Judgment No.: UNDT/2012/163

Date: 2 November 2012

Introduction

1. On 11 June 2010, the Applicant filed an application with the Dispute Tribunal complaining about what she regarded as undue, inordinate and unreasonable delay on the part of the Respondent in considering her request for rebuttal of her performance appraisal for the period 1 April 2006 to 31 March 2007.

2. The Respondent's reply that the application was not receivable was the subject of Order No. 327 (NY/2010) dated 10 December 2012 in which Her Honour, Judge Kaman rejected the Respondent's contention that there was no contestable administrative decision within the meaning of art. 2.1 of the Statute of the Dispute Tribunal. She ordered that the application was receivable and identified the issues for determination, affirmed herewith, as follows:

a. Whether the protracted rebuttal process in itself constituted a compensable breach of the Applicant's contract?

b. If so, to what compensation is the Applicant then entitled?

3. The present case is one of three interrelated cases. The two other cases were determined by Judge Kaman in *Simmons* UNDT/2011/084 and *Simmons* UNDT/2011/085. Judge Kaman did not render judgment in the present case before the end of her tenure with the Dispute Tribunal on 30 June 2011. Subsequently, it was assigned to Judge Greceanu and, on 25 October 2012, to the undersigned Judge. The present case is being considered on the papers before the Tribunal as both parties agreed that no hearing was necessary.

Facts

4. The following facts are based largely on the Respondent's contentions and were recorded in Order No. 327 (NY/2010). It appears to be common ground between the parties, although the Applicant has not specifically agreed to them nor for that matter has

she challenged their accuracy. In any event, these facts provide a detailed account of the lengthy process that was involved in the preparation of the Rebuttal Panel's report.

5. On 9 May 2008, the Applicant submitted a rebuttal of her electronic Performance Appraisal System ("e-PAS") report for the period 1 April 2006 to 31 March 2007.

6. On 29 August 2008, upon receipt of the First Reporting Officer's ("FRO") response of 18 July 2008 to the Applicant's rebuttal, the Executive Office, Department of Management ("DM"), requested the Applicant to identify the Rebuttal Panel members. The Applicant submitted the names of three individuals for appointment as Chairperson, Management Representative and Staff Representative.

7. On 15 November 2008, the Applicant was informed that the Management Representative was away on mission assignment and that such assignment had been extended; the Applicant subsequently identified a replacement.

8. In November 2008, the Staff Representative advised that she was no longer able to sit on the Rebuttal Panel due to a conflict of interest and another person was subsequently identified to replace her.

9. In May 2009, the Rebuttal Panel members organised interviews with the Applicant and the First and Second Reporting Officers. However, the Chairperson withdrew from the Rebuttal Panel due to exigencies of service. The interviews did not take place.

10. Having been requested by the Executive Office, DM, to identify a new Chairperson, the Applicant did so. The Executive Office was informed that the second Staff Representative would no longer be available, and, by the end of May 2009, the second Chairperson returned the case to the Executive Office, indicating that he was unable to review the Applicant's e-PAS rebuttal due to work commitments.

11. On 29 January 2010, the Applicant submitted an incomplete request for management evaluation.

12. By email dated 1 February 2010, the Management Evaluation Unit ("MEU")

18. On 11 May 2010, the Executive Office informed another (named) person that the Applicant had agreed to his appointment as Chair of the Rebuttal Panel (a third Chairperson) and that the deadline for issuing the report was 20 May 2010.

19. On 12 May 2010, the third Chairperson of the Rebuttal Panel spoke with the Applicant to determine her availability for interview. The Applicant informed him that she saw no value in this, as her position was set out in her rebuttal statement and in her response to the FRO's statement, but that she would be willing to answer any specific questions which the Panel members may have during the course of their deliberations.

20. The Rebuttal Panel convened on 13 May 2010. It determined that further documentation was required from the FRO to support the statements of poor performance. The Panel sent a set of questions to the FRO on 14 May 2010. The FRO responded stating that, in view of the imminent deadline, the time which had elapsed, the fact that he was now working in Vienna and had no access to the documentation, he would not be in a position to assist the Panel.

21. On 19 May 2010, the Rebuttal Panel issued its rebuttal report, indicating therein that there was insufficient documentary evidence to sustain the finding of "partially meeting performance expectations" and that the rating for the performance appraisal cycle 2006–2007 should be adjusted to "fully successful performance".

22. By way of memorandum dated 20 May 2010, the Applicant was advised of the outcome of the rebuttal report and a copy of the same was provided to her.

