, by the significant management changes in 2005. It is also clear that the Applicant did have a work plan during that period, although it had not been formally entered in the e-PAS.

b. The results of the mid-point review were not added to the e-PAS report until June 2006 at the request of the Applicant. The Tribunal is satisfied that the Applicant had several substantive performance meetings with Mr. Gambari and Ms. Kane and the substantive requirements of ST/AI/2002/3

The Applicant has not complied with the requirements of ST/AI/2002/3 (ant' 0.695 0 Td () /TT0 1 Tf0007 Tc c

report. It is evident that, in assessing the Applicant's performance, her supervisors

CaseNo. UNDT/NY/2009/104

JudgmentNo. UNDT/2011/197