Applicant's submissions

23. The Applicant's case, in essence, is that in accordance with ST/AI/2002/3 (Performance appraisal system), the Respondent was required to take proactive measures to ensure that her e-PAS rebuttal request was considered within a reasonable timeframe to satisfy the requirement of "maximum dispatch" (see sec. 15.3). The Applicant rejects the Respondent's contention that she was partly responsible for the delay about which she now complains. The Applicant argues, in the alternative, that she had discharged the onus

placed on her in secs. 14.1 and 15.1 of ST/AI/2002/3, but that the Executive Office of DM failed to take proactive steps to make a genuine effort to facilitate and speed up the process to ensure that the entire process was completed in a timely manner. She adds that it was only when the USG/DM intervened that the rebuttal process was completed. There was a duty on the Administration to complete the process with "maximum dispatch" and the Applicant contends that their failure to do so constituted a breach of her contractual rights to benefit from the rebuttal process and that such failure caused her damage in terms of anxiety and stress for which she should be compensated and that the Administration should not cast blame on her for their own defaults.

24. Regarding compensation, the Applicant contends that the alleged delay in the rebuttal process caused her stress, anxiety and other psychological harm. She submits that, when applying for jobs, she has not been able to present an e-PAS report that was prepared in a proper and timely manner for over nine years. Although not providing any evidence for this, she had hoped that if her rebuttal had been completed in a timely manner, she would have been in a better position to submit a proper e-PAS report in support of her job applications, and that she would not have been embarrassed to engage in lengthy discussions with prospective employers to explain that she had a matter pending before a rebuttal panel.

Respondent's submissions

25. The Respondent submits that the term "maximum dispatch" in sec. 15.3 is not further defined in ST/AI/2002/3 and that the Administrative Instruction does not lay down a time limit for completing the rebuttal process, thereby implying that there was no breach of a provision in relation to a time limit for completing the rebuttal process. The Respondent has not addressed the question as to what in his opinion is the proper meaning to be attached to the expression "maximum dispatch" other than that it depends on the circumstances of each case and lists a range of factors to be considered in this regard. However, the Respondent provides a detailed account of the various stages in the process of rebuttal—initially empanelling and then reconstituting the panel, including the time taken by the Applicant to provide her responses.

26. Concerning relief, the Respondent's contentions may be summarized as follows:

a. Compensation may be awarded for non-pecuniary loss where there is proof of loss or damage, for example, emotional distress, and it is insufficient to simply allege that moral injury has occurred, referring to the United Nations Appeals Tribunal's ("UNAT") judgment in *Wu* 2010-UNAT-042;

b. Mere mention of worry, psychological stress and deprivation of rights is not enough to demonstrate that moral injury has occurred (Administrative Tribunal of the International Labour Organization Judgment No. 1534 *In re Wasef* (1996)), and frustration is an ordinary vicissitude of life and not compensable;

c. The Applicant is not entitled to compensation for a breach that did not cause her injury (*Sina* 2010-UNAT-094, *Abboud* 2010-UNAT-100). The burden is on her to substantiate her claim for damages (*Fröhler* UNDT/2010/135). She has not produced any medical evidence to demonstrate psychological distress;

d. The Applicant's case differs from that of the applicant in *Jennings* UNDT/2010/213, who was awarded USD6,000. Had the Applicant been anxious to expedite the process, she would not have taken over two months to respond when asked to name three panel members;

e. The Applicant has not demonstrated that the pace of the rebuttal process impacted either on her receiving any salary increment or on her success in any selection exercise and has therefore not been adversely affected. Ultimately, her rating was upgraded and she received the full benefit of the rebuttal process, and she cannot appeal the successful outcome of the process.

Consideration

27. The Applicant filed her request for rebuttal of her e-PAS report for 2006-2007 on 9 May 2008 and the Rebuttal Panel issued its report two years later, on 19 May 2010.

Considering Judge Kaman's delineation of the issues in the present case (see para. 2), the specific questions for the Tribunal to address may therefore be defined as follows:

a. Considering the provisions of ST/AI/2002/3 as a whole, was it reasonable

095). For example, she could have missed an opportunity of a promotion. However,

Conclusion

38. The Respondent is ordered to pay to the Applicant the sum of USD10,000 for the anxiety and distress she suffered as a result of the Respondent's failure to give full effect to sec. 15.3 in ST/AI/2002/3 which requires "maximum dispatch" in the completion of the rebuttal process.

39. Under art. 10.5 of the Statute of the Dispute Tribunal, the total sum of compensation as detailed above in para. 38 is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(*Signed*)

Judge Goolam Meeran

Dated this 2nd day of November 2012

Entered in the Register on this 2nd day of November 2012

(*Signed*)

Hafida Lahiouel, Registrar, New Yn3Dk